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# STANDARD ENCYCLOPÆDIA *of* PROCEDURE

---

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SUPERVISING EDITOR

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# JUDGMENTS AND DECREES, ENFORCEMENT OF

By the Editorial Staff.

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CROSS-REFERENCES:

[See 15 STANDARD PROC. 713, 714.]

5. Exemptions From Levy.<sup>1</sup>—a. What Property Exempt.<sup>2</sup>

(1.) In General. — Statutory provisions in most states give every debtor certain specified exemptions from execution and other judicial process for the enforcement of judgments.<sup>3</sup> The fact that a debtor used non-exempt funds or property in acquiring property which is exempt, does not deprive him of his exemption in the acquired property,<sup>4</sup> even though he acts in anticipation of a levy, with the deliberate purpose of holding the property as exempt.<sup>5</sup> Although it has been held that this rule does not apply to homestead exemptions,<sup>6</sup> on principle, an insolvent debtor knowing of his insolvency may acquire a homestead and hold it as exempt from his creditors although purchased with non-exempt assets.<sup>7</sup> The exercise of a right of homestead by a debtor who is indebted to third persons is not a fraud invalidating his homestead claim at the instance of his creditors.<sup>8</sup> It has been held that a

1. As to exemptions generally, see the title "Homesteads and Exemptions."

2. What property subject to levy, see *supra*, II, B, 3.

3. See generally the statutes, and 11 STANDARD PROC. 469; also *infra*, this article.

4. U. S.—*In re Letson*, 157 Fed. 78, 84 C. C. A. 582 (where the debtor acquired a homestead); *First Nat. Bank v. Glass*, 79 Fed. 706, 25 C. C. A. 151. Mich.—*O'Donnell v. Segar*, 25 Mich. 367. Minn.—*Jacoby v. Parkland Distilling Co.*, 41 Minn. 227, 43 N. W. 52.

5. U. S.—*In re Hammonds*, 198 Fed. 574. Ky.—*Northington v. Boyd*, 12 Ky. L. Rep. 227. Wis.—*Comstock v. Bechtel*, 63 Wis. 656, 24 N. W. 465.

[a] The section of the Bankrupt Act providing that conveyances and transfers of property by a debtor made with intent to hinder, delay, or defraud his creditors shall be void as to them has no application to the case made in the text. This section has in view dispositions of property made by a debtor to others with such intent. *In re Hammonds*, 198 Fed. 574.

[b] The only remedy of the creditor is in following the non-exempt property into the hands of the fraudulent purchaser. *Comstock v. Bechtel*, 63 Wis. 656, 24 N. W. 465.

6. *In re Hammonds*, 198 Fed. 574; *Pratt v. Burr*, 5 Biss. 36, 19 Fed. Cas. No. 11,372; *Long v. Murphy*, 27 Kan. 375.

7. U. S.—*In re Letson*, 157 Fed. 78, 84 C. C. A. 582; *Kelly v. Sparks*, 54 Fed. 70; *Backer v. Meyer*, 43 Fed. 702. Ill.—*Cippery v. Rhodes*, 53 Ill. 346. Minn.

*Jacoby v. Parkland Distilling Co.*, 41 Minn. 227, 43 N. W. 52.

[a] An insolvent who devotes money, subject to claims of his creditors, to the payment of liens to which the homestead is subject, may claim his homestead against his creditors. *In re Henkel*, 2 Sawy. 305, 11 Fed. Cas. No. 6,362; *Randall v. Buffington*, 10 Cal. 491. But see *Riddell v. Shirley*, 5 Cal. 488.

8. Ala.—*Dowling v. Horne*, 117 Ala. 242, 23 So. 74. Cal.—*Simonson v. Burr*, 121 Cal. 582, 54 Pac. 87 (where homestead was created pending suit); *Fritzell v. Leaky*, 72 Cal. 477, 14 Pac. 198; *King v. Gatz*, 70 Cal. 236, 11 Pac. 656. Tex.—*Chase v. Swayne*, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742; *North v. Shearn*, 15 Tex. 174.

[a] Even though the purpose be to avoid the subjection of the property to his debts, it is no fraud to convert property liable to execution into a homestead. *Dowling v. Horne*, 117 Ala. 242, 23 So. 74; *McPhee v. O'Rourke*, 10 Colo. 301, 15 Pac. 420.

[b] A declaration of homestead is not a conveyance within the meaning of a statute relating to fraudulent conveyances. *In re Henkel*, 2 Sawy. 305, 11 Fed. Cas. No. 6,362; *Simonson v. Burr*, 121 Cal. 582, 54 Pac. 87; *Fritzell v. Leaky*, 72 Cal. 477, 14 Pac. 198.

[c] When a conveyance to the wife is made by the husband for the purpose of placing the home beyond the reach of creditors, she may claim the benefit of the homestead statute even against such creditors. Colo.—*McPhee v. O'Rourke*, 10 Colo. 301, 309, 15 Pac. 420. Mich.—*Orr v. Shraft*, 22 Mich.

bankruptcy court, on principles of equity, will not set aside to the bankrupt as exempt, property which was fraudulently acquired by him.<sup>9</sup>

(II.) **Personal Property.**—Some statutes exempt generally "property" or "personal property" to a certain amount,<sup>10</sup> or make an exemption of a certain amount of personal property to heads of families who have no homestead.<sup>11</sup> Under the latter statute, the exemption cannot be claimed even though the homestead be incumbered for all it is worth,<sup>12</sup> or though the title to the homestead is in the wife.<sup>13</sup> While some courts have held that the word "property" refers expressly to articles of property which are liable to be sold under execution and would not include a chose in action,<sup>14</sup> generally the words "*personal property*" used in an exemption statute have a comprehensive signification and are construed to embrace everything not realty, which is subject to ownership.<sup>15</sup> Such statutes therefore include money,<sup>16</sup> and choses in action,<sup>17</sup> such as judgments,<sup>18</sup> as well as

260. *Miss.*—Edmonson v. Meacham, 50 Miss. 34, 39.

[d] **Where Occupancy Is Not Bona Fide.**—A debtor who built a business block with funds obtained from goods purchased of his creditors cannot on the eve of bankruptcy move into the block and claim it as a homestead, where his occupancy fails for want of good faith. *In re Lammer*, 7 Biss. 269, 14 Fed. Cas. No. 8,031.

9. *In re Woolcott*, 140 Fed. 460.

10. *Brewer's Admr. v. Granger*, 45 Ala. 580.

[a] **Where the statute does not prescribe any particular kind of property,** the debtor may claim as exempt an account or a note or any other chose in action. *Coppage v. Gregg*, 1 Ind. App. 112, 27 N. E. 570.

11. See generally the statutes.

[a] **The owner of a life estate occupied by him as a family residence and mortgaged to creditors is the owner of a homestead within the statute and cannot hold as exempt personal property in lieu of a homestead.** *Bidinger v. Pratt*, 50 Ohio St. 719, 35 N. E. 795.

12. *State v. Townsend*, 17 Neb. 530, 23 N. W. 509; *State v. Krumpas*, 13 Neb. 321, 14 N. W. 409; *Quigley v. Mitchell*, 41 Ohio St. 375; *Staley v. Wooley*, 8 Ohio Cir. Ct. 35.

13. *Stout v. Rapp*, 17 Neb. 462, 23 N. W. 364; *Staley v. Woolley*, 4 Ohio Cir. Dec. 550, 8 Ohio Cir. Ct. 35.

[a] **But if the house is not occupied at the time of the levy, the exemption**

may be claimed. *Ryan v. Miller*, 40 Ohio St. 232.

14. *N. C.*—*Ballard v. Waller*, 52 N. C. 84. *Vt.*—*Scott v. White*, 27 Vt. 561; *Edson v. Trask*, 22 Vt. 18. *Can.*—*Hudson's Bay Co. v. Hazlett*, 4 Brit. Col. 450.

15. *Kennedy v. Smith*, 99 Ala. 83, 11 So. 665; *Enzor v. Hurt*, 76 Ala. 595; *Williamson v. Harris*, 57 Ala. 40, 29 Am. Rep. 707.

16. *Brewer's Admr. v. Granger*, 45 Ala. 580.

**As to exemption of money generally,** see *infra*, II, B, 5, a, (III).

17. *Kennedy v. Smith*, 99 Ala. 83, 11 So. 665; *Borden v. Bradshaw*, 68 Ala. 362.

[a] **A chose in action is property and if selected by the debtor it must be exempt.** *Frost v. Naylor*, 68 N. C. 325.

[b] **Claiming Wages Above Statutory Limit, as Personalty.**—Where the statute exempts personal property to a value of \$1000 and in addition thereto wages to an amount of \$25, the debtor can claim any wages over the \$25 as personal property not exceeding \$1000. *Enzor v. Hurt*, 76 Ala. 595.

18. *Ala.*—*Borden v. Bradshaw*, 68 Ala. 362. *Ark.*—*Driffin v. Smith*, 63 Ark. 83, 37 S. W. 307; *Atkinson v. Pittman*, 47 Ark. 464, 2 S. W. 114. *Ga.*—*Leggett & Co. v. Van Horn*, 76 Ga. 795. *Ind.*—*Butner v. Bowser*, 104 Ind. 255, 3 N. E. 889. *Ky.*—*Braswell v. Reh-koff*, 19 Ky. L. Rep. 1037, 42 S. W. 916. *Mo.*—*Day v. Burnham*, 82 Mo.

notes,<sup>19</sup> and credits generally.<sup>20</sup> Merchandise kept for sale is exempt as personal property,<sup>21</sup> unless the statute provides that the exemption shall not be claimed in shifting merchandise.<sup>22</sup>

(III.) Money. — (A.) IN GENERAL.<sup>23</sup> — The right to exemption in money depends entirely upon the statutes and constitutional provisions of the particular jurisdiction wherein it is sought to be claimed as exempt.<sup>24</sup> In some jurisdictions a debtor claiming his exemption may select money.<sup>25</sup> But under statutes exempting property only, money cannot usually be claimed as exempt.<sup>26</sup>

App. 538. **Neb.**—*Mace v. Heath*, 34 Neb. 54, 51 N. W. 317. **N. D.**—*Cleveland v. McCanna*, 7 N. D. 455, 75 N. W. 908, 66 Am. St. Rep. 670, 41 L. R. A. 852.

19. *Brinson v. Edwards*, 94 Ala. 447, 10 So. 219; *Darden v. Reese*, 62 Ala. 311; *Carter's Admrs. v. Carter*, 20 Fla. 558, 51 Am. Rep. 618.

20. **Ala.**—*Dane v. Loomis*, 51 Ala. 487. **Ark.**—*Wheeler v. Eatman*, 67 Ark. 133, 53 S. W. 571. **Mo.**—*Rolla State Bank v. Borgfeld*, 93 Mo. App. 62; *Green v. Baxter*, 91 Mo. App. 633; *State v. Finn*, 8 Mo. App. 261. **Ohio.** *Chilcote v. Conley*, 36 Ohio St. 545.

[a] **Fees due to an officer or witness** may be claimed as exempt. *Dane v. Loomis*, 51 Ala. 487.

[b] **A debt due him from the garnishee** may be exempted. *Winter & Co. v. Simpson*, 42 Ark. 410.

[c] **Book Accounts.**—*Coppage v. Gregg*, 1 Ind. App. 112, 27 N. E. 570; *Miller v. Mahoney*, 16 Ky. L. Rep. 799, 29 S. W. 879.

21. *Brewer's Admrs. v. Granger*, 45 Ala. 580.

22. *Laderburg v. Miller*, 210 Fed. 614, 127 C. C. A. 250.

[a] **Under such a statute a bankrupt** cannot hold as exempt goods which he removed from the shelves and boxed up in contemplation of bankruptcy and for the purpose of claiming the exemption. *Laderburg v. Miller*, 210 Fed. 614, 127 C. C. A. 250.

[b] **Upon the death of the owner** a stock of merchandise ceases to be shifting, and becomes fixed and stable. *Edgewood Dist. Co. v. Rosser's Admr.*, 116 Va. 624, 82 S. E. 716.

23. **Exemption of pension money**, see *infra*, II, B, 5, a, (III), (B).

**Exemption of bounty money**, see *infra*, II, B, 5, a, (III), (C).

**Exemption of insurance money**, see *infra*, II, B, 5, a, (III), (D).

24. See generally the statutes and constitutions.

[a] **Money (1) in the hands of an attorney**, belonging to an execution defendant, is not exempt from garnishment, even though such money was collected by suit. *Mann v. Buford*, 3 Ala. 312. (2) But money awarded to a debtor out of the proceeds of his real estate under the exemption law, and paid over to his attorney is not liable to attachment in the hands of the attorney. *Gery v. Ehrgood*, 31 Pa. 329. As to exemption of proceeds of exempt property, see *infra*, II, B, 5, a, (XIX).

[b] **In Georgia** no exemption of cash is allowed, but the debtor is given an opportunity to invest the cash in other personalty which may then be claimed as exempt. *Johnson v. Redwine*, 105 Ga. 449, 33 S. E. 676; *Richards v. Jernigan*, 70 Ga. 650; *Jones v. Ehrlich*, 65 Ga. 546. But see *Rosser v. Florence*, 119 Ga. 250, 45 S. E. 975; *Johnson v. Dobbs*, 69 Ga. 605.

25. See the following: **Ala.**—*Williamson v. Harris*, 57 Ala. 40. **Mo.** *Rolla State Bank v. Borgfeld*, 93 Mo. App. 62; *Marchildon v. O'Hara*, 52 Mo. App. 523. **Ohio.**—*Comer v. Dodson*, 22 Ohio St. 615. **Pa.**—*Gibbons v. Gaffney*, 154 Pa. 48, 26 Atl. 24.

[a] **An exemption in the proceeds of the sale of real property** in which the debtor has an interest may be claimed. *Swandale v. Swandale*, 25 S. C. 389.

[b] **Where a debtor uses his own money** to purchase a house and lot, in his wife's name and for her benefit, his creditors cannot follow and subject to their claims so much of this money as the debtor was entitled to claim as his personal property exemption. *Bridgers v. Howell*, 27 S. C. 425, 3 S. E. 790.

26. **Ark.**—*Surratt v. Young*, 55 Ark. 447, 18 S. W. 539; *Brown v. Peters*, 53 Ark. 182, 13 S. W. 129; *Chambers v.*

(B.) PENSION MONEY. — In the absence of any statute upon the subject, pension money is not exempt.<sup>27</sup> There are statutes, however, both federal and state, exempting such moneys.<sup>28</sup>

Under the federal statute,<sup>29</sup> the rule generally obtaining is that pension money is wholly exempt, regardless of whose hands it may be in or the nature of the process by which it is sought to be held, up to the time that it is received by the pensioner.<sup>30</sup> After the money has been paid over to him, it is no longer exempt, however;<sup>31</sup> and this

Perry, 47 Ark. 400, 1 S. W. 700; *Norris v. Kidd*, 28 Ark. 485, 499. Ill.—*Finlen v. Howard*, 126 Ill. 259, 18 N. E. 560; *Nichols, Shepard & Co. v. Goodheart*, 5 Ill. App. 574. But see *Fanning v. Jacksonville Nat. Bank*, 76 Ill. 53, decided under a former statute. Md.—*State v. Boulden*, 57 Md. 314.

[a] Unless the property claimed exceeds the amount of the exemption and the statute requires a sale and a payment to the debtor of the amount of the exemption out of the proceeds. *Fowler v. Gray*, 99 Md. 594, 58 Atl. 444; *State v. Boulden*, 57 Md. 314.

As to exemption of proceeds of exempt property, see generally *infra*, II, B, 5, a, (AIX).

27. *Cavanaugh v. Smith*, 84 Ind. 380, 386, wherein the court said: "It is pushing analogy to an unreasonable length to affirm that pensions are protected, independently of statute, upon the same grounds as the salaries of public officers. The salaries of officers are protected from seizure in order to prevent the machinery of government from being stopped by a withdrawal of compensation from those charged with the administration of governmental affairs, and this reason . . . cannot extend to pensioners."

28. See generally the statutes.

29. U. S. Rev. St., 1873, §4747; U. S. Comp. St., 1913, §9080, providing that "no sum of money due, or to become due, to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the Pension-Office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

30. Ia.—*Triplett v. Graham*, 58 Iowa 135, 12 N. W. 143; *Webb v. Holt*, 57 Iowa 712, 11 N. W. 658. See *Manning v. Spry*, 121 Iowa 191, 96 N. W.

873. Ky.—*Robion v. Walker*, 82 Ky. 60, 56 Am. Rep. 878; *Eckert & Co. v. McKee*, 9 Bush 355. Me.—*Friend v. Garcelon*, 77 Me. 25, 52 Am. Rep. 739. N. J.—*Jardain v. Fairton Sav. F. & Bldg. Assn.*, 44 N. J. L. 376. N. Y.—*Stockwell v. Nat. Bank*, 36 Hun 583. Tenn.—*Payne & Co. v. Gibson*, 5 Lea 173. Vt.—*Bullard v. Goodno*, 73 Vt. 88, 50 Atl. 544. See *Bailey v. Bailey*, 76 Vt. 264, 56 Atl. 1014, 104 Am. St. Rep. 935, 65 L. R. A. 332.

[a] Pension money in the hands of the pensioner's agent or attorney appointed to receive it from the disbursing agent is exempt from trustee-process. *Adams v. Newell*, 8 Vt. 190. See also *Payne & Co. v. Gibson*, 5 Lea (Tenn.) 173.

31. U. S.—*McIntosh v. Aubrey*, 185 U. S. 122, 22 Sup. Ct. 561, 46 L. ed. 834; *In re Jones*, 166 Fed. 337 (*disapproving In re Bean*, 100 Fed. 262); *In re Stout*, 109 Fed. 794. Conn.—*Price v. Savings Soc.*, 64 Conn. 362, 30 Atl. 139, 42 Am. St. Rep. 198. Ind.—*Faurote v. Carr*, 108 Ind. 123, 9 N. E. 350; *Cavanaugh v. Smith*, 84 Ind. 380. Kan.—*Cranz v. White*, 27 Kan. 319, 41 Am. Rep. 408. Ky.—*Curtis v. Helton*, 109 Ky. 493, 59 S. W. 745, 95 Am. St. Rep. 388; *Johnson v. Elkins*, 90 Ky. 163, 13 S. W. 448, 8 L. R. A. 552; *Robion v. Walker*, 82 Ky. 60, 56 Am. Rep. 878 (*overruling Eckert & Co. v. McKee*, 9 Bush 355, so far as contrary); *Sims v. Walsham*, 9 Ky. L. Rep. 912, 7 S. W. 557; *Ashler v. Terry*, 6 Ky. L. Rep. 745; *Hudspeth v. Harrison*, 6 Ky. L. Rep. 304; *Moxley v. Andrews*, 5 Ky. L. Rep. 425. See *Sanders v. Herndon*, 122 Ky. 760, 768, 93 S. W. 14, 121 Am. St. Rep. 493, 5 L. R. A. (N. S.) 1072. Me.—*Crane v. Linneus*, 77 Me. 59; *Friend v. Garcelon*, 77 Me. 25, 52 Am. Rep. 739. See *Hathorn v. Robinson*, 96 Me. 33, 51 Atl. 236. Mass.—*Tully v. Tully*, 159 Mass. 91, 34 N. E. 79; *Spelman v. Aldrich*, 126 Mass. 113; *Kellogg v. Waite*,

is true although it be deposited in a bank,<sup>32</sup> or with some other per-

12 Allen 529. Mich.—See *Recor v. Commercial*, etc. Bank, 142 Mich. 479, 106 N. W. 82, 7 Ann. Cas. 754, 5 L. R. A. (N. S.) 472. N. J.—*Jardain v. Fairton Sav. Fund*, etc. Assn., 44 N. J. L. 376. N. Y.—*Beecher v. Barber*, 6 Dem. Sur. 129; *Matter of Winans*, 5 Dem. Sur. 138; *Smith v. Blood*, 106 App. Div. 317, 94 N. Y. Supp. 667; *St. Lawrence State Hospital v. Fowler*, 15 Misc. 159, 37 N. Y. Supp. 12, 72 N. Y. St. 164; *Burgett v. Fancher*, 35 Hun 647. Ohio.—*Fulwiler v. Infield's Guardian*, 3 Ohio Cir. Dec. 338, 6 Ohio Cir. Ct. 36. Pa.—*Rozelle v. Rhodes*, 116 Pa. 129, 9 Atl. 160, 2 Am. St. Rep. 591, (holding that money received from the government by a pensioner, and by him deposited in the hands of a bailee for safe keeping, is subject to an attachment-execution); *Lancaster County Poor Directors v. Hartman*, 9 Pa. Co. Ct. 177, holding that pension money paid to committee of insane pensioners not exempt thereafter. Vt.—*Martin v. Hurlburt*, 60 Vt. 364, 14 Atl. 649, *disapproving* *Hayward v. Clark*, 50 Vt. 612. See *Bailey v. Bailey*, 76 Vt. 264, 56 Atl. 1014, 104 Am. St. Rep. 935, 65 L. R. A. 332.

[a] The federal statute "protects pension money from attachment so long as it remains due to the pensioner, but not after it has been actually paid over, and has come into his possession." *Price v. Society for Savings*, 64 Conn. 362, 30 Atl. 139, 42 Am. St. Rep. 198. "It does not attempt to invade the domain of state legislation in respect to exemptions; its simple and obvious purpose is to protect the donation while in transit to the pensioner. Its language is not, 'no money in the hands of a pensioner,' or 'no pension money,' but 'no sum of money due or to become due to any pensioner.' The protection is to an undelivered sum of money. This, which is implied in the first words of the section is made more clear by its after language, for it prohibits seizure whether this sum of money due or to become due remains with the pension office or an officer or agent thereof, or in course of transmission to the pensioner entitled thereto. To guard against any abuse or destruction, it thus specifies the various positions which money due

or to become due can occupy, and in effect declares that pension money shall not be interrupted on its way to the pensioner. The last clause of the section which reads, 'but shall inure wholly to the benefit of such pensioner,' is qualified by and must be read in the light of the preceding words of the section. It is comprehensive language, but it is only language strengthening and making more plain the intention of the preceding words. It applies to money due or to become due, and not to money paid and in possession. Nowhere in the section is there reference to pension money in the hands of the pensioner. It does not purport to exempt money in such hands from the operation of state laws, either those of taxation, or the ordinary statutes concerning exemptions and indebtedness. It is doubtless true that such statute is to be liberally construed, and so construed that the pensioner shall acquire full possession of his pension, free from any interception directly or indirectly in the course of its transit." *Cranz v. White*, 27 Kan. 319, 41 Am. Rep. 408.

[b] Another Statement.—"The exemption under the law (federal statute) covers pension money only during its transmission to the pensioner. When it has been received by him, it has inured wholly to his benefit, within the meaning of this statute. Then, to the same extent as money from other sources, it is subject to attachment, levy, and seizure as opportunity presents itself. *McIntosh v. Aubrey*, 185 U. S. 122, 46 L. ed. 834. And so, in effect, was the holding of this court in *Martin v. Hurlburt*, 60 Vt. 364, 14 Atl. 649." *Bailey v. Bailey*, 76 Vt. 264, 56 Atl. 1014.

But under state statutes, rule may be otherwise. See *infra*, this section.

32. Kan.—*Cranz v. White*, 27 Kan. 319, 41 Am. Rep. 408. Mass.—*Spelman v. Aldrich*, 126 Mass. 113. N. J.—*State v. Fairton Sav. Fund*, etc. Assn., 44 N. J. L. 376. N. Y.—*Matter of Winans*, 5 Dem. Sur. 138; *Burgett v. Fancher*, 35 Hun 647. Vt.—*Martin v. Hurlburt*, 60 Vt. 364, 14 Atl. 649.

But see *Reiff v. Mack*, 160 Pa. 265, 28 Atl. 699, 40 Am. St. Rep. 720, im-

son,<sup>33</sup> or loaned to another.<sup>34</sup> Nor does the exemption extend to or include property purchased with such pension money,<sup>35</sup> though upon

pliedly overruling *McCalla v. Brennan*, 14 W. N. C. (Pa.) 513.

33. *Carter & Co. v. Strange*, 7 Ky. L. Rep. 302.

34. *Carter & Co. v. Strange*, 7 Ky. L. Rep. 302.

35. **U. S.**—*McIntosh v. Aubrey*, 185 U. S. 122, 22 Sup. Ct. 561, 46 L. ed. 834, affirming 10 Pa. Super. 275; *In re Stout*, 109 Fed. 794. **Ind.**—*Cavanaugh v. Smith*, 84 Ind. 380. **Ky.**—*Curtis v. Helton*, 109 Ky. 493, 59 S. W. 745, 95 Am. St. Rep. 388; *Johnson v. Elkins*, 90 Ky. 163, 13 S. W. 448, 8 L. R. A. 552; *Robion v. Walker*, 82 Ky. 60, 56 Am. Rep. 878; *Coakley v. Underwood*, 13 Ky. L. Rep. 654, 18 S. W. 7; *Sims v. Walsham*, 9 Ky. L. Rep. 912, 7 S. W. 557; *Carter & Co. v. Strange*, 7 Ky. L. Rep. 302 (although conveyed to the pensioner's wife); *Herrelt v. Skillew's Assn.*, 6 Ky. L. Rep. 666; *Hudspeth v. Harrison*, 6 Ky. L. Rep. 304. **Pa.** *Hadsall v. Clark*, 2 Chester Co. Rep. 492. **W. Va.**—*Bank of Kingwood v. Murdock*, 48 W. Va. 301, 37 S. E. 548 (*distinguishing* *Hissem v. Johnson*, 27 W. Va. 644, wherein a pensioner received pension drafts and transferred said drafts or the proceeds thereof to a third person, who in consideration thereof conveyed or agreed to convey to the wife of the pensioner a tract of land; and thereafter a suit was brought by judgment creditors of the pensioner, whose judgments existed at the time said drafts were received, and it was held that said land was not liable for the payment of said judgments); *McFarland v. Fish*, 34 W. Va. 548, 12 S. E. 548. **Wis.**—*In re Ferguson's Est.*, 140 Wis. 583, 123 N. W. 123, 17 Ann. Cas. 1189, *criticising* *Folschow v. Werner*, 51 Wis. 85, 7 N. W. 911, where it was held, under the federal statute, that pension money after having been received by the pensioner, so long as the same can be identified as a fund in his hands for his use, is within the zone of exemption.

[a] In *McIntosh v. Aubrey*, 185 U. S. 122, 22 Sup. Ct. 561, 46 L. ed. 834, the court said: "The section of itself seems to present no difficulty. . . . We think the purpose of Congress is clearly expressed. It is not that

pension money shall be exempt from attachment in all of its situations and transmutations. It is only to be exempt in one situation, to-wit, when 'due or to become due.' From that situation the pension money," having been paid to the pensioner and converted into other property, ". . . had departed."

[b] **Transfer and Investment of Check.**—In *Sims v. Walsham*, 9 Ky. L. Rep. 912, 7 S. W. 557, "The money did not, in this case, actually come to the hands of the pensioner, but a check therefor did, and that he transferred to another person with directions to cash it and deliver the money to his two sons, appellees, to be used by them in paying for the land in controversy." The court said: "If the pensioner had applied the check or proceeds of it to the purchase of the land in his own name and for his own benefit, he could not, under the ruling of this court, have claimed a homestead exemption against the pre-existing debt of appellant. And no more can his two sons, who hold the land by what is, in the meaning of the statute, a voluntary conveyance, without valuable consideration from their father, prevent it being subjected to that debt."

[c] **In Pennsylvania** (1) it is held "that the pensioner may use the money in any manner he may see proper, for his own benefit and to secure the comfort of his family, free from attacks of creditors." Accordingly, where the pensioner indorsed his pension check and gave it to his wife, who drew the money and applied it to the purchase of real estate, taking the title in her own name, it was held that such real estate was not liable to seizure and sale for the husband's debt. *Holmes v. Tallada*, 125 Pa. 133, 17 Atl. 238, 11 Am. St. Rep. 880, 3 L. R. A. 219, *distinguishing* *Rozelle v. Rhodes*, 116 Pa. 129, 9 Atl. 160, 2 Am. St. Rep. 591. (2) But where the pensioner makes the transaction by which the property is acquired, though taking the property in his wife's name, it is liable to execution for his debts. *Burteh v. Burteh*, 14 Pa. Co. Ct. 482.

**Property or money in lieu of exemp-**

this proposition there are authorities to the contrary.<sup>36</sup>

The state statutes are generally broader in their terms than the federal law;<sup>37</sup> they are not intended to be as limited in their operation in protecting pension money in the hands of the pensioner.<sup>38</sup> Some expressly provide for the exemption of pension money whether in the hands of the pensioner, or deposited, loaned or invested by him.<sup>39</sup> Under such statutes, pension money deposited in a bank has been held exempt.<sup>40</sup> So also, property capable of identification purchased or acquired with such money,<sup>41</sup> together with all the increase there-

tion as exempt, see *infra*, II, B, 5, a, (XX).

36. *Ratliff v. Elwell*, 141 Iowa 312, 119 N. W. 740, 20 L. R. A. (N. S.) 223; *Marquardt v. Mason*, 87 Iowa 136, 54 N. W. 72; *Crow v. Brown*, 86 Iowa 741, 53 N. W. 131, *s. c.* 81 Iowa 344, 46 N. W. 993, 25 Am. St. Rep. 501, 11 L. R. A. 110 (*overruling* prior decisions to the contrary); *Dean v. Clark*, 81 Iowa 753, 46 N. W. 995. See also *Cook v. Allee*, 119 Iowa 226, 93 N. W. 93. But see *Foster v. Byrne*, 76 Iowa 295, 35 N. W. 513, 41 N. W. 22; *Baugh v. Barrett*, 69 Iowa 495, 29 N. W. 425; *Farmer v. Turner*, 64 Iowa 690, 21 N. W. 140; *Triplett v. Graham*, 58 Iowa 135, 12 N. W. 143; *Webb v. Holt*, 57 Iowa 712, 11 N. W. 658. See *Goble & Co. v. Stephenson*, 68 Iowa 270, 26 N. W. 433.

[a] **Reason.**—If force and effect is to be given to that clause of congress which provides that pension money “shall inure wholly to the benefit of the pensioner,” to the exclusion of his creditors, there appears to us to be no escape from the conclusion that the property purchased with pension money is exempt. Any other construction of the law would permit creditors to subject the money as soon as it reaches the hands of the pensioner. *Crow v. Brown*, 81 Iowa 344, 46 N. W. 993, 25 Am. St. Rep. 501, 11 L. R. A. 110.

37. *Burgett v. Fancher*, 35 Hun (N. Y.) 647.

38. *Burgett v. Fancher*, 35 Hun (N. Y.) 647.

39. See generally the statutes, and the following: *Cal.*—Code Civ. Proc., §690, subdiv. 20; *Treadway v. Board of Directors*, 14 Cal. App. 75, 111 Pac. 111. *Colo.*—Ann. St., 1911, §3631. *Ia.*—Code, 1897, §4009.

[a] **Where Pensioner Insane.**—Pension money received by one who is an inmate of an insane asylum is exempt

from claims by the state or the county for his support, even though in the hands of his representatives. *State v. Cole*, 155 Iowa 654, 136 N. W. 887.

[b] **Under the Texas statute** of 1874, the exemption of a pension bond from forced sale continued only while the bond was in the hands of the original owner; after his death it became property to be administered as part of his estate. *Heard v. Northington*, 49 Tex. 439, *approving* *Hubbard v. Horne*, 24 Tex. 270, decided under an earlier statute.

40. *Price v. Society for Savings*, 64 Conn. 362, 30 Atl. 139, 42 Am. St. Rep. 198 (savings deposit); *Stockwell v. Nat. Bank*, 36 Hun (N. Y.) 583 (deposit on interest); *Burgett v. Fancher*, 35 Hun (N. Y.) 647, deposit subject to check, without interest. Compare *In re Kennedy's Estate*, 3 N. Y. Supp. 18, holding that a deposit upon a certificate which is interest-bearing was not exempt.

[a] **The object of the statute** “is to secure the pensioner in the use and enjoyment of this gift of the government, and to prevent his creditors from taking it away. As far as possible the courts should protect him in such use and enjoyment. If, like a prudent man, the pensioner places his money in bank, where it will gain a little interest, it would be most unjust to make this act the ground of depriving him of that which the State intended that he should keep and enjoy.” *Stockwell v. Nat. Bank of Malone*, 36 Hun (N. Y.) 583.

41. **U. S.**—*In re Ellithorpe*, 111 Fed. 163, under New York statute. *Ia.* *Smith v. Hill*, 83 Iowa 684, 49 N. W. 1043, 32 Am. St. Rep. 329. See *Goble v. Stephenson*, 68 Iowa 270, 26 N. W. 433. *Neb.*—*Dargan v. Williams*, 66 Neb. 1, 91 N. W. 862. **N. Y.**—*Yates Co. Nat. Bank v. Carpenter*, 119 N. Y.

of,<sup>42</sup> has been held exempt, but only during the life of the pensioner.<sup>43</sup>

(C.) BOUNTY MONEY, ETC.—Bounty money, like pension money, is exempt until such time as it reaches the hands of the person entitled to receive it.<sup>44</sup> But when it has been paid over to such person,<sup>45</sup> or

550, 23 N. E. 1108, 16 Am. St. Rep. 855, 7 L. R. A. 557; *Benedict v. Higgins*, 165 App. Div. 611, 151 N. Y. Supp. 42; *Matter of Stafford*, 105 App. Div. 46, 94 N. Y. Supp. 194; *Toole v. Board of Supervisors*, 13 App. Div. 471, 37 N. Y. Supp. 9, 43 N. Y. Supp. 1160; *Buffum v. Forster*, 77 Hun 27, 28 N. Y. Supp. 285; *King v. Warren*, 42 Misc. 317, 86 N. Y. Supp. 609; *Matter of Liddle*, 35 Misc. 173, 71 N. Y. Supp. 173; *Tyler v. Ballard*, 31 Misc. 540, 65 N. Y. Supp. 557, 31 Civ. Proc. 63, 7 Ann. Cas. 465; *St. Lawrence State Hospital v. Fowler*, 15 Misc. 159, 37 N. Y. Supp. 12, 72 N. Y. St. 164; *Countryman v. Countryman*, 23 Civ. Proc. 161, 28 N. Y. Supp. 258.

[a] "The money may be applied to his support and maintenance, may be saved intact for future use, or may be invested by the beneficiary in real or personal property necessary for the maintenance and support of himself and family. Such property is exempt as long as it can be strictly identified as the actual proceeds of the pension. If the pension is embarked in business enterprises or employed in speculation, which results in intermingling the bounty of the government with other property interests and rendering the pension funds incapable of identification, then the statutory exemption is lost. *Bank v. Carpenter*, 119 N. Y. 550, 23 N. E. 1108, 7 L. R. A. 557, 16 Am. St. Rep. 855." *In re Ellithorpe*, 111 Fed. 163.

[b] The discharge of a mortgage debt by pension money operates to exempt the property so affected, the same as if the pensioner had purchased the same. *Dargan v. Williams*, 66 Neb. 1, 91 N. W. 862.

[c] Property received in exchange for property purchased with pension money is exempt from execution. *Smith v. Hill*, 83 Iowa 684, 49 N. W. 1043, 32 Am. St. Rep. 329; *Dargan v. Williams*, 66 Neb. 1, 91 N. W. 862.

[d] The exemption is limited to the amount of pension money put into such property; a surplus above such amount is not exempt. *Countryman v. Coun-*

*tryman*, 23 Civ. Proc. 161, 28 N. Y. Supp. 258.

[e] Claimant must prove (1) that pension money was invested in the property. *Matter of King*, 24 App. Div. 605, 49 N. Y. Supp. 1. (2) He must show how much pension money was invested in such property. *Lee v. Grimm*, 106 Iowa 37, 75 N. W. 655.

Property or money in lieu of exemption, see *infra*, II, B, 5, a, (XX).

42. *Dargan v. Williams*, 66 Neb. 1, 91 N. W. 862.

[a] But the provisions of the Iowa code (1) do "not operate to exempt the increase or produce derived from the property which is exempt as procured with pension money." *Smyth v. Hall*, 126 Iowa 627, 102 N. W. 520; *Haefer v. Mullison*, 90 Iowa 372, 57 N. W. 893, 48 Am. St. Rep. 451; *Diamond v. Palmer*, 79 Iowa 578, 44 N. W. 819. (2) Crops on land purchased with pension money are not exempt, at least where it is not shown that the land is a homestead. *Haefer v. Mullison*, 90 Iowa 372, 57 N. W. 893, 48 Am. St. Rep. 451.

43. *Beecher v. Barber*, 6 Dem. Sur. 129 (*disapproving Hodge v. Leaning*, 2 Dem. Sur. 553); *Matter of Winans*, 5 Dem. Sur. 138; *Smith v. Blood*, 106 App. Div. 317, 94 N. Y. Supp. 667; *Matter of Liddle*, 35 Misc. 173, 71 N. Y. Supp. 173.

44. *Manchester v. Burns*, 45 N. H. 482; *Brown v. Heath*, 45 N. H. 168; *Whiting v. Barrett*, 7 Lans. (N. Y.) 106; *Youmans v. Boomhower*, 3 *Thomp. & C.* (N. Y.) 21.

Compare, *supra*, II, B, 5, a, (III), (B).

[a] After Death.—A bounty which is not received by a soldier in his lifetime is not subject to seizure in the course of transmission to the person entitled thereto after his decease. *Fish v. Hays*, 6 Ky. Op. 108.

45. *Morse v. Towns*, 45 N. H. 185.

[a] Exemption does not extend to property purchased with bounty money, when it is impossible to identify the fund in the various articles of property in which, through numerous and

to a third person, by his orders,<sup>46</sup> it then becomes subject to levy.

Other gratuities from the government are entitled to the same exemptions as pensions and bounty money.<sup>47</sup>

(D.) INSURANCE MONEY.<sup>48</sup> — (1.) *In the Absence of Statute.* — In the absence of an exemption law, life insurance payable to the insured or his estate stands on the same footing as other nonexempt personalty of the decedent.<sup>49</sup> So also, where made payable to a beneficiary, the proceeds are subject to the debts of the beneficiary in the absence of statute providing otherwise.<sup>50</sup>

(2.) *Under Statute.* — (a.) *In General.* — Statutes have been enacted in most states exempting from execution the proceeds of insurance policies.<sup>51</sup> The scope and extent of the exemption is dependent on the construction and application of the statute under which the exemption is claimed.<sup>52</sup> Some statutes allow an exemption only when the policy is made payable to particular beneficiaries.<sup>53</sup> But under a statute exempting all moneys growing out of life insurance, it is immaterial whether the policy is made payable to the wife or to the

successive changes, it had become invested. *Wynant v. Smith*, 2 Lans. (N. Y.) 185. As to exemption of property purchased with pension money, see *supra*, II, B, 5, a, (III), (B).

[b] **Title to Property Purchased Taken in Name of Wife.**—Under a statute exempting personal property of a volunteer during his term of service, real estate purchased after the expiration of such term with bounty money received as a volunteer is not exempt, though title thereto is taken in the name of the wife. *Knapp v. Beattie*, 70 Me. 410.

46. *Manchester v. Burns*, 45 N. H. 482; *Yates v. Hurst*, 41 Vt. 556.

47. *Heirs of Emerson v. Hall*, 13 Pet. (U. S.) 409, 10 L. ed. 223.

48. **Exemption of money generally**, see *supra*, II, B, 5, a, (III).

49. *Wright v. Wright*, 100 Tenn. 313, 45 S. W. 672.

50. **1a.**—*Smedley v. Felt*, 43 Iowa 607. **Mo.**—*Meyer v. Lodge, etc.*, 72 Mo. App. 350. **N. Y.**—*Crosby v. Stephan*, 32 Hun 478.

51. See generally the statutes, and the following: **Ill.**—*Houston v. Mad-dux*, 179 Ill. 377, 53 N. E. 599. **Mass.** *Saunders v. Robinson*, 144 Mass. 306, 10 N. E. 815. **N. Y.**—*Baron v. Brummer*, 100 N. Y. 372, 3 N. E. 474; *Barry v. Equitable Life Assur. Soc.*, 59 N. Y. 587, 593; *Amberg v. Manhattan L. Ins. Co.*, 56 App. Div. 343, 67 N. Y. Supp. 872; *Ettenson v. Schwartz*, 38 Misc. 669, 78 N. Y. Supp. 231; *Leonard v.*

*Clinton*, 26 Hun 288; *Smillie v. Quinn*, 25 Hun 332. **Ohio.**—*Klinekhamer Brwg. Co. v. Cassman*, 21 Ohio Cir. Ct. 465, 12 Ohio Cir. Dec. 141. **Tex.** *Dulaney v. Walsh*, 37 S. W. 615.

[a] **That a paid up policy shares in the annual dividends** does not destroy its essential character as a purely life insurance policy and take it out of the statute. *Allen v. Central Wisconsin Trust Co.*, 143 Wis. 381, 127 N. W. 1003, 139 Am. St. Rep. 1107.

[b] **Constitutionality of Statutes.** Statutes exempting proceeds of life insurance policies are constitutional. *Williams v. Donough*, 6 Ohio N. P. 418.

52. See *Holmes v. Marshall*, 145 Cal. 777, 79 Pac. 534, 104 Am. St. Rep. 86, 2 Ann. Cas. 88, 69 L. R. A. 67.

[a] **Life insurance taken out before marriage** is exempt under a statute providing for exemption of "a life insurance effected by a husband on his own life" in favor of his widow and next of kin. *Rose v. Wortham*, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609.

53. See the statutes, and *Allen v. Central Wisconsin Trust Co.*, 143 Wis. 381, 127 N. W. 1003, 139 Am. St. Rep. 1107.

[a] **Under a statute exempting the life insurance of a husband** in favor of his widow and children, a policy of an unmarried man payable to his estate is not exempt. *Wright v. Wright*, 100 Tenn. 313, 45 S. W. 672.

estate of the insured.<sup>54</sup> Under some statutes, the exemption applies only to insurance issued by a company or association incorporated within the state.<sup>55</sup> The exemption of the proceeds continues after their receipt and deposit in a bank.<sup>56</sup> The proceeds of an insurance policy taken out by a wife on her husband's life cannot be reached by the creditors of the husband.<sup>57</sup>

**From Whose Debts.**—The statutes of many states exempt the proceeds of a life insurance policy from execution upon the debts of the insured only.<sup>58</sup> Under such a statute, the funds are not exempt from

[b] **A reservation of the right to change the beneficiary** does not affect the right to exemption in the proceeds of an insurance policy. *Allen v. Central Wisconsin Trust Co.*, 143 Wis. 381, 127 N. W. 1003, 139 Am. St. Rep. 1107.

[c] **Where Payable to Insured or Representatives.**—Under a statute providing that "the amount of any life insurance policy . . . shall inure to the party or parties named as the beneficiaries thereof, freed from all liabilities for the debts of the persons paying the premiums thereon," where a policy is made payable to the insured, his executors, administrators or assigns, he is the real beneficiary and the proceeds, being liable for his debts, cannot be claimed as exempt by his heirs. *Rice v. Smith*, 72 Miss. 42, 16 So. 417. But the statute under which this case was decided was amended, so that it now secures the exemption to the heirs and legatees, of a deceased insured, even though he leave no wife or children. *Coates v. Worthy*, 72 Miss. 575, 17 So. 606.

54. *Holmes v. Marshall*, 145 Cal. 777, 79 Pac. 534, 104 Am. St. Rep. 86, 2 Ann. Cas. 88, 69 L. R. A. 67; *Rose v. Wortham*, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609.

[a] **Where one policy is payable to the estate and one to the widow**, and both are collected and deposited by her in one account, the proceeds are exempt from execution, and it is immaterial that she received one directly as beneficiary and one indirectly through the estate. *Holmes v. Marshall*, 145 Cal. 777, 79 Pac. 534, 104 Am. St. Rep. 86, 2 Ann. Cas. 88, 69 L. R. A. 67.

[b] **In Florida** the statute declares that when any person dies leaving insurance on his life, the proceeds shall inure to the benefit of the husband or

wife and children of such person or to the person named therein exclusive of his creditors. If a husband dies after the wife and leaves no children, the proceeds of a policy payable to himself are not exempt. *Gilchrist v. Jeffcoat*, 64 Fla. 79, 59 So. 243.

55. *Briggs v. McCullough*, 36 Cal. 542. But for law in California at present, see Cal. Code Civ. Proc., §690, subd. 18; *Presbyterian Mut. Assn. Fund v. Allen*, 106 Ind. 593, 7 N. E. 317.

56. *Holmes v. Marshall*, 145 Cal. 777, 79 Pac. 534, 104 Am. St. Rep. 86, 2 Ann. Cas. 88, 69 L. R. A. 67.

[a] The statute of California exempts insurance money, and the money is still money and protected although deposited in a bank. It has not lost its identity by reason of the fact that the identical coins or bills deposited are not returned. *Holmes v. Marshall*, 145 Cal. 777, 79 Pac. 534, 104 Am. St. Rep. 86, 2 Ann. Cas. 88, 69 L. R. A. 67.

57. *Baron v. Brummer*, 100 N. Y. 372, 3 N. E. 474, explained in *Commercial Traveler's Assn. v. Newkirk*, 16 N. Y. Supp. 177.

[a] **Even though the husband takes the policy in his own name**, if the wife pays the premiums from her own money he is regarded merely as her agent. *Jacob v. Continental L. Ins. Co.*, 13 Ohio Dec. 696, 1 Cine. Sup. 519.

58. See generally the statutes, and the following: **U. S.**—*Frederick v. Metropolitan Life Ins. Co.*, 235 Fed. 639. **Ala.**—*Kimball v. Cunningham Hdw. Co.*, 192 Ala. 223, 68 So. 309; *Young v. Thomason*, 179 Ala. 454, 60 So. 272; *Heflin v. Allen*, 160 Ala. 241, 48 So. 695; *Mitchell v. Allis*, 157 Ala. 304, 47 So. 715. **Fla.**—*Eppinger, Russell & Co. v. Canepa*, 20 Fla. 262. **Miss.** Code, 1906, §1552; *Dobbs v. Chandler*, 84 Miss. 372, 36 So. 388; *Cozine v.*

seizure for the debts of the beneficiary.<sup>59</sup> The statutes of some states, however, exempt the fund from seizure for debts of the beneficiary also, either entirely or under particular circumstances.<sup>60</sup>

**From What Debts.**—Some statutes exempt the proceeds of the policy generally from liability for any debt without specifying the time when

Grimes, 76 Miss. 294, 24 So. 197; Coates v. Worthy, 72 Miss. 575, 17 So. 606. **Mo.**—Gibbs v. Knights of Pythias, 173 Mo. App. 34, 156 S. W. 11. **Wis.** St., 1898, §2982, subd. 19; Allen v. Central Wisconsin Trust Co., 143 Wis. 381, 127 N. W. 1003, 139 Am. St. Rep. 1107.

[a] **Funeral expenses** (1) are not a debt of a decedent within a statute providing that insurance money shall inure to the heirs or legatees freed from all liability for the debts of the decedent (Dobbs v. Chandler, 84 Miss. 372, 36 So. 388); (2) but a claim for nurse's hire is. Dobbs v. Chandler, supra.

[b] **Attorney's fees of an administrator** are not debts of a decedent. Dobbs v. Chandler, 84 Miss. 372, 36 So. 388.

59. **Kan.**—Crumley v. Fuller, 8 Kan. App. 857, 57 Pac. 47; Reighart v. Harris, 6 Kan. App. 339, 51 Pac. 788. **Mass.**—Saunders v. Robinson, 144 Mass. 306, 10 N. E. 815; Troy v. Sargent, 132 Mass. 408; Norris v. Mass. Mutual Life Ins. Co., 131 Mass. 294. **Mich.**—Recor v. Commercial Sav. Bank, 142 Mich. 479, 106 N. W. 82, 7 Ann. Cas. 754, 5 L. R. A. (N. S.) 472. **Miss.**—Yale v. McLaurin, 66 Miss. 461, 5 So. 689. **Mo.**—Meyer v. Supreme Lodge K. & L. H., 72 Mo. App. 350. **Ohio.**—Klinckhamer Brwg. Co. v. Cassman, 12 Ohio Cir. Dec. 141, 21 Ohio Cir. Ct. 465.

60. See generally the statutes, and the following: **Cal.**—Holmes v. Marshall, 145 Cal. 777, 79 Pac. 534, 104 Am. St. Rep. 86, 2 Ann. Cas. 88, 69 L. R. A. 67. **Ia.**—Code, 1897, §1182; Cook v. Allee, 119 Iowa 226, 93 N. W. 93; Murdy v. Skyles, 101 Iowa 549, 70 N. W. 714, 63 Am. St. Rep. 411. See Larrabee v. Palmer, 101 Iowa 132, 70 N. W. 100; *In re* Conrad's Est., 89 Iowa 396, 56 N. W. 535; Murray v. Wells, 53 Iowa 256, 5 N. W. 182; Smedley v. Felt, 43 Iowa 607, decided before the amendment of the statute exempting the fund from debts of the beneficiary also. **Kan.**—Emmert v. Schmidt, 65 Kan. 31, 68 Pac. 1072,

overruling Reighart v. Harris, 6 Kan. App. 339, 51 Pac. 788. **N. Y.**—Baron v. Brummer, 100 N. Y. 372, 3 N. E. 474; Austin v. McLaurin, 1 N. Y. Supp. 209, 16 N. Y. St. 806. **Wash.** German-American State Bank v. Godman, 83 Wash. 231, 145 Pac. 221; Reiff v. Armour & Co., 79 Wash. 48, 139 Pac. 633, L. R. A. 1915A, 1201. See *In re* Blattner's Est., 89 Wash. 412, 154 Pac. 796; Northwestern Mutual Life Ins. Co. v. Chehalis Co. Bank, 65 Wash. 374, 118 Pac. 326, construing Rem. & Bal. Code, §6158, which has been repealed by the "Insurance Code," §6059-238.

[a] The words "exempt from execution" are clearly intended to apply to moneys coming from the life insurance to the hands of the beneficiary. It is exempt from execution as to all strangers or parties who have no claim to it without any provision of statute. The words mean "exempt from any execution." Holmes v. Marshall, 145 Cal. 777, 79 Pac. 534, 2 Ann. Cas. 88, 104 Am. St. Rep. 86, 69 L. R. A. 67.

[b] **In Iowa** (1) it is provided that the avails of all policies of life insurance payable to the surviving widow of the insured, shall be exempt from liabilities for all debts of such beneficiary contracted prior to the death of the assured. Code, 1897, §1182. (2) To meet the requirements of the statute it must be shown that the assured is dead, that the widow was the beneficiary and that the debts were contracted prior to the death of the assured. Murdy v. Skyles, 101 Iowa 549, 70 N. W. 714, 63 Am. St. Rep. 411.

[c] Under the statute and under a policy providing that in the event of the husband's total disability a certain sum shall be paid to him or in the event of his death to the widow, the funds paid to the husband on his total disability and by him given to his wife are not exempt from her debts. Murdy v. Skyles, 101 Iowa 549, 70 N. W. 714, 63 Am. St. Rep. 411.

[d] **In New York** insurance effected by a husband for the benefit of his

such debt must have been incurred,<sup>61</sup> whereas other statutes expressly limit the exemption to those debts of the beneficiary incurred prior to the death of the assured.<sup>62</sup> Some statutes exempt the proceeds from all claims of the person effecting the insurance.<sup>63</sup> Such exemption statutes are not retroactive.<sup>64</sup>

(b.) *Limitation as to Amount.*—The statutes sometimes limit the amount of the exemption.<sup>65</sup> If the amount paid in annual premiums exceeds the statutory limitation, the amount of premiums paid in excess is not exempt.<sup>66</sup> Under some statutes the creditor's rights are

wife and children is exempt from his or her creditors. *Baron v. Brummer*, 100 N. Y. 375, 3 N. E. 475; *Smillie v. Quinn*, 90 N. Y. 492, 497; *Brummer v. Cohn*, 86 N. Y. 11; *Barry v. Equitable Life Ins. Co.*, 59 N. Y. 587; *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395.

[e] In *Bolt v. Keyhoe*, 30 Hun (N. Y.) 619, after reviewing these authorities it is said that they simply decide that a policy of insurance issued to a wife upon the life of her husband is not assignable while he is living and that her interest is not such that it can be seized while the contract is executory.

[f] Where the policy provides for payment to the wife on a certain date, the policy on that date ripens into a debt due and collectible and is subject to her creditors. *Amberg v. Manhattan Life Ins. Co.*, 32 Misc. 89, 67 N. Y. Supp. 872.

61. See the statutes, and *German-American State Bank v. Godman*, 83 Wash. 231, 145 Pac. 221; *Reiff v. Armour & Co.*, 79 Wash. 48, 139 Pac. 633, L. R. A. 1915A, 1201.

[a] **Subsequently Incurred Debts.** Under a statute exempting the proceeds of life and accident insurance from all liability for any debt, the proceeds are exempt from the debts of the beneficiary existing at the time the policy is made available to his use but not from his after incurred debts. *German-American State Bank v. Godman*, 83 Wash. 231, 145 Pac. 221; *Reiff v. Armour & Co.*, 79 Wash. 48, 139 Pac. 633, L. R. A. 1915A, 1201.

[b] **Expenses of funeral and last sickness** cannot be recovered from insurance money, under such a statute. *German-Am. St. Bank v. Godman*, 83 Wash. 231, 145 Pac. 221.

62. See generally the statutes and *Booth v. Martin*, 158 Iowa 434, 139 N.

W. 888; *Murdy v. Skyles*, 101 Iowa 549, 70 N. W. 714, 63 Am. St. Rep. 411.

[a] **Note Given for Previous Indebtedness.**—Where the widow signed a note given by the husband in his lifetime for necessities for which she was also liable, the signing of the note merely changed the evidence of her original indebtedness and did not convert it into a debt contracted after the death of the insured. *Booth v. Martin*, 158 Iowa 434, 139 N. W. 888.

63. *Emmert v. Schmidt*, 65 Kan. 31, 68 Pac. 1072.

64. *In re Bonvillain*, 232 Fed. 370. But see *Bartram v. Hopkins*, 71 Conn. 505, 42 Atl. 645.

65. See generally the statutes and *In re How*, 59 Minn. 415, 61 N. W. 456.

[a] **Limitation of Premium Applies to Single Policy.**—(1) A statute which limits the exemption to the proceeds accruing from not to exceed a specified annual premium, applies only to single policies and the premiums of several policies cannot be lumped to limit the exemption. *Hinch v. D'Utassy*, 1 Ohio Dec. 372. (2) *Contra*, *Bartram v. Hopkins*, 71 Conn. 505, 42 Atl. 645.

[b] **For a construction of the Mississippi statutes**, see *Cozine v. Grimes*, 76 Miss. 294, 24 So. 197.

66. *Bartram v. Hopkins*, 71 Conn. 505, 42 Atl. 645; *Houston v. Maddux*, 179 Ill. 377, 53 N. E. 599.

[a] **Under the California statute**, life insurance policies, the annual premiums of which exceed five hundred dollars, cannot as to any portion thereof be set apart to the widow and children as property exempt from execution. *Estate of Brown*, 123 Cal. 399, 55 Pac. 1055, 69 Am. St. Rep. 74.

[b] **Effect of Intent of Insured.** The fact that the husband paid the excess premiums with intent to defraud

limited to the excess of premiums paid,<sup>67</sup> but under others he may claim a pro rata share in the proceeds of the policy.<sup>68</sup> The fact that the husband was insolvent at the time of paying the premiums would not give the creditors any rights in the insurance if the amount paid does not exceed the statutory limitation.<sup>69</sup>

(c.) *Endowment Policies.*—Under some statutes it has been held that the exemption extends to endowment policies as well as life policies where the statute was broad enough to embrace such policies;<sup>70</sup> but some courts hold that an endowment policy is in the nature of an investment with insurance as an incidental feature and that such a policy is not exempt.<sup>71</sup> But where the investment feature has been

his creditors would not give the creditors any claim upon the policy except as to excess premiums. *Kiely v. Hickcox*, 70 Mo. App. 617. *Compare*, *Weber v. Paxton*, 48 Ohio St. 266, 26 N. E. 1051.

[c] *Creditor's claim must have accrued prior to the payment of the premiums.* *Baron v. Brummer*, 100 N. Y. 372, 3 N. E. 474.

67. *Kiely v. Hickcox*, 70 Mo. App. 617.

68. *Cross v. Armstrong*, 44 Ohio St. 613, 10 N. E. 160.

[a] *But it must first be determined that the other assets of the estate are insufficient to satisfy the claims against the estate, and policies assigned by the wife and her husband before his death cannot be reckoned in computing the statutory limitation or charged against the wife in determining the amount of insurance to which she is entitled.* *Kittel v. Domeyer*, 175 N. Y. 205, 67 N. E. 433; *Matter of Palmer*, 3 Dem. Sur. (N. Y.) 129.

69. *Ala.*—*Young v. Thomason*, 179 Ala. 454, 60 So. 272; *Fearn v. Ward*, 65 Ala. 33. *Colo.*—*Hendrie, etc. Mfg. Co. v. Platt*, 13 Colo. App. 15, 56 Pac. 209. *N. H.*—*Mellows v. Mellows*, 61 N. H. 137. *Va.*—*Mahoney v. James*, 94 Va. 176, 26 S. E. 384.

70. *U. S.*—*Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. ed. 1018; *In re Sawyer*, 2 Hask. 153, 21 Fed. Cas. No. 12,393. *Cal.*—*Holmes v. Marshall*, 145 Cal. 777, 79 Pac. 534, 104 Am. St. Rep. 86, 69 L. R. A. 67; *Briggs v. McCulloch*, 36 Cal. 542, 550. *Me.*—*Pulsifer v. Hussey*, 97 Me. 434, 54 Atl. 1076. *Mass.*—*Brigham v. Home Life Ins. Co.*, 131 Mass. 319. *Wash.* *Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851.

[a] *A statute exempting moneys,*

*benefits, rights, privileges, or immunities accruing or in any manner growing out of any life insurance covers and exempts the proceeds of an endowment policy.* *Briggs v. McCulloch*, 36 Cal. 542, 550.

[b] *Under a statute exempting the proceeds of all life insurance from liability for all debts, life insurance which has a present cash surrender value to the holder is exempt from liability for his debts.* *Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851.

[c] *Under Bankruptcy Act.*—But the cash surrender value of a life insurance policy payable to the estate of a debtor passes to a trustee in bankruptcy and is not exempt by virtue of §70a of the Bankruptcy Act. *Burlingham v. Crouse*, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. ed. 920.

71. *U. S.*—*In re Churchill*, 198 Fed. 711, under Wisconsin statute. *Ala.* *Tompkins v. Levy*, 87 Ala. 263, 6 So. 246, 13 Am. St. Rep. 31. *Neb.*—*Talcott v. Field*, 34 Neb. 611, 52 N. W. 400, 33 Am. St. Rep. 662. *N. Y.* *Kratzenstein v. Lehman*, 18 Misc. 590, 42 N. Y. Supp. 237, 26 Civ. Proc. 157, *affirmed*, 19 Misc. 600, 44 N. Y. Supp. 369; *Scobie v. Connor*, 157 N. Y. Supp. 567. *Wis.*—*Ellison v. Straw*, 119 Wis. 502, 97 N. W. 168.

[a] *See also* *Allen v. Central Trust Co.*, 143 Wis. 381, 127 N. W. 1003, 139 Am. St. Rep. 1107, where the twenty-year period had expired, and, through one of the options, the assured, prior to bankruptcy, made his wife the sole beneficiary, thereby transforming the contract and giving it the essential character of a pure life insurance agreement, and the court, while sustaining the claim of exemption, intimated that, except for the transforma-

eliminated by the payment of the surplus to the insured at the end of the tontine period, the policy remains strictly a paid up life insurance policy and is exempt.<sup>72</sup>

(d.) *Fraternal Insurance.*—By virtue of statute or provisions in the charters of benefit associations, the proceeds of benefit certificates are exempt from liability for the debts of the deceased or the beneficiary.<sup>73</sup> Statutes relating to fraternal societies sometimes provide that when a fund in such society is set apart to be paid to the family of the deceased, such fund is exempt from execution and shall not be liable to be seized to pay any debts of the deceased member.<sup>74</sup> Some stat-

tion which had occurred prior to bankruptcy, the policy would be deemed to be non-exempt, because by its terms the fund was payable to the assured in his lifetime.

[b] "Where the money or a considerable portion of it is to be repaid in the lifetime of the insured the transaction partakes more of the character of a loan and the fund is liable to claims of creditors." *Talcott v. Field*, 34 Neb. 611, 52 N. W. 400, 33 Am. St. Rep. 662.

[c] *Where Sum To Be Paid on a Contingency.*—Stipulations in a life insurance policy that the insured in a certain event should be paid personally a part of the proceeds, will not subject the policy to his debts where the contingency does not happen. *Kimball v. Cunningham Hdw. Co. (Ala.)*, 68 So. 309.

[d] *Surplus Liable to Creditors.*—Although the wife of the assured is the beneficiary in a life insurance policy, the accumulated surplus thereon which is payable absolutely to the assured at the expiration of a certain period if he survives that period and the policy is then in force is not exempt from the claims of the creditors of the assured. *Ellison v. Straw*, 119 Wis. 502, 97 N. W. 168.

72. *Allen v. Central Wisconsin Trust Co.*, 143 Wis. 381, 127 N. W. 1003, 139 Am. St. Rep. 1107.

73. *Matter of Palmer*, 3 Dem. Sur. (N. Y.) 129; *Ogle v. Barron*, 247 Pa. 19, 92 Atl. 1071; *Kinsloe v. Davis*, 167 Pa. 519, 31 Atl. 934, 935; *Zinn's Estate*, 14 Pa. Co. Ct. 33.

[a] *Exemption of Money Due a Member as Creditor.*—Under a charter of an insurance company providing that "no part of the stock or interest which any member, or his widow or children, may have in said institu-

tion shall be subject to any debt, liability, or legal or equitable process against him or any of them," money due a deceased member is not an interest in such institution, and may be subjected to the debts of such representatives. *Geiger v. McLin*, 78 Ky. 232.

[b] *Where the beneficiary dies before receiving the fund from a policy* the exemption would still exist and it would go to her administrator free from liability for debts. *Grand Lodge A. O. U. W. v. Dister*, 77 Mo. App. 608.

[c] *Exempting Benefits of Society With Ritual.*—Under a statute providing that all benefits due from a fraternal society with a ritualistic form of work shall be exempt, the benefits due from a mutual aid association which has no ritual of its own are not exempt. And the fact that all the members of such association are members of an order having the prescribed ritual is immaterial. *Miles & Co. v. Odd Fellows Mut. Aid Assn.*, 76 Conn. 132, 55 Atl. 607.

74. See the statutes, and *First Nat. Bank v. How*, 65 Minn. 187, 67 N. W. 994; *Lake v. Minn. M. R. Assn.*, 61 Minn. 107, 63 N. W. 263; *In re How*, 59 Minn. 415, 61 N. W. 456; *Brown v. Balfour*, 46 Minn. 68, 48 N. W. 604, 12 L. R. A. 373.

[a] *Exemption of Contingent Fund.* This statute exempts only the beneficiary or mortuary funds. The remaining contingent fund received for the general purposes of the association is not exempt. *Lake v. Minnesota Masonic Relief Assn.*, 61 Minn. 107, 63 N. W. 263.

[b] *From Whose Debts.*—This statute exempts the fund from seizure by the creditors of the beneficiary as well as from seizure by the creditors of the

utes specifically exempt the fund from liability for the debts of the beneficiary also.<sup>75</sup> As the statutes are generally limited to funds to be paid, the fund is no longer exempt when it has been paid over,<sup>76</sup> though under some statutes the exemption is extended to the funds after they are paid.<sup>77</sup>

(e.) *Waiver of Exemption.*—In some jurisdictions the right of exemption may be waived by the insured.<sup>78</sup>

(IV.) *Wages or Salary.*<sup>79</sup>—(A.) IN GENERAL.—In nearly all the states the statutes provide for an exemption of the earnings of a debtor or at least a portion thereof, under certain circumstances.<sup>80</sup> There are two common classes of statutes, those exempting “wages,” or “wages

deceased member. *Schillinger v. Boes*, 85 Ky. 357, 3 S. W. 427; *In re How*, 59 Minn. 415, 61 N. W. 456; *Brown v. Balfour*, 46 Minn. 68, 48 N. W. 604, 12 L. R. A. 373. *Contra*, *Crosby v. Stephan*, 32 Hun (N. Y.) 478; *Bolt v. Keyhoe*, 30 Hun (N. Y.) 619. But for present law of New York see next following note.

75. See generally the statutes, and the following: Mo.—Rev. St., 1909, §7120; *Meyer v. Supreme Lodge*, 72 Mo. 350, decided before the statute. Neb.—*Coleman v. McGrew*, 71 Neb. 801, 99 N. W. 663. N. H.—Pub. St. & Sess. Laws, p. 581, Laws, 1895, ch. 86, §10. And see *Mellows v. Mellows*, 61 N. H. 137. N. Y.—Laws, 1901, ch. 397, quoted in *Ettenson v. Schwartz*, 38 Misc. 669, 78 N. Y. Supp. 231.

76. Ill.—*Hamilton v. Darley*, 266 Ill. 542, 107 N. E. 798; *Rumbold v. Supreme Council Royal League*, 206 Ill. 513, 69 N. E. 590; *Martin v. Martin*, 187 Ill. 200, 58 N. E. 230. Me.—*Hathorn v. Robinson*, 96 Me. 33, 51 Atl. 236; *Friend v. Garcelon*, 77 Me. 25, 52 Am. Rep. 739. Mich.—*Recor v. Commercial, etc. Bank*, 142 Mich. 479, 106 N. W. 82, 7 Ann. Cas. 754, 5 L. R. A. (N. S.) 472. N. Y.—*Bull v. Case*, 41 App. Div. 391, 58 N. Y. Supp. 774 (*distinguishing In re Lynch*, 83 Hun 462, 31 N. Y. Supp. 1038, as that was under a differently worded statute); *Bolt v. Keyhoe*, 30 Hun 619.

*Contra*, *First Nat. Bank v. How*, 65 Minn. 187, 67 N. W. 994; *In re How*, 61 Minn. 217, 63 N. W. 627.

77. Mo. Rev. St., 1909, §7120. See *Meyer v. Supreme Lodge, etc.*, 72 Mo. App. 350; *Ettenson v. Schwartz*, 38 Misc. 669, 78 N. Y. Supp. 231.

[a] Under a statute extending the exemption “to that part of such bene-

fiary fund paid to the widow” the exemption applies to a fund paid to her. *In re Lynch*, 83 Hun 462, 31 N. Y. Supp. 1038, *affirmed* in 150 N. Y. 560, 44 N. E. 1125.

[b] *Debts Contracted After Receipt of Fund.*—And where the statute exempts the fund from “any debt or liability” the fund is exempt from debts contracted after as well as before the receipt of the fund. *Clark v. Lynch*, 83 Hun 462, 31 N. Y. Supp. 1038.

78. See *Larrabee v. Palmer*, 101 Iowa 132, 70 N. W. 100.

79. *Garnishment of wages and salary*, see the title “Garnishment.”

80. See generally the statutes.

[a] The Illinois act of 1901, par. 14, is mandatory upon the employer and compels him to pay exempt wages when due upon receiving the affidavit of the employe that he is the head of a family and residing with the same, notwithstanding such affidavit may afterwards prove to be false. *Illinois Cent. R. Co. v. Cowles*, 127 Ill. App. 456.

[b] *Exemption Cannot Be Asserted Against Claim by Wife for Alimony.* As to accrued earnings for services rendered within the statutory period, exemption cannot be asserted against the debtor’s wife in a suit to enforce payment of alimony, since she is the party for whose benefit the exemption is made. *Valentine v. Williams*, 159 N. Y. Supp. 815.

[c] *Effect of Statute as to Exemption of Money Upon Exemption of Wages.*—A statute forbidding a debtor to claim as exempt money due him, does not abrogate the right of a debtor to hold his wages as exempt. *Reade v. Kerr*, 52 Ill. App. 467.

and salary,"<sup>81</sup> and those exempting "personal earnings" or "earnings for personal services."<sup>82</sup> And in some states it is provided that on a proper showing an order may be obtained directing that execution issue against the debtor's wages.<sup>83</sup>

(B.) TO WHOM EXEMPTION STATUTES APPLY. — (1.) *In General.* — The statutes of some jurisdictions limit the exemption to those debtors who are heads of families.<sup>84</sup>

(2.) *Where Statute Exempts Wages.* — The right to exemption, under a statute exempting wages, is determined chiefly by the nature of the debtor's employment.<sup>85</sup> Under a statute exempting the wages of any

81. See generally the statutes, and *infra*, II, B, 5, c, (II), (B).

82. **1a.**—*Millington v. Laurier*, 89 Iowa 322, 56 N. W. 533, 49 Am. St. Rep. 385; *Banks v. Rodenbach*, 54 Iowa 695, 7 N. W. 152; *McCoy v. Cornell*, 40 Iowa 457. **Mont.**—*Dayton v. Ewart*, 28 Mont. 153, 72 Pac. 420, 98 Am. St. Rep. 549. **N. Y.**—*Matter of Wyman*, 76 App. Div. 292, 78 N. Y. Supp. 546; *Miller v. Hooper*, 19 Hun 394. **Ohio.**—*Beckett v. Wishon*, 5 Ohio N. P. 155, 5 Ohio Dec. 257. **Okla.**—*Youst v. Willis*, 5 Okla. 170, 49 Pac. 56, all current wages and earnings for personal or professional services. **Wis.**—*Brown v. Hebard*, 20 Wis. 326, 344, 91 Am. Dec. 408. And see *infra*, II, B, 5, a, (IV), (B), (3).

83. *Laird v. Carton*, 196 N. Y. 169, 89 N. E. 822.

84. **U. S.**—*Holland v. Steamship Helene, etc. Co.*, 1 U. S. Dist. Haw. 281. **Miss.**—*McLarty v. Tibbs*, 69 Miss. 357, 12 So. 557. **Mo.**—*Dinkins v. Crunden-Martin Woodenware Co.*, 91 Mo. App. 209.

85. **Ga.**—*Franklin v. Southern R. Co.*, 119 Ga. 855, 47 S. E. 344; *Pike v. Sutton*, 115 Ga. 688, 42 S. E. 58; *Moore v. Hendry*, 111 Ga. 863, 36 S. E. 921; *Ensel v. Adler*, 110 Ga. 326, 35 S. E. 334; *Boynton v. Pelham*, 108 Ga. 794, 33 S. E. 876; *McPherson v. Stroup*, 100 Ga. 228, 28 S. E. 157; *Cox v. Bearden*, 84 Ga. 304, 10 S. E. 627, 20 Am. St. Rep. 359; *Lamar v. Chisholm*, 77 Ga. 306. **Ill.**—*Davis v. Siegel, Cooper & Co.*, 80 Ill. App. 278. **La.**—*State v. Land*, 108 La. 512, 32 So. 433, 92 Am. St. Rep. 392, 58 L. R. A. 407. **Miss.**—*Williams v. Link*, 64 Miss. 641, 1 So. 907. **Tex.**—*Vern. Sayle's St.*, 1914, art. 3785 (all current wages for personal services); *Bell v. Indian Live Stock Co.*, 11 S. W. 344; *Sydnor v. Galveston* (Tex. App.), 15 S. W. 202.

[a] **Compensation for the Following Occupations Has Been Held To Be Exempt as "Wages."**—(1) Locomotive engineer (*Johnson v. Hicks*, 120 Ga. 1002, 48 S. E. 383; *Sanner v. Shivers*, 76 Ga. 335. *Contra*, *State v. Land*, 108 La. 512, 32 So. 433, 92 Am. St. Rep. 392, 58 L. R. A. 407; (2) a house and sign painter (*Waite v. Franciola*, 90 Tenn. 191, 16 S. W. 116); (3) an iron puddler who is paid so much per ton (*Adeock v. Smith*, 97 Tenn. 373, 37 S. W. 9, 56 Am. St. Rep. 810); (4) a miner, mining coal at so much per ton and employing a common laborer to assist him (*Pennsylvania Coal Co. v. Costello*, 33 Pa. 241); (5) an auditor and comptroller of a railroad where his salary is payable in equal monthly instalments (*Bovard v. Kansas City, etc. R. R.*, 83 Mo. App. 498; (6) foreman in a planing mill (*Stothart v. Melton*, 117 Ga. 460, 43 S. E. 801); (7) a street car conductor (*Stuart v. Poole*, 112 Ga. 818, 38 S. E. 41, 81 Am. St. Rep. 81); (8) a commercial traveler (*Briscoe v. Montgomery & Co.*, 93 Ga. 602, 20 S. E. 40, 44 Am. St. Rep. 192. See also *Jumper v. Moore*, 110 Me. 159, 85 Atl. 485); (9) a forwarding clerk (*Claghorn v. Saussy*, 51 Ga. 576; *McCarty v. Clark*, 46 Ga. 466); (10) stenographer to president of a railroad (*Empire Inv. Co. v. Sullivan*, 133 Ga. 391, 65 S. E. 882. See also *Cohen v. Aldrich*, 5 Ga. App. 256, 62 S. E. 1015); (11) a night watchman a part of whose duties consisted in firing a boiler (*McAdams v. Ellis*, 5 Ga. App. 262, 62 S. E. 1001); (12) a manager of a live stock company at a salary of \$200 per month who is also a stockholder. *Bell v. Indian Live Stock Co.* (Tex.), 11 S. W. 344.

[b] The compensation of the following held not to be exempt as "wages": (1) A traveling salesman

laboring man, a laborer is held to be one whose services are manual or menial, and who is responsible for no independent action.<sup>86</sup> If the compensation of the debtor is for manual labor, it is wages, and exempt,<sup>87</sup> but if it is for any employment that calls for the exercise of intellectual or mental skill or business acumen, the compensation is deemed to be a salary and is not exempt.<sup>88</sup> Some statutes in making

taking orders from samples (*Wildner v. Ferguson*, 42 Minn. 112, 43 N. W. 794, 18 Am. St. Rep. 495, 6 L. R. A. 338; *Hamberger v. Marcus*, 157 Pa. 137, 27 Atl. 681, 37 Am. St. Rep. 719); (2) a civil engineer (*Penn. & Delaware R. R. v. Leuffer*, 84 Pa. 168); (3) a master mechanic in charge of a passenger train (*State v. Land*, 108 La. 512, 32 So. 433, 92 Am. St. Rep. 392, 58 L. R. A. 407); (4) trustee (*In re Pears*, 205 Fed. 255, 123 C. C. A. 459); (5) captain of a canal boat (*Shimer v. Rugg*, 7 North. Co. Rep. (Pa.) 248); (6) a conductor on a train (*Miller v. Dugas*, 77 Ga. 386); (7) a "boss" in an extensive factory (*Kyle v. Montgomery*, 73 Ga. 337); (8) a teacher (*Schwacke v. Langton*, 12 Phila. [Pa.] 402); (9) a photographer (*Mathewson v. Shewmake*, 15 Ga. App. 706, 84 S. E. 174); (10) president of a railroad. *South & N. A. R. R. Co. v. Falkner*, 49 Ala. 115.

[d] **The fees of (1) a physician** (*Staples v. Keister*, 81 Ga. 772, 8 S. E. 421); or (2) attorney (*First Nat. Bank v. Graham*, 3 Wills. Civ. Cas. [Tex.], §462), are not exempt from process where the hiring is not by the day, week, month or year. (3) But where a physician is employed on a salary for a definite time, his wages are "current wages" within the Texas statute. *Sydner v. Galveston* (Tex. App.), 15 S. W. 202.

[d] **Wages of Minor Son Exempt to Father as Wages.**—Under a statute exempting the wages of a laborer from garnishment the wages of his unemancipated minor child would also be exempt. *Darlington v. Watson*, 49 Pa. Super. 611.

[e] **One who works in any capacity for another for a stated compensation** is a wage earner, and, if the head of a family, is entitled to the statutory exemption of wages. *Koppen v. Union Iron & Foundry Co.*, 181 Mo. App. 72, 163 S. W. 560.

86. *Wildner v. Ferguson*, 42 Minn. 112, 43 N. W. 794, 18 Am. St. Rep. 495,

6 L. R. A. 338; *Wakefield v. Fargo*, 90 N. Y. 213. See also *Smith v. Brooke*, 49 Pa. 147; *Pennsylvania Coal Co. v. Costello*, 33 Pa. 241; *Heebner v. Chave*, 5 Pa. 115; *Schwacke v. Langton*, 12 Phila. (Pa.) 402.

[a] **The Test.**—If the contract of employment contemplated that the clerk's services were to consist mainly of work requiring mental skill or business capacity and involving the exercise of his intellectual faculties rather than work, the doing of which properly would depend upon a mere physical power to perform ordinary manual labor he would not be a "laborer." If on the other hand the work which the contract required the clerk to do was in the main to be the performance of such labor as that last above indicated he would be a "laborer." *Oliver v. Macon Hdw. Co.*, 98 Ga. 249, 25 S. E. 403; *Georgia Ry. & P. Co. v. High Co.*, 15 Ga. App. 243, 82 S. E. 932.

[b] **Skilled Labor.**—A statute exempting laborer's wages exempts the wages of laborers on farms, plantations, factories and other places where workmen possess no particular skill. Skilled labor in trades is not exempt. Mechanical engineers, electrical engineers, clerks, agents, cashiers of banks, and bookkeepers are not laborers. *State v. Land*, 108 La. 512, 32 So. 433, 92 Am. St. Rep. 392, 58 L. R. A. 407.

[c] A contractor is not a laborer and is not entitled to exemption of his compensation. *Heard v. Crum*, 73 Miss. 157, 18 So. 934, 55 Am. St. Rep. 520; *Riley v. Warden*, 2 Exch. Rep. (Eng.) 59.

87. *Wildner v. Ferguson*, 42 Minn. 112, 43 N. W. 794, 18 Am. St. Rep. 495, 6 L. R. A. 338.

88. **Ala.**—*Southern, etc. Ala. R. Co. v. Falkner*, 49 Ala. 115. **Ga.**—*Buchanan v. Echols*, 8 Ga. App. 565, 70 S. E. 28. **Mo.**—*Bovard v. Ford*, 83 Mo. App. 498.

*Contra.*—*Bell v. Indian Live Stock Co. (Tex.)*, 11 S. W. 344, holding no

exemptions use the phrase "wages or salary," which obviates the necessity for distinguishing between the two terms.<sup>89</sup>

(3.) *Where Statute Exempts Personal Earnings.*—Statutes exempting "personal earnings" or "earnings for personal services" are much broader than statutes exempting wages only, and operate to exempt compensation for services regardless of the character of the service or contract of employment.<sup>90</sup> Under such a statute the earnings of professional men as well as those of mechanics and laborers are exempt.<sup>91</sup>

(4.) *Public Officers.*—In some states statutes exempt the salaries of persons in public employment, from seizure upon judicial process.<sup>92</sup> In many states, on grounds of public policy the salary of a public officer is held not subject to execution, but this is not a matter of exemption, and is elsewhere treated.<sup>93</sup>

(5.) *Seamen.*<sup>94</sup>—The wages of a seaman are exempt<sup>95</sup> under a federal

distinction should be made between wages and salary.

89. **U. S.**—*In re Pears*, 205 Fed. 255, 123 C. C. A. 459, applying Pennsylvania statute. **Ala.**—Civ. Code, 1907, §4165 ("wages, salary or other compensation of laborers or employes"); Southern, etc. Ala. R. Co. v. Falkner, 49 Ala. 115. **Md.**—*Moore v. Heaney*, 14 Md. 558. **Pa.**—*Hamberger v. Marcus*, 157 Pa. 133, 27 Atl. 681, 37 Am. St. Rep. 719; *Scott v. Watson*, 36 Pa. 342; *Catlin v. Ensign*, 29 Pa. 264; *Hartman v. Mittel*, 8 Pa. Super. 22.

90. **Ia.**—*McCoy v. Cornell*, 40 Iowa 457. **N. Y.**—*Miller v. Hooper*, 19 Hun 394. **Ohio.**—*Beckett v. Wishon*, 5 Ohio Dec. 257, 5 Ohio N. P. 155.

[a] The compensation of the superintendent of a county infirmary are "personal earnings," and when he is the head of the family it is exempt. *Beckett v. Wishon*, 5 Ohio Dec. 257, 5 Ohio N. P. 155.

[b] The salary of flour inspector is exempt as "personal earnings." *Brown v. Hebard*, 20 Wis. 326, 344, 91 Am. Dec. 408.

[c] Money due a sub-contractor, where the material to be used was to be paid for by the principal contractor, is "personal earnings" according to *Banks v. Rodenbach*, 54 Iowa 695, 7 N. W. 152.

91. *Millington v. Laurer*, 89 Iowa 322, 56 N. W. 533, 49 Am. St. Rep. 385.

[a] Money due a practicing physician for services within the statutory period of limitation, is exempt as per-

sonal earnings within the meaning of the statute. *McCoy v. Cornell*, 40 Iowa 457.

92. **Ga.**—*Holt v. Experience*, 26 Ga. 113. **La.**—*Moll v. Sbis*a, 51 La. Ann. 290, 25 So. 141; *Wild v. Ferguson*, 23 La. Ann. 752. **Ohio.**—*Driscoll v. Kelly*, 4 Ohio S. & C. Pl. Dec. 124, 5 Ohio N. P. 243. **Pa.**—*Catlin v. Ensign*, 29 Pa. 264.

[a] The salary of a clerk of a recorder's court is exempt. *Moll v. Sbis*a, 51 La. Ann. 290, 25 So. 141.

93. See *supra*, II, B, 3; and the title "Garnishment."

94. See generally the title "Seamen."

95. Act March 4, 1915, ch. 153, §12; U. S. Comp. St., 1916, §8325a.

[a] The reason for this exemption is stated by Mr. Justice Benedict, in an exhaustive opinion, to be that a seaman's wages "cannot be paid him day by day, but must be allowed to accumulate in the hands of an unknown owner. When the voyage is over he must at once provide himself with temporary shelter and with food, and for that purpose he must have money in his hand. Therefore it is that his wages are nailed to the ship, and therefore it is that, . . . the law is forced to declare that no man can be permitted to say anything or do anything to deprive the seaman of the right to demand his wages when he leaves the ship." *McCarty v. Steam-Propeller City of New Bedford*, 4 Fed. 818.

statute, which protects them against both attachment and execution.<sup>96</sup> But after the wages have come into the seaman's hands or those of his attorney the exemption ceases.<sup>97</sup> And as to seamen engaged in coast-wise trade, the statute was repealed in 1874.<sup>98</sup>

(C.) WHAT ARE WAGES AND EARNINGS. — (1.) *In General.* — The term "wages" under a statute exempting wages from seizure upon judicial process, is defined to be the earnings of a laborer by his personal manual toil.<sup>99</sup>

The term "wages" does not include profits which a contractor derives from an enterprise,<sup>1</sup> or from the labor of others,<sup>2</sup> even though the debtor himself does a part of the work.<sup>3</sup> Nor does the statute exempt the amount due a debtor for wages of other men employed by him.<sup>4</sup>

**Earnings.** — The statute exempting from seizure the personal earnings of a debtor does not exempt the proceeds of a business or enter-

[b] **A person serving on a ferry boat is a seaman** within the United States Statute, §4536, exempting the "wages of seamen and apprentices from attachment or arrest." *Hitchcock v. The St. Louis*, 48 Fed. 312.

[c] **A fisherman has been held not to be included in the term "seaman."** *Telles v. Lynde*, 47 Fed. 912.

96. *Wilder v. Inter-Island Steam Nav. Co.*, 211 U. S. 239, 29 Sup. Ct. 58, 53 L. ed. 164, 15 Ann. Cas. 127, reviewing the previous conflicting cases.

97. *Ayer v. Brown*, 77 Me. 195. *Compare, Rutter v. Shumway*, 16 Colo. 95, 26 Pac. 321.

98. *Inter-Island Steam Nav. Co. v. Byrne*, 239 U. S. 459, 36 Sup. Ct. 132, 60 L. ed. 382.

99. *Swift Mfg. Co. v. Henderson*, 99 Ga. 136, 25 S. E. 27; *Smith, etc. v. Brooke*, 49 Pa. 147; *Pennsylvania Coal Co. v. Costello*, 33 Pa. 241; *Heebner v. Chave*, 5 Pa. 115; *Schwacke v. Langton*, 12 Phila. (Pa.) 402.

[a] **"Wages" are defined to be compensation paid by the week, month or day for the services of laborers or other subordinate or menial employes.** *Adcock v. Smith*, 97 Tenn. 373, 37 S. W. 91, 56 Am. St. Rep. 810.

[b] **"Current wages" (1) under the Texas statute are such compensation for personal services as are to be paid periodically, or from time to time, as the services are rendered; as where the services are to be paid for by the hour, day, week, month, or year.** *Dempsey v. McKennell*, 2 Tex. Civ. App.

284, 23 S. W. 525; *Sydnor v. Galveston (Tex. App.)*, 15 S. W. 202. (2) The exemption would not include money due under a liquidated demand for settlement of a liability of an insurance company, even though the premiums were paid from wages which were exempt. *Mitchell v. Western Casualty Co. (Tex. Civ. App.)*, 163 S. W. 630.

[c] **Illustrations.**—(1) Commissioner's costs taxed upon a partition of land (*Porter v. Cobb*, 4 Lea [Tenn.] 481), and (2) debts due a blacksmith (*Tatum v. Zachry*, 86 Ga. 573, 12 S. E. 940), are not wages.

1. *Schwake v. Langton*, 12 Phila. (Pa.) 402.

[a] **Money due a schoolteacher for tuition is not exempt** where he is conducting a school as a business enterprise. *Schwake v. Langton*, 12 Phila. (Pa.) 402. *Compare, Miller v. Hooper*, 19 Hun (N. Y.) 394.

2. *Smith v. Brooke*, 49 Pa. 147.

3. *Heard v. Crum*, 73 Miss. 157, 18 So. 934, 55 Am. St. Rep. 520; *Riley v. Warden*, 2 Exch. (Eng.) 59.

[a] But in *Riker Lumber Co. v. Chrouh*, 135 Mich. 703, 98 N. W. 739, 106 Am. St. Rep. 416, an exemption was allowed to a debtor who did work for a total sum for the job and who employed others to aid in the work.

[b] **Profits made by a carpenter or builder, above what he receives as wages for himself and the men employed by him, are not exempt.** *Smith v. Brooke*, 49 Pa. 147.

4. *Brainard v. Shannon*, 60 Me. 342.

prise carried on by the debtor,<sup>5</sup> unless the business is carried on by him alone so that his labors are the chief factor in it.<sup>6</sup>

**Wages Recovered by Action.**—The fact that the debtor is obliged to sue at law for his wages does not affect his right to claim them as exempt.<sup>7</sup>

(2.) *Effect of Provisions of the Contract.*—It is immaterial by what standard the wages are to be estimated or determined, whether by the time spent,<sup>8</sup> or the work done,<sup>9</sup> or that the debtor does the work for a total sum for the job;<sup>10</sup> and it is equally unimportant how the payment is to be made.<sup>11</sup> The mere fact that no rate of compensation

5. *Ia.*—*Shelley v. Smith*, 59 Iowa 453, 13 N. W. 419. **N. Y.**—*Matter of Wyman*, 76 App. Div. 292, 78 N. Y. Supp. 546; *Prince v. Brett*, 21 App. Div. 190, 47 N. Y. Supp. 402; *Mulford v. Gibbs*, 9 App. Div. 490, 41 N. Y. Supp. 273; *Schafer v. Tyroler*, 94 Misc. 127, 158 N. Y. Supp. 1090. **Okla.** *Youst v. Willis*, 5 Okla. 170, 49 Pac. 56.

[a] **Amounts due a farmer for milk sold to condensary** are not exempt as "earning for personal services." *In re French*, 231 Fed. 255; *Matter of Wyman*, 76 App. Div. 292, 78 N. Y. Supp. 546.

[b] **The money due from boarders to a boarding house keeper** is not exempt as personal earnings, where the debtor hires help and furnishes supplies to carry on the business of boarding house keeper. *Shelly v. Smith*, 59 Iowa 453, 13 N. W. 419.

[c] **Moneys received by a saloon keeper** in the usual course of his business are not exempt as "earning for his personal services." *Prince v. Brett*, 21 App. Div. 190, 47 N. Y. Supp. 402.

[d] **The proprietor of a school** who derives his sole income from tuition paid by his patrons is entitled to the exemption of such tuition as personal earnings. *Miller v. Hooper*, 19 Hun (N. Y.) 394. *Compare, Schwake v. Langton*, 12 Phila. (Pa.) 402.

6. *Schafer v. Tyroler*, 94 Misc. 127, 158 N. Y. Supp. 1090; *McSkimin v. Knowlton*, 14 N. Y. Supp. 283. *Compare, Matter of Wyman*, 76 App. Div. 292, 78 N. Y. Supp. 546, not deciding but stating it to be the opinion of the court that even if the debtor alone does the work on a farm, the proceeds of milk sold would not be personal earnings.

[a] **Gold dust dug by a miner** is "personal earnings." *Dayton v. Ew-*

*art*, 28 Mont. 153, 72 Pac. 420, 98 Am. St. Rep. 549.

7. *Cox v. Bearden*, 84 Ga. 304, 10 S. E. 627, 20 Am. St. Rep. 359.

8. *Hamberger v. Marcus*, 157 Pa. 133, 27 Atl. 681, 37 Am. St. Rep. 719; *Seiders' Appeal*, 46 Pa. 57; *Wentroth's Appeal*, 3 W. N. C. (Pa.) 248.

9. *Swift Mfg. Co. v. Henderson*, 99 Ga. 136, 25 S. E. 27.

[a] **Piece Work.**—Though the compensation is to be a certain number of cents per hank for the manufacture of yarn, the compensation is nevertheless wages and exempt from garnishment. *Swift Mfg. Co. v. Henderson*, 99 Ga. 136, 25 S. E. 27.

[b] **Payment by Piece or Commission.**—The miner who is paid by the ton, the mechanic who is paid by the piece and the clerk or salesman who is paid by commissions on his sales are within the statute. *Moore v. Hendry*, 111 Ga. 863, 36 S. E. 921; *Swift Mfg. Co. v. Henderson*, 99 Ga. 136, 25 S. E. 27; *Hamberger v. Marcus*, 157 Pa. 133, 27 Atl. 681, 37 Am. St. Rep. 719.

10. *Rikerd Lumber Co. v. Chrouch*, 135 Mich. 703, 98 N. W. 739, 106 Am. St. Rep. 416.

[a] **Percentage of Cost of Construction.**—Compensation under a contract providing for the payment of a certain per cent. of the cost of construction of a building in consideration of superintending the construction thereof is "wages." *Moore v. Heaney*, 14 Md. 558.

11. *Mason v. Ambler*, 6 Allen (Mass.) 124.

[a] **Wages to be applied toward the rent of a house** are exempt. *Mason v. Ambler*, 6 Allen (Mass.) 124.

[b] **Wages To Be Applied on Land Bought.**—Where A sold a lot of ground to B to be paid for by labor, and

is agreed upon,<sup>12</sup> or that the debtor under his contract can ask for his earnings at any time during service,<sup>13</sup> does not affect his right to exemption.

(D.) WHEN MINGLED OR COMBINED WITH NON-EXEMPT CLAIM. — The statutes do not exempt the sums due a debtor into which other matters beside his personal labor not capable of being distinguished from it, go to form the sum which he is to receive,<sup>14</sup> but it is otherwise where they can be distinguished.<sup>15</sup>

(E.) EFFECT OF PAYMENT AND INVESTMENT OF PROCEEDS.<sup>16</sup> — The term wages is not limited to such wages as remain in the hands of the employer,<sup>17</sup> but the exemption may be claimed after they have been paid.<sup>18</sup> The wages or earnings will remain exempt as long as they are capable of identification,<sup>19</sup> and the fact that the debtor has given his exempt wages to his wife,<sup>20</sup> or has invested them in her property or property

after B performed part of the services, A repudiated the contract, the amount owing by A to B is wages for labor. *Scott v. Watson*, 36 Pa. 342.

12. *Dempsey v. McKennell*, 2 Tex. Civ. App. 284, 23 S. W. 525.

13. *Prothro v. Grubbs*, 71 Ga. 863.

14. *Me.*—*Brainard v. Shannon*, 60 Me. 342. *N. H.*—*Steer v. Dow*, 75 N. H. 95, 71 Atl. 217, 20 L. R. A. (N. S.) 263; *Gray v. Fife*, 70 N. H. 89, 47 Atl. 541, 85 Am. St. Rep. 603; *Robbins v. Rice*, 18 N. H. 507. *Pa.*—*Heebner v. Chave*, 5 Pa. 115, *disapproved* in *Pennsylvania Coal Co. v. Costello*, 33 Pa. 241.

[a] A fund created in part by the labor of others than defendant's wife and minor children is not exempt unless the amount due for the privileged labor can be specified. *Steer v. Dow*, 75 N. H. 95, 71 Atl. 217, 20 L. R. A. (N. S.) 263.

[b] Where Sum Included Is Nominal.—The personal earnings of an artist will not lose their exemption because the amount thereby secured includes a nominal sum for the cost of material. *Millington v. Laurer*, 89 Iowa 322, 56 N. W. 533, 48 Am. St. Rep. 385.

[c] Where Use of Team Is Included. (1) A claim due partly for wages and partly for use of a team is not exempt when they form an inseparable debt. *Gray v. Fife*, 70 N. H. 89, 47 Atl. 541, 85 Am. St. Rep. 603; *Robbins v. Rice*, 18 N. H. 507. (2) But the earnings of an exempt team may be included in a debtor's "personal earnings." *Ill. Rev. Stats.*, 1916, p. 1317; *Kuntz v. Kinney*, 33 Wis. 510.

15. *Banks v. Rodenbach*, 54 Iowa 695, 7 N. W. 152.

[a] When a sub-contractor agrees to furnish materials and labor for the stone work of a building, materials to be paid for by the general contractor and credited on the sum to be paid to the sub-contractor, the remainder after deducting the payment for materials is "earnings" and exempt under the statute. *Banks v. Rodenbach*, 54 Iowa 695, 7 N. W. 152.

16. As to right to claim exemption in proceeds of exempt property, see *infra*, II, B, 5, a, (XIX).

17. *Rutter v. Shumway*, 16 Colo. 95, 26 Pac. 321.

18. *Rutter v. Shumway*, 16 Colo. 95, 26 Pac. 321. But see *Ayer v. Brown*, 77 Me. 195.

[a] Where in the Hands of Another. The exemption continues while the wages or earnings are under the control of the debtor, although temporarily in the hands of another. *Elliott v. Hall*, 3 Idaho 421, 31 Pac. 796, 35 Am. St. Rep. 285, 18 L. R. A. 586.

19. *Rutter v. Shumway*, 16 Colo. 95, 26 Pac. 321; *Elliot v. Hall*, 3 Idaho 421, 31 Pac. 796, 35 Am. St. Rep. 285, 18 L. R. A. 586.

[a] But see *Mitchell v. Western Casualty & G. Co.* (Tex. Civ. App.), 163 S. W. 630, holding that the proceeds of a claim under an accident insurance policy are not exempt as "current wages" though the premiums thereon were paid by exempt wages.

20. *Cushing v. Quigley*, 11 Mont. 577, 29 Pac. 337.

for her,<sup>21</sup> does not entitle his creditors to look to the property or proceeds in her hands, for the satisfaction of their debts.

(F.) LIMITATION AS TO EXTENT OF EXEMPTION. — The statutes usually limit the exemption of the debtor's wages or earnings to a specific amount or to wages for a specified time or both.<sup>22</sup> But it seems that the non-exempt portion of wages or earnings may be claimed under a general exemption statute,<sup>23</sup> unless the statutes provide to the contrary.<sup>24</sup> In some states there must be a showing that the earnings or wages are necessary for the support of the debtor's family.<sup>25</sup> Under such statutes only such an amount earned during the statutory period as is reasonably necessary for the support of the defendant's family is exempt.<sup>26</sup> Where earnings during a specified period only are exempt, the exemption must be confined to that period,<sup>27</sup> which is not extended by leaving the wages in the hands of the employer,<sup>28</sup> or in the hands

21. *Robb v. Brewer*, 60 Iowa 539, 15 N. W. 420; *Stump v. Frary*, 13 Ohio Cir. Ct. 619, 6 Ohio Cir. Dec. 357.

22. See generally the statutes and the following: *Ia.*—*McCoy v. Corneli*, 40 Iowa 457; *Davis, Watson & Co. v. Humphrey*, 22 Iowa 137. *Me.* *Jumper v. Moore*, 110 Me. 159, 85 Atl. 485; *Haynes v. Hussey*, 72 Me. 448. *Minn.*—*Bean v. Germania L. Ins. Co.*, 54 Minn. 366, 56 N. W. 127. *Miss.* *Chapman v. Berry*, 73 Miss. 437, 18 So. 918, 55 Am. St. Rep. 546. *Mo.* *Mangold v. Dooley*, 89 Mo. 111, 1 S. W. 126; *Cooper v. Seyoe*, 104 Mo. App. 414, 79 S. W. 751. *N. Y.*—*McCullough v. Carragan*, 24 Hun 157. *Ohio.*—*Snook v. Snetzer*, 25 Ohio St. 516. *Pa.*—*Little v. Balliette*, 9 Pa. Super. 411. *Wyo.* *Lafferty v. Sistalla*, 11 Wyo. 360, 72 Pac. 192.

[a] **Limitations as to Time and Amount Not Cumulative.**—Where a statute exempts the wages of a debtor earned by him in a period of one month and provides that ten dollars shall be exempt in all cases, the amounts stated are not cumulative and the lesser sum would be included in the greater. *Pike v. Bannon (Me.)*, 98 Atl. 68.

[b] **Maximum Limit Construed as Minimum Also.**—A statute exempting one-half of the earnings of a debtor for services rendered within sixty days and providing there shall be exempt in all cases a sum not to exceed fifty dollars, means that in no case shall the exemption be less than fifty dollars. *Lafferty v. Sistalla*, 11 Wyo. 360, 72 Pac. 192.

23. *Enzor v. Hurt*, 76 Ala. 595.

24. *Finlen v. Howard*, 26 Ill. App. 66.

25. See the statutes, and *New Mexico Nat. Bank v. Brooks*, 9 N. M. 113, 49 Pac. 947; *Snook v. Snetzer*, 25 Ohio St. 516; *Vandal v. Daiber*, 10 Ohio Cir. Ct. 355, 6 Ohio Cir. Dec. 585, but where the justice's act applies protecting the earnings of a head of a family, it is not necessary that the earnings be necessary to the support of his family.

[a] The word "necessary" as used in this connection does not mean that the debtor's wages must be absolutely indispensable to the bare subsistence of his family and that the family could not live without them, but is used in a broader and less rigid sense looking rather to the comfort and well being of the family and contemplates the furnishing of whatever is necessary to its comfort and well being as distinguished from luxuries. *Cushing v. Quigley*, 11 Mont. 577, 29 Pac. 337.

As to method of asserting claim, see 11 STANDARD PROC. 483, et seq.

As to form of affidavit, see 9 STANDARD PROC. 571.

26. *New Mexico Nat. Bank v. Brooks*, 9 N. M. 113, 49 Pac. 947.

[a] If all is necessary, the debtor is entitled to exemption of all his earnings during the statutory period. *Vandal v. Daiber*, 10 Ohio Cir. Ct. 355, 6 Ohio Cir. Dec. 585.

27. *Me.*—*Haynes v. Hussey*, 72 Me. 448. *Minn.*—*Bean v. Germania Life Ins. Co.*, 54 Minn. 366, 56 N. W. 127. *S. C.*—*Union Bank v. Northrop*, 19 S. C. 473. *Wis.*—*Bloodgood v. Meissner*, 84 Wis. 452, 54 N. W. 772.

28. *Seligmann v. Heller Bro. Clothing Co.*, 69 Wis. 410, 34 N. W. 232.

of the debtor's wife,<sup>29</sup> or because suit is necessary to recover them.<sup>30</sup>

But a creditor will not be permitted to evade the statute by using his process in such a manner as to tie up the debtor's wages or earnings until the statutory period has expired, or until the amount of the wages due the debtor is sufficiently great to take it out of the statute.<sup>31</sup>

(V.) Furniture, Pictures, Musical Instruments, etc. — (A.) IN GENERAL. The statutes generally exempt all or a part of the household furniture of a debtor.<sup>32</sup> The debtor's right to this exemption is not affected by his ownership of other property.<sup>33</sup>

The term "household furniture" has been very broadly and liberally construed and has been held to include nearly everything for necessary use or convenience about a house.<sup>34</sup> Generally it is not limited

[a] **Current Wages.** — (1) Wages past due, voluntarily left with the employer, are not current and exempt. *Bell v. Indian Live-Stock Co.* (Tex.), 11 S. W. 344; *Childress v. Franks* (Tex. Civ. App.), 44 S. W. 868; *Davidson v. Logeman Chair Co.* (Tex. Civ. App.), 41 S. W. 824. (2) But if left with the employer involuntarily, current wages do not lose their exemption. *Childress v. Franks* (Tex. Civ. App.), 44 S. W. 868.

29. *Bloodgood v. Meissner*, 84 Wis. 452, 54 N. W. 772.

30. *Chadwick v. Stout*, 112 Iowa 167, 83 N. W. 901, 84 Am. St. Rep. 334.

31. *Rustad v. Bishop*, 80 Minn. 497, 83 N. W. 449, 81 Am. St. Rep. 282, 50 L. R. A. 168; *Chapman v. Berry*, 73 Miss. 437, 18 So. 918, 55 Am. St. Rep. 546; *Chandler v. White*, 71 Miss. 161, 14 So. 454.

32. *Montague v. Richardson*, 24 Conn. 338, 63 Am. Dec. 173; *Mueller v. Richardson*, 82 Tex. 361, 18 S. W. 693; *Alsop v. Jordan*, 69 Tex. 300, 6 S. W. 831, 5 Am. St. Rep. 53; *Hammer v. Woods*, 6 Tex. Civ. App. 179, 24 S. W. 942; *Neeper v. Irons*, 3 Wills. Civ. Cas. (Tex.), §180. And see generally the statutes.

33. *Bray & Bros. v. Laird*, 44 Ala. 295.

[a] **He is not obliged to offer other property** in lieu of the exempt property. *Bray & Bros. v. Laird*, 44 Ala. 295.

34. **Conn.**—*Hitchcock v. Holmes*, 43 Conn. 528; *Montague v. Richardson*, 24 Conn. 338, 63 Am. Dec. 173. **Ga.** *Butler v. Shiver*, 79 Ga. 172, 4 S. E. 115; *Sasser v. Roberts*, 68 Ga. 252; *Mitchell v. Hay*, 37 Ga. 581. **Kan.**

*Rasure v. Hart*, 18 Kan. 340, 26 Am. Rep. 772. **Mass.**—*Day v. Lawrence*, 167 Mass. 371, 45 N. E. 751; *Manan v. Merritt*, 11 Allen 582; *Davlin v. Stone*, 4 Cush. 359. **Tenn.**—*Tipton v. Pickens*, 1 Swan 25. **Tex.**—*Mueller v. Richardson*, 82 Tex. 361, 18 S. W. 693; *Alsop v. Jordan*, 69 Tex. 300, 6 S. W. 831, 5 Am. St. Rep. 53. **Vt.**—*Leavitt v. Metcalf*, 2 Vt. 342, 19 Am. Dec. 718; *Crocker v. Spencer*, 2 D. Chip. 68.

[a] **Household furniture belonging to the wife** of the debtor is exempt. *Harrison v. Foster*, 94 Kan. 284, 146 Pac. 355.

[b] **A silver card receiver** used on a hat rack is embraced in the expression "household furniture necessary for the use and comfort of the family" as used in the statute. *Phillips v. Phillips*, 151 Ala. 527, 44 So. 391, 125 Am. St. Rep. 40, 15 Ann. Cas. 157.

[c] **A cooking stove** is exempt, as household furniture. *Hart v. Hyde*, 5 Vt. 328; *Crocker v. Spencer*, 2 D. Chip. (Vt.) 68. But see *Brown v. Wait*, 19 Pick. (Mass.) 470, 31 Am. Dec. 154. *Compare*, Rev. Laws of Mass., 1902, p. 1598, not exceeding \$300.00 in value.

[d] **A watch and chain** (1) habitually carried upon the person of the debtor, for his own convenience is not exempt as "household furniture." *Brown v. Edmonds*, 5 S. D. 508, 59 N. W. 731. (2) But in *Leavitt v. Metcalf*, 2 Vt. 342, an only timepiece was held exempt under a statute exempting "suitable apparel, bedding, tools, arms and articles of household furniture."

Watch as wearing apparel, see *supra*, II, B, 5, a, (VI), (B).

[e] **A gun** is not exempt as household

to such furniture as is actually needed by the family,<sup>35</sup> nor to such articles as were deemed necessary when the statute in question was passed.<sup>36</sup> Nor is it necessary that the furniture claimed as exempt be in actual use,<sup>37</sup> though it has been held that it must be constructively in use or destined so to be.<sup>38</sup> The term "household furniture" will not include furniture used in a shop or office.<sup>39</sup> In deciding what is necessary household furniture, the owner's vocation may be considered.<sup>40</sup> In some states a piano is held to be exempt as household furniture,<sup>41</sup> but in others it has been held not exempt under the

furniture, though in the case of a hunter or frontiers man, it might be exempt as necessary apparatus to his occupation. *Choate v. Redding*, 18 Tex. 579.

[f] **Lace curtain, a pier glass and an expensive clock** were held not to be exempt under a statute providing for the exemption of "household furniture necessary for supporting life." *Hitchcock v. Holmes*, 43 Conn. 528.

[g] **Dentist's chair** is not within a statute exempting "one table and set of chairs sufficient for the use of the family." *Burt v. Stocks Coal Co.*, 119 Ga. 629, 46 S. E. 828, 100 Am. St. Rep. 203.

[h] **A traveling trunk** is not household furniture within the meaning of the statute. *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726.

[i] **A debtor though unmarried** is entitled to the exemption of one bed and bedding under the statute. *Brown v. Wait*, 19 Pick. (Mass.), 470, 31 Am. Dec. 154.

35. Ill.—*Amend v. Murphy*, 69 Ill. 337. Mass.—*Davlin v. Stone*, 4 Cush. 359. Compare *Glidden v. Smith*, 15 Mass. 170, decided under an early statute. Wis.—*Heath v. Keyes*, 35 Wis. 668.

[a] **Family, Relatives and Visitors.** The exemption is not necessarily restricted to the use of the debtor himself. Reasonable provision may be made for wife and children, for domestics, for dependent relatives who may be residing with and constitute a part of the family and for visitors. *Weed v. Dayton*, 40 Conn. 293.

[b] **Not Limited to Furniture Required for Immediate Use.**—The fact that the number of beds claimed as exempt was greater than was required for the immediate use of the family is no objection to the exemption as such a construction of the statute would be too narrow. *Haswell v. Par-*

*sons*, 15 Cal. 266, 76 Am. Dec. 480. But see *Glidden v. Smith*, 15 Mass. 170.

36. *Montague v. Richardson*, 24 Conn. 338, 346, 63 Am. Dec. 173.

37. *Weed v. Dayton*, 40 Conn. 293; *Ott v. Odenwelder*, 10 North. Co. Rep. (Pa.) 133.

[a] **The fact that furniture is in storage** does not make it open to attachment, or levy or sale. *Weed v. Dayton*, 40 Conn. 293.

38. *Conner v. Hawkins*, 66 Tex. 639, 2 S. W. 520; *McCoy v. Thompson* (Tex. Civ. App.), 138 S. W. 1062.

39. Conn.—*Seeley v. Gwillim*, 40 Conn. 106. Ia.—*Turrill v. McCarthy*, 114 Iowa 681, 87 N. W. 667. La.—*Farmers, etc. Bank v. Franklin*, 1 La. Ann. 393. But see *Harrison v. Mitchell*, 13 La. Ann. 260. Pa.—*Kessler v. McConachy*, 1 Rawle 435.

[a] **An exemption of a stove** is confined to that which is used by the family and does not extend to include one used by the debtor in his shop. *Kessler v. McConachy*, 1 Rawle (Pa.) 435.

40. *Weed v. Dayton*, 40 Conn. 293, since it may increase his personal needs. "His personal wants and those of his family may depend largely upon the nature of the business whereby he is seeking a livelihood."

41. Ala.—*Phillips v. Phillips*, 151 Ala. 527, 44 So. 391, 125 Am. St. Rep. 40, 15 Ann. Cas. 157. N. Y.—See *Conklin v. McCauley*, 41 App. Div. 452, 58 N. Y. Supp. 879. Okla.—*Cook v. Fuller*, 35 Okla. 339, 130 Pac. 140, Ann. Cas. 1914D, 507, 44 L. R. A. (N. S.) 76. R. I.—*Von Storeh v. Winslow*, 13 R. I. 23, 43 Am. Rep. 10. Tex.—*Alsup v. Jordan*, 69 Tex. 300, 6 S. W. 831, 5 Am. St. Rep. 53; *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710.

[a] **But Only When It Is Being Used as Household Furniture.**—Hence if it has been offered for sale because the owner has quit housekeeping, and

statute.<sup>42</sup> A sewing machine is household furniture,<sup>43</sup> and some statutes expressly exempt sewing machines.<sup>44</sup>

(B.) FURNITURE IN HOTELS AND BOARDING HOUSES.—Under a statute exempting such furniture as is necessary to the personal comfort of the debtor's family, furniture used by a debtor only as a means of profit to accommodate boarders, is not exempt.<sup>45</sup> And under a statute exempting "all household and kitchen furniture," personal property held only for the purpose of business, such as that of a hotel or restaurant, is not within the statute,<sup>46</sup> though it has been held that furniture used in boarding houses is exempt.<sup>47</sup> But furniture used by the hotel or boarding house keeper for the use and convenience of his family is exempt.<sup>48</sup> And where the primary purpose of the furniture is the protection, comfort and convenience of the family, it is not subject to process because incidentally it may be used for the temporary support of the family.<sup>49</sup>

(C.) FAMILY PICTURES, BOOKS, ETC.—Family pictures are sometimes

placed in a salesroom, it is not exempt. *McCoy v. Thompson* (Tex. Civ. App.), 138 S. W. 1062.

[b] A piano used by the debtor for the education of her children is "household and kitchen furniture" within the meaning of a statute exempting "all household furniture." *Cook v. Fuller*, 35 Okla. 339, 130 Pac. 140, Ann. Cas. 1914 D, 507, 44 L. R. A. (N. S.) 76.

Exemption of piano as an implement of trade, see II, B, 5, a, (IX), (A), (3).

As a musical instrument, see *infra*, II, B, 5, a, (V), (D).

[c] It is a question for the jury whether a piano is an article necessary for the personal use of a wife. *Hamilton v. Lane*, 138 Mass. 358.

42. Ky.—*Speers v. Reed*, 4 Ky. L. Rep. 894. Mich.—*Kehl v. Dunn*, 102 Mich. 581, 61 N. W. 71, 47 Am. St. Rep. 561. Vt.—*Dunlap v. Edgerton*, 30 Vt. 224. Wis.—*Tanner v. Billings*, 18 Wis. 163, 86 Am. Dec. 755.

[a] A piano belonging to the wife of a debtor who was a dentist was held not to be exempt, even though the wife was a music teacher and contributed to the support of the family. *Smith v. Rogers*, 16 Ga. 479.

43. *Von Storch v. Winslow*, 13 R. I. 23, 43 Am. Rep. 10.

44. And see the statutes.

Sewing machine as a necessary tool, see *infra*, II, B, 5, a, (IX), (A), (4).

45. *Weed v. Dayton*, 40 Conn. 293.

[a] A bureau kept for the mere use of boarders is not exempt, but if in consequence of keeping boarders, the

debtor needed for her personal use a bureau, although in ordinary house-keeping she might have dispensed with it, the bureau is exempt. *Weed v. Dayton*, 40 Conn. 293.

46. *Mueller v. Richardson*, 82 Tex. 361, 18 S. W. 693; *Heidenheimer Bros. v. Blumenkron*, 56 Tex. 308; *Hammer v. Woods*, 6 Tex. Civ. App. 179, 24 S. W. 942; *Frank v. Bean*, 3 Wills. Civ. Cas. (Tex.), §211; *Bond v. Ellison*, 2 Pos. Unrep. Cas. (Tex.) 387.

47. *Harrison v. Foster*, 94 Kan. 284, 146 Pac. 355; *Rasure v. Hart*, 18 Kan. 340, 26 Am. Rep. 772, under statute exempting "all other" household furniture.

[a] A boarding house keeper who is a householder is entitled to the same exemptions as any other householder, and the household furniture purchased for the purpose of keeping a boarding house is exempt to the statutory amount, even against a judgment for the purchase price. *Vanderhorst v. Bacon*, 38 Mich. 669, 31 Am. Rep. 328.

48. *Myers v. Esray*, 8 Pa. Co. Ct. 281; *Mueller v. Richardson*, 82 Tex. 361, 18 S. W. 693.

[a] Servant.—In reckoning the family it would be proper to include a servant. *Weed v. Dayton*, 40 Conn. 293.

[b] A boarding house keeper is entitled to the same exemption as any other person. *Vanderhorst v. Bacon*, 38 Mich. 669, 31 Am. Rep. 328.

49. *Mueller v. Richardson*, 82 Tex. 361, 18 S. W. 693.

exempted by the statute,<sup>50</sup> but such exemption does not extend to the private gallery of a connoisseur.<sup>51</sup> Likewise the family library, bibles, etc., are exempt in nearly all jurisdictions.<sup>52</sup>

(D.) **MUSICAL INSTRUMENTS.**—Statutes sometimes exempt musical instruments.<sup>53</sup> In the absence of express statute they are sometimes exempt as tools of trade,<sup>54</sup> or household furniture.<sup>55</sup>

(VI.) **Wearing Apparel and Ornaments.**—(A.) **IN GENERAL.**—Wearing apparel is exempt from seizure both at common law,<sup>56</sup> and by virtue of the statutes regulating exemptions,<sup>57</sup> which generally exempt from execution all the wearing apparel of a debtor and his family,<sup>58</sup> or his necessary wearing apparel.<sup>59</sup>

(B.) **CONSTRUCTION OF TERMS.**—The phrase "wearing apparel" when used in exemption statutes is construed according to its usual and ordinary meaning.<sup>60</sup> The word "necessary" is not to be understood in its most rigid sense implying something indispensable, but as equivalent

50. *Rasure v. Hart*, 18 Kan. 340, 26 Am. Rep. 772; *M'Micken v. Directors*, 3 Ohio Dec. (Reprint) 429. And see the statutes.

51. *M'Micken v. Directors*, 3 Ohio Dec. (Reprint) 429.

52. **Mass.**—*Davlin v. Stone*, 4 Cush. 359. **Tex.**—*Mueller v. Richardson*, 82 Tex. 361, 18 S. W. 693; *Alsup v. Jordan*, 69 Tex. 300, 6 S. W. 831, 5 Am. St. Rep. 53. **Vt.**—*Leavitt v. Metcalf*, 2 Vt. 342, 19 Am. Dec. 718.

See generally the statutes.

[a] **The books of a professional man**, to a reasonable extent, are exempt as a part of his "family library." *Robinson's Case*, 3 Abb. Pr. (N. Y.) 466.

[b] **An exemption of a "family library"** will include books of a miscellaneous but instructive character without reference to the scientific books which may be the chief means of the debtor's support. The head of a family whose vocation is a learned profession will be protected to a reasonable amount in scientific books as well as books for the use of his family. *Robinson's Case*, 3 Abb. Pr. (N. Y.) 466.

**Professional man's books**, see II, B, 5, a, (IX), (B).

53. See generally the statutes.

[a] **A piano** is a musical instrument within the meaning of the exemption statute. *Thompson v. Peterson*, 122 Minn. 228, 142 N. W. 307.

54. See II, B, 5, a, (IX), (A), (3).

55. See *supra*, II, B, 5, a, (V), (A).

56. *In re Steel*, 22 Fed. Cas. No.

13,346; *Bumpus v. Maynard*, 38 Barb. (N. Y.) 626.

57. See generally the statutes.

58. **U. S.**—*In re Evans & Co.*, 158 Fed. 153, construing the Delaware statute; *In re Jones*, 97 Fed. 773 (under the Wisconsin statute); *In re Smith*, 96 Fed. 832 (construing the Texas statute). **N. J.**—*Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666. **S. D.**—*Brown v. Edmonds*, 8 S. D. 271, 66 N. W. 310, 59 Am. St. Rep. 762.

[a] **It is not necessary that the articles serve a useful end** in order that they be wearing apparel. *In re Evans & Co.*, 158 Fed. 153, characterizing a contrary dictum in *In re Smith*, 96 Fed. 832, as an untenable theory.

59. **U. S.**—*Sellers v. Bell*, 94 Fed. 801, 36 C. C. A. 502, construing the Alabama statute. **Ga.**—*Hendricks v. Lewis*, R. M. Charl. 105. **Mass.**—*Cooke v. Gibbs*, 3 Mass. 193. **N. Y.**—*Bumpus v. Maynard*, 38 Barb. 626. **Tenn.**—*Bell v. Douglass*, 1 Yerg. 397.

[a] **Sufficient leather to provide shoes for the family.** *Vincent v. Vincent*, 1 Heisk. (Tenn.) 333.

60. *Rothschild v. Boulter*, 18 Minn. 361; *Stewart v. McClung*, 12 Ore. 431, 8 Pac. 447, 53 Am. Rep. 374.

[a] **In Rothschild v. Boelter**, 18 Minn. 361, the court said: "The words are to be construed, in this case, according to the common and approved usage of the language (Gen. St. c. 4, §1), namely, as referring to garments or clothing generally designed for wear of the debtor and his family." But compare *In re Evans & Co.*, 158 Fed. 153.

to "convenient" or "comfortable."<sup>61</sup> And where any doubt arises as to whether an article should be exempt as necessary wearing apparel, the term "necessary" should receive a liberal construction.<sup>62</sup> The ordinary meaning of the term "wearing apparel" is vesture, garments, dress, that which is worn or appropriated to the person.<sup>63</sup> The term includes all clothing which has been appropriated to the use of a particular wearer and his family,<sup>64</sup> but clothing kept for sale will not be included in the exemption.<sup>65</sup> Cloth which has been left with a tailor to be made into garments for use of the debtor is exempt on the ground that it has been appropriated to the use of the proposed wearer;<sup>66</sup> and this would also include all necessary trimmings as well as the cloth.<sup>67</sup> Besides clothing the term "wearing apparel" will include articles intended and adapted to be worn on the person which are necessary to or promotive of protection of the person against the elements, or personal comfort or decency.<sup>68</sup> And it will include articles usually or customarily worn on the person solely for ornament.<sup>69</sup> But statutes which exempt necessary wearing ap-

61. *Daylin v. Stone*, 4 Cush. (Mass.) 359.

62. *Cooke v. Gibbs*, 3 Mass. 193; *Brackett v. Watkins*, 21 Wend. (N. Y.) 68; *Hall v. Penney*, 11 Wend. (N. Y.) 44, 25 Am. Dec. 601.

[a] The exemption statutes were enacted for the relief of debtors. Their purpose is to prevent a debtor from being deprived of articles necessary for his comfort and decent appearance in society. *Sellers v. Bell*, 94 Fed. 801, 36 C. C. A. 502.

63. *Stewart v. McClung*, 12 Ore. 431, 8 Pac. 447, 53 Am. Rep. 374.

64. *In re Lentz*, 97 Fed. 486.

[a] A masonic regalia (1) was held to be exempt under a statute exempting all wearing apparel. *In re Jones*, 97 Fed. 773. (2) But in Vermont under a statute exempting suitable apparel necessary for sustaining life, the hat alone, of Masonic regalia consisting of a hat, belt and sword, is exempt, it being such a hat as when worn would answer all purposes of a hat. *In re Everleth*, 129 Fed. 620.

65. *In re Lentz*, 97 Fed. 486; *Shaw v. Davis*, 55 Barb. (N. Y.) 389.

66. *Ordway v. Wilbur*, 16 Me. 263, 33 Am. Dec. 663; *Richardson v. Buswell*, 19 Met. (Mass.) 506, 43 Am. Dec. 450.

67. *Richardson v. Buswell*, 10 Met. (Mass.) 506, 43 Am. Dec. 450.

68. **U. S.**—*In re Evans & Co.*, 158 Fed. 153; *Sellers v. Bell*, 94 Fed. 801, 36 C. C. A. 502. **N. H.**—*Peverly v.*

*Sayles*, 10 N. H. 356. **S. D.**—*Brown v. Edwards*, 8 S. D. 271, 66 N. W. 310, 59 Am. St. Rep. 762. **Can.**—*Robertson v. Honan*, 24 Quebec Super. 512.

[a] A suitable overcoat and clothes for Sunday held to be "necessary" wearing apparel. *Peverly v. Sayles*, 10 N. H. 356.

69. *In re Evans & Co.*, 158 Fed. 153, characterizing as an untenable theory a statement of *In re Smith*, 96 Fed. 832, that an article worn as a mere ornament and intended for display without serving a useful purpose is not exempt under a statute exempting "all wearing apparel." But see *Rothschild v. Boelter*, 18 Minn. 361.

[a] The phrase "all wearing apparel" occurring in a statutory exemption" includes, among other things, articles usually or customarily worn on the person solely for ornament. The fact that they are worn and adapted to be worn for that purpose imparts to them the character of wearing apparel, for ornamentation of the person is one of the legitimate uses and ends of such apparel. The buttons on the back or sleeves of a coat are worn solely as ornaments, answering no useful end whatsoever. Yet they are wearing apparel, whether consisting of cloth, bone, gutta-percha, composition, mother of pearl, brass, silver, or gold. They may or may not be inseparably attached to the garment they adorn. If buttons of mother of pearl or other delicate or precious material be so ad-

justed to the back or sleeves of a coat as to be removable in order to avoid injury when the garment is pressed or cleaned, they do not by such removability or removal cease to be part and parcel of the wearing apparel, although intended and used purely for adornment. A thin lace collar on a woman's neck may not be necessary to decency or promotive of physical comfort. It may be worn solely for ornamentation; yet undoubtedly, it is part of her wearing apparel. If, instead of a lace collar, a band or necklace of pearls is worn for precisely the same purpose, it is equally wearing apparel, unless a distinction is to be recognized based wholly upon a difference of material. But such a distinction is clearly unsound. Similar considerations are applicable to the substitution of a jeweled bracelet for a purely ornamental wristband or of a brooch for a bow of ribbon on the breast. So, in the case of men, there can be no doubt that gold-fringed epaulets, or shirt studs, stick pins, cravat rings, cuff buttons, watch chains, fob chains, or ribbons, cigar cutters attached to ribbons and chains, and worn as charms, and other articles customarily worn on or in connection with the clothing by way of ornamentation, whether conducive to physical comfort or other useful ends or not, may properly be treated as attire or wearing apparel under the general language of the Delaware statute. Nor am I able to distinguish in principle between kid gloves worn merely for the sake of appearance and metal rings worn on the fingers for the same purpose, or between such rings so worn and ornaments of gold, silver, and precious stones displayed on other parts of the person. The fact that articles worn on the person solely for ornamentation may be detached from or unconnected with the clothing or other articles of attire cannot exclude them from the category of wearing apparel. A small triangular piece of lace, or a bow of ribbon, worn on a woman's head for ornamentation alone, is none the less wearing apparel because unconnected with other parts of her dress. A narrow velvet ribbon worn around her throat above and separate from a necklace of jewels or precious metal, . . . worn only for display, is undoubtedly wearing apparel, and as such would be

exempt under the Delaware statute. The necklace is equally wearing apparel, and one is irresistibly led to the conclusion that a bracelet of jewels or precious metal and a finger ring of gold or precious stones equally come within the same category. It is impossible to discriminate between the necklace, the bracelet, and the finger ring. They are all worn solely as ornaments, and are unconnected with other portions of the dress or attire. If finger rings and other articles worn by women solely for display and unconnected with their clothing be wearing apparel, I can perceive no reason to justify the court in holding that finger rings and other articles worn by men for the same purpose and so unconnected are not wearing apparel, within the general unrestrained language of the statutory exemption in Delaware. The notion that articles usually worn for ornament only must serve to connect the clothing of the person in order to be wearing apparel has no sound or reasonable basis." *In re Evans & Co.*, 158 Fed. 153.

[b] The following articles have been held to be exempt under a statute exempting all wearing apparel: A set of cuff links, two watch fobs, a gold ring with sapphire setting, a pearl scarf pin, a ruby scarf pin, a match safe and a set of shirt studs; also badges, medals, insignia and regalia intended to be worn on the person indicative of rank, office, title or distinction though not useful in the sense of conducing to bodily comfort or decency but only ornamental. *In re Evans & Co.*, 158 Fed. 153.

[c] A diamond shirt stud was held to be exempt where it was habitually worn by the debtor for several years for the purpose of fastening his shirt, there being no circumstance tending to show fraud toward creditors. *In re Smith*, 96 Fed. 832.

[d] A ring and watch and chain were held exempt to the widow and children as being the wearing apparel of the deceased father and husband. *Phillips v. Phillips*, 151 Ala. 527, 44 So. 391, 125 Am. St. Rep. 40, 15 Ann. Cas. 157.

[e] But the following articles have been held not to be exempt:—A breast pin (*In re Ludlow*, 15 Fed. Cas. No. 8,599; *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726); a ring (*In re Gem-*

parel only, may well exclude articles which are merely ornamental.<sup>70</sup>

**Watches.**—Some courts hold that watches are exempt as constituting wearing apparel,<sup>71</sup> or necessary wearing apparel,<sup>72</sup> but in some jurisdictions the contrary has been held.<sup>73</sup>

(C.) **EFFECT OF RANK AND CONDITION OF DEBTOR.**—Under a statute exempting from execution all wearing apparel of a debtor, the condition of the debtor as to rank and property cannot be inquired into in determining whether he may claim as exempt certain articles. The only question is whether the debtor purchased the property in good faith as wearing apparel,<sup>74</sup> or for the purpose of defrauding his cred-

mill, 155 Fed. 551; *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666; a Masonic belt and sword (In re Everleth, 129 Fed. 620); rings and jewelry. *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666; *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726.

70. *In re Evans & Co.*, 158 Fed. 153. Compare *Sellers v. Bell*, 94 Fed. 801, 36 C. C. A. 502, holding "necessary and proper wearing apparel" includes what is reasonable and customary in the way of ornament.

[a] **Jewelry Usefully Employed.** While including such articles of jewelry as are usefully employed in connecting or fastening together parts of one's clothing, the term "necessary wearing apparel" may exclude jewelry not so used. *In re Evans & Co.*, 158 Fed. 153.

71. **U. S.**—*In re Evans & Co.*, 158 Fed. 153; *In re Jones*, 97 Fed. 773. **Ohio.**—*Beckett v. Wishon*, 5 Ohio Dec. 257, 5 Ohio N. P. 155. **S. D.**—*Brown v. Edmonds*, 8 S. D. 271, 66 N. W. 310, 59 Am. St. Rep. 762.

[a] **A watch and chain of moderate value owned and habitually worn by the debtor are exempt as "wearing apparel."** *Beckett v. Wishon*, 5 Ohio Dec. 257, 5 Ohio N. P. 155.

**Exemption of watch as household furniture,** see II, B, 5, a, (V), (A).

**As to exemption of watch as tool of trade,** see *infra*, II, B, 5, a, (IX), (A), (3).

72. *Sellers v. Bell*, 94 Fed. 801, 36 C. C. A. 502 (under statute exempting "all necessary and proper wearing apparel"); *Stewart v. McClung*, 12 Ore. 431, 8 Pac. 447, 53 Am. Rep. 374.

73. **U. S.**—*In re Turnbull*, 106 Fed. 667, under statute exempting necessary wearing apparel. **Minn.**—*Rothschild v. Boelter*, 18 Minn. 361, under statute exempting all wearing apparel. **Vt.** *In re Everleth*, 129 Fed. 620, under

statute exempting suitable apparel necessary to sustaining life.

[a] **A watch worn merely as an ornament is not exempt as wearing apparel.** *Peck v. Mulvihill*, 2 City Ct. Rep. (N. Y.) 424.

[b] **Two watches cannot be claimed as exempt.** *Smith v. Rogers*, 16 Ga. 479.

74. *In re Evans & Co.*, 158 Fed. 153; *In re Jones*, 97 Fed. 773; *In re Smith*, 96 Fed. 832; *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666.

[a] **Value and Amount Immaterial.** Under a statute exempting "all the wearing apparel" the value and amount of the articles is wholly immaterial save in so far as such value or amount may be indicative of mala fides on the part of the debtor or an intent to defraud his creditors. If the wearing apparel claimed as exempt be so excessive in amount or value as to create a conviction that the demand is made for the purpose of defrauding creditors, due regard being had to the circumstances of the particular case including condition and style of living, such claim will be disallowed in whole or in part by reason of the fraud. Nor will one be allowed to invest inordinately large sums of money in wearing apparel with an intent to hinder and defraud his creditors and effectuate his wrongful purpose by wearing or intending to wear it, in whole or in part. But fraud must be strictly proved. *In re Evans & Co.*, 158 Fed. 153.

[b] **A lace shawl worth \$300.00 was the article in question in the case of Frazier v. Barnum, 19 N. J. Eq. 316, 318, 97 Am. Dec. 666, and the court said: "Whether the shawl is of greater value than she ought to wear in her condition in life as to property cannot be inquired into. It was bought for her use before the complainant's judg-**

itors. It is otherwise where the statute exempts necessary wearing apparel only.<sup>75</sup>

(VII.) **Provisions.**—The exemption statutes generally allow to the debtor a certain amount of provisions or provisions sufficient for comfortable subsistence of his family for a specified time.<sup>76</sup> Some statutes specifically enumerate various items for the nourishment of the family,<sup>77</sup> or exempt necessary provisions for the current year.<sup>78</sup> These statutes are for the benefit only of a debtor who uses the provisions exempted for himself or his family.<sup>79</sup> The word "family" in this connection will include children who are over age as well as minors

ment or claim. The only inquiry which could be made is whether it is held in good faith as wearing apparel or purchased for the purpose of putting its price beyond the reach of creditors."

75. *Stewart v. McClung*, 12 Ore. 431, 8 Pac. 447, 53 Am. Rep. 374.

[a] **What Is Necessary Wearing Apparel.**—*Sellers v. Bell*, 94 Fed. 801, 36 C. C. A. 502, construing "wearing apparel" under a statute exempting "all necessary and proper wearing apparel" holds it to include all articles of dress generally worn by persons in the calling and condition of life and in the locality of the residence of the person claiming the exemption. It includes whatever is necessary to a decent appearance and to protection against exposure to changes of weather and also what is reasonably proper and customary in the way of ornament.

76. See generally the statutes and *Tolbert v. Freeman*, 130 La. 47, 57 So. 580; *Phelan v. Lacey* (Okla.), 151 Pac. 1070.

[a] **All provision and forage on hand for home consumption is exempt in Texas.** *Anderson v. Larremore*, 1 White & W. Civ. Cas. (Tex.), §947.

[b] **A barrel of flour purchased by the debtor and made from grain never owned by the debtor, is not exempt** *Tucker v. Lane*, 23 Me. 537.

77. See the statutes.

[a] **Oats are not included under an exemption of "corn and grain."** *Blake v. Baker*, 41 Me. 78.

78. La. Code of Pr., art. 645; *Rynella Mill & Merc. Co. v. Segura*, 128 La. 643, 55 So. 2; *Hinton v. Roane*, 124 La. 927, 50 So. 798, 134 Am. St. Rep. 526; *Dejean & Bro. v. Lee*, 124 La. 239, 50 So. 25.

[a] **Seventy bushels of corn is not an excessive amount for a debtor having a family and ten minor children.**

*Dejean & Bros. v. Lee*, 124 La. 239, 50 So. 25.

[b] **A current year does not mean a calendar year; it means from harvest to harvest.** *Hinton v. Roane*, 124 La. 927, 50 So. 798, 134 Am. St. Rep. 526.

[c] **The statute forbidding the separate seizure of agricultural implements, and the corn, fodder, hay, provisions and other supplies necessary for carrying on the plantation to which they are attached, is not a law of exemption but merely a prohibition against seizing the articles therein named separately from the land, so that sugar cane raised to be converted into syrup for the family, is subject to seizure.** *Hinton v. Roane*, 124 La. 927, 50 So. 798, 134 Am. St. Rep. 526.

[d] **Ownership of Farm.**—Under a statute exempting from seizure supplies necessary for carrying on a farm for the current year, it is not required that the person who claims the exemption own the farm provided he be cultivating it. *Rynella Mill & Merc. Co. v. Segura*, 128 La. 643, 55 So. 2; *Hinton v. Roane*, 124 La. 927, 50 So. 798, 134 Am. St. Rep. 526 (construing a statute exempting corn, etc., necessary for the carrying on the plantation to which they are attached for the current year); *Dejean & Bro. v. Lee*, 124 La. 239, 50 So. 25.

[e] **Exemption While Attached by the Roots.**—Under a statute exempting corn, hay and fodder necessary for carrying on the plantation to which they are attached, the exemption operates as well while the crop still hangs by the roots. *Hinton v. Roane*, 124 La. 927, 50 So. 798, 134 Am. St. Rep. 526.

79. *Blake v. Baker*, 41 Me. 78, a mere boarder cannot claim the exemption.

[a] **Food prepared for boarders is**

if they have no home elsewhere than with their father.<sup>80</sup> The fact that the debtor may have other property does not deprive him of the right to claim provisions as exempt.<sup>81</sup>

Generally the articles must be such as could be consumed directly by the debtor's family; the exemption does not extend to or include such articles as might be sold or exchanged for articles of consumption,<sup>82</sup> or articles which, although provisions in themselves, are kept for sale as part of a stock of merchandise.<sup>83</sup>

The word "provisions" has been construed to mean something in a condition to be consumed as food, such as meal, flour, lard, meat and other articles of that kind which need no change but cooking,<sup>84</sup> but a broader and perhaps better construction would be "whatever is fit for the food of families and is usually eaten as food."<sup>85</sup> The word "provisions" has been held to be broad enough to include crops<sup>86</sup> not

not exempt "as necessary provisions for the use of the family." *Coffey v. Wilson*, 65 Iowa 270, 21 N. W. 602.

80. *Stilson v. Gibbs*, 53 Mich. 280, 18 N. W. 815.

81. Ark.—*Atkinson v. Gatcher*, 23 Ark. 101. Mich.—*Stilson v. Gibbs*, 53 Mich. 280, 18 N. W. 815. Tex.—*Burris v. Booth*, 40 S. W. 186.

82. Kan.—*George v. Hunter*, 48 Kan. 651, 29 Pac. 1148, 30 Am. St. Rep. 325. Ky.—*Herndon v. Waters' Exr.*, 14 Ky. L. Rep. 667; *Hayden v. Crichtfield*, 3 Ky. L. Rep. 83. Me.—*Blake v. Baker*, 41 Me. 78. Tex.—*Seligson & Co. v. Staples*, 1 White & W. Civ. Cas. §1072.

[a] But the fact that the farmer was carrying vegetables to market to exchange them for articles of necessity for his family would not deprive the vegetables of their character as "provisions provided for family use." *Shaw v. Davis*, 55 Barb. (N. Y.) 389.

83. Mass.—*Nash v. Farrington*, 4 Allen 157. Mo.—*State v. Conner*, 73 Mo. 572. N. H.—*Bond v. Tucker*, 65 N. H. 165, 18 Atl. 653. Ohio.—*Robinette v. Doyle*, 2 Ohio Dec. (Reprint) 391; *Donahue v. Steele*, 1 Ohio Dec. (Reprint) 130.

[a] Merchandise in a grocery store would not be exempt as provisions even though the debtor was accustomed to carry home the sustenance for the family from the stock. *State v. Conner*, 73 Mo. 572.

84. *Wilson v. McMillan*, 80 Ga. 733, 6 S. E. 182.

[a] Under a statute exempting provisions actually prepared and designed for the use of the family, the debtor must not only have the articles which

may be provisions, but he must actually have prepared and appropriated them to that use, for the use of his own family. *Donahue v. Steele*, 1 Ohio Dec. (Reprint) 130.

85. *Cochran v. Harvey*, 88 Ga. 352, 14 S. E. 580.

[a] *Cotton* (1) is not included in either the term "provisions" or "forage." *Seligson & Co. v. Staples*, 1 White & W. Civ. Cas. (Tex.), §1072. (2) But some statutes exempt a certain amount of raw cotton. *Vincent v. Vincent*, 1 Heisk. (Tenn.) 333.

86. *Cochran v. Harvey*, 88 Ga. 352, 14 S. E. 580; *Carpenter v. Herrington*, 25 Wend. (N. Y.) 370, 37 Am. Dec. 239.

[a] Whether "provisions" includes crops planted and barely visible above the ground is a question upon which the court was equally divided in *King v. Moore*, 10 Mich. 538.

[b] *Growing Vegetables*.—As "necessary vegetables" are absolutely exempt, they will be protected in any stage of the process of obtaining them for the family use whether by planting them or in any other manner. *Carpenter v. Herrington*, 25 Wend. (N. Y.) 370, 37 Am. Dec. 239.

[c] Whether unthreshed wheat is exempt as provisions is a question for the jury. *Plummer v. Currier*, 52 N. H. 287.

[d] But a field of standing corn was held not to be provisions "actually prepared and designed for family use," on the ground that at "the time of the levy the debtor's family did not require it as provisions and that the condition of the family at that time would govern. *Robinette v. Doyle*, 2 Ohio

yet harvested, as corn in the husk,<sup>87</sup> crops ripe for harvest,<sup>88</sup> or potatoes in the ground.<sup>89</sup> The word "flour" in the exemption statutes has been held to include corn meal,<sup>90</sup> but not wheat,<sup>91</sup> although wheat may be claimed under a statute exempting grain.<sup>92</sup>

It is a question of fact for the jury whether the provisions seized were held by the debtor for home consumption,<sup>93</sup> and whether the quantity on hand is necessary for the family use.<sup>94</sup>

(VIII.) Domestic Animals and Food Therefor.—(A.) IN GENERAL. Generally the statutes exempt to the debtor a certain number of domestic animals, such as cows, swine, sheep, etc.<sup>95</sup> The exemption of specified domestic animals will generally include the young of that species;<sup>96</sup> thus the exemption of a cow will include a heifer.<sup>97</sup> The exemption of an animal will cover the meat of the animal after it has

Dec. (Reprint) 391; *Donahue v. Steele*, 1 Ohio Dec. (Reprint) 130.

87. *Cochran v. Harvey*, 88 Ga. 352, 14 S. E. 580.

88. *Mulligan v. Newton*, 16 Gray (Mass.) 211.

89. *Carpenter v. Herrington*, 25 Wend. (N. Y.) 370, 37 Am. Dec. 239.

90. *Atkinson v. Gatcher*, 23 Ark. 101; *Lashaway v. Tucker*, 61 Hun 6, 15 N. Y. Supp. 490.

91. *Salsbury v. Parsons*, 36 Hun (N. Y.) 12.

92. *George v. Hunter*, 48 Kan. 651, 29 Pac. 1148, 30 Am. St. Rep. 325.

93. *Ward v. Gibbs*, 10 Tex. Civ. App. 287, 30 S. W. 1125.

94. *Atkinson v. Gatcher*, 23 Ark. 101.

95. See generally the statutes and *Vincent v. Vincent*, 1 Heisk. (Tenn.) 323; *Davis v. Bryan*, 7 Yerg. (Tenn.) 88.

[a] A hog used for show purposes is not exempt under a statute exempting "ten head of hogs for family use," though it might be claimed as exempt under a statute allowing the debtor to select other property in place of that specified by the statute. *Wabash R. Co. v. Bowring*, 103 Mo. App. 158, 77 S. W. 106.

[b]. Under the words "other property" a mare and five hogs may be set apart as exempt if they do not exceed the statutory limit of value. *Dean v. King*, 35 N. C. 20.

[c] Exemption to Agriculturists. The Tennessee statute exempts five head of sheep among other animals to persons engaged in agriculture. A butcher cannot by this statute claim as exempt five head of sheep purchased for slaughter and sale. *Simons v. Lovell*, 7 Heisk. (Tenn.) 510.

[d] Pork and Hogs.—(1) Where the statute exempts "pork on foot" it will include all kinds of hogs regardless of whether they are in condition to kill at the time of levy or not. *Byous v. Mount*, 89 Tenn. 361, 17 S. W. 1037. And (2) under a statute exempting "one swine or the meat of one swine" a debtor having a part of the meat of one swine may nevertheless claim as exempt his best remaining swine. *In re Libby*, 103 Fed. 776. But (3) a statute which exempts "one hog and one pig and the pork of the same when slaughtered" exempts one hog from attachment and that exemption follows the chattel when converted into pork. It does not protect a hog in addition to the pork of a slaughtered hog. *Parker v. Tirrell*, 19 N. H. 201.

96. *Patterson v. English* (Tex. Civ. App.), 142 S. W. 18.

97. Ky.—*Stirman v. Smith*, 8 Ky. L. Rep. 781. Mass.—*Johnson v. Babcock*, 8 Allen 583; *Pomeroy v. Trimper*, 8 Allen 398, 85 Am. Dec. 714. Vt. *Dow v. Smith*, 7 Vt. 465, 29 Am. Dec. 202.

[a] A heifer (1) forward with calf (*Dow v. Smith*, 7 Vt. 465, 29 Am. Dec. 202), a heifer (2) not with calf (*Freeman v. Carpenter*, 10 Vt. 433), are exempt, and a heifer (3) not giving milk for more than a year after levy is exempt if the owner is raising it for a cow. *Carruth v. Grassie*, 11 Gray (Mass.) 211, 71 Am. Dec. 707.

[b] But a yearling heifer is not exempt under a statute exempting "two cows and a calf." *Mitchell v. Joyee*, 69 Iowa 121, 28 N. W. 473.

[c] Where the statute exempts five "milk cows," and the debtor has only two which are giving milk, he will be

been slaughtered.<sup>98</sup> And, it has been held, its produce,<sup>99</sup> although the increase is not necessarily exempt.<sup>1</sup> The use to which the animals are put is wholly immaterial, where they are exempted without qualification.<sup>2</sup> Of two animals, one of which is mortgaged, the unmortgaged is exempt under a statute allowing an exemption in but one.<sup>3</sup>

**Election.**—Generally the debtor may select the animals to be exempted,<sup>4</sup> though this right is not everywhere recognized.<sup>5</sup>

(B.) **FOOD FOR ANIMALS.**—Statutes which exempt domestic animals generally exempt food for such animals either in a specified amount or for a specified period of time.<sup>6</sup> The fodder or food claimed as exempt must be such as is suitable for the exempt animals,<sup>7</sup> and, under some statutes, must be "on hand" for home consumption.<sup>8</sup> If sufficient fodder for a specified time is exempted, the running of the time dates from the levy.<sup>9</sup> Where the statute is silent as to the period of exemption, the food will be exempted with reference to the season.<sup>10</sup> Many states limit the food to those animals owned at the time of the levy,<sup>11</sup> though in some jurisdictions the statute has been construed to

allowed to claim the balance of his exemption from heifers two years old and with calf, though they have never given milk. *Nelson v. Fightmaster*, 4 Okla. 38, 44 Pac. 213.

98. *Gibson v. Jenney*, 15 Mass. 205.

99. *Leavitt v. Metcalf*, 2 Vt. 342, 19 Am. Dec. 718, holding exempt the butter made from an exempt cow, even though butter was not enumerated in the statute.

[a] **Sheep and Their Fleece.**—Under a statute exempting a certain quantity of sheep with their fleeces or the yarn or cloth manufactured from the same, it has been held that yarn and wool possessed by a householder was exempt although he did not own the sheep which produced the wool. *Brackett v. Watkins*, 21 Wend. (N. Y.) 68; *Hall v. Penney*, 11 Wend. (N. Y.) 44, 25 Am. Dec. 601.

1. *Citizens Nat. Bank v. Green*, 78 N. C. 247.

2. *Nuzman v. Schooley*, 36 Kan. 177, 12 Pac. 829, cows though not used by the debtor or necessary to his support.

3. *Tryon v. Mansir*, 2 Allen (Mass.) 219; *Greenleaf v. Sanborn*, 44 N. H. 16.

[a] **Where All Defendant's Cattle Are Mortgaged.**—If the debtor has mortgaged his one cow, his interest in the one cow is exempt. If he has more than one cow, and mortgages them all, the creditor may attach his interest in all except one. *Cooper v. Newman*, 45

N. H. 339; *Greenleaf v. Sanborn*, 44 N. H. 16.

4. **Kan.**—*Nuzman v. Schooley*, 36 Kan. 177, 12 Pac. 829. **Ky.**—*Stirman v. Smith*, 8 Ky. L. Rep. 781. **Me.**—*Wentworth v. Young*, 17 Me. 70.

[a] **Cows, Calves and Heifers.**—An execution defendant having a cow and a calf and two heifers, may, under a statute exempting two cows and calves, elect to keep the heifers and give up the cow and calf, but in the absence of such an election the cow and calf are primarily exempt. *Stirman v. Smith*, 8 Ky. L. Rep. 781.

5. *Lindsey v. Fuller*, 10 Watts (Pa.) 144.

6. See generally the statutes.

7. *Herndon v. Waters' Exr.*, 14 Ky. L. Rep. 667; *Stephens v. Hobbs*, 14 Tex. Civ. App. 148, 36 S. W. 287.

[a] **Corn in June** cannot be food for animals and exempt even if claimed by the debtor. *Donahue v. Steele*, 1 Ohio Dec. (Reprint) 130.

8. *Burris v. Booth* (Tex.), 40 S. W. 186; *Stephens v. Hobbs*, 14 Tex. Civ. App. 148, 36 S. W. 287.

9. *Donahue v. Steele*, 1 Ohio Dec. (Reprint) 130.

10. *Farrell v. Higley*, *Lalor's Supp.* (N. Y.) 87.

[a] **Although a part of the winter has passed**, the debtor may claim the full exemption. *Kennedy v. Philbrick*, 38 Me. 135.

11. **Kan.**—*Byrnes v. Plow Co.*, 74 Kan. 97, 85 Pac. 819. **Me.**—*Foss v.*

mean sufficient to keep all of the exempted stock regardless of whether the debtor owns such stock at the time of levy or not.<sup>12</sup> Where the amount "necessary" for exempted animals is exempt, what is necessary is a question of fact.<sup>13</sup>

(IX.) **Tools, Implements and Apparatus.**—(A.) OF TRADE OR OCCUPATION.<sup>14</sup>

(1.) *In General.*—At common law the tools necessary for a trade or occupation were not exempt from seizure on judicial process,<sup>15</sup> but in the United States it has long been the policy of the law to exempt the tools of trade whereby the debtor derives support for himself and family.<sup>16</sup> This exemption is sometimes allowed in addition to those allowed the head of a family,<sup>17</sup> and also to a debtor who has no family.<sup>18</sup> The statute is sometimes broadened to include materials, stock and other things necessary to carry on a business or occupation.<sup>19</sup>

(2.) *To What Occupations Statute Applies.*—The statutes vary as to the occupations included. Some exempt merely the tools of a mechanic. Others exempt those belonging to a trade, to a trade or occupation, or to a trade or profession.<sup>20</sup> A statute exempting tools of trade or

Stewart, 14 Me. 312. Mich.—King v. Moore, 10 Mich. 538. Wis.—Cowan v. Main, 24 Wis. 569.

[a] **Amount Reasonably Necessary.** Where food for animals for a specified time is exempted only so much of such food is exempt as will reasonably be necessary for keeping such animals as the debtor has on hand at the time of levy. King v. Moore, 10 Mich. 538.

12. Olin v. Fox, 79 Minn. 459, 82 N. W. 858; Kimball v. Woodruff, 55 Vt. 229.

13. Haugen v. Younggren, 57 Minn. 170, 58 N. W. 988; Howard v. Rugland, 35 Minn. 388, 29 N. W. 63; Ward v. Gibbs, 10 Tex. Civ. App. 287, 30 S. W. 1125.

14. **Animals and vehicles as tools and implements**, see *infra*, II, B, 5, a, (XI) and (XIII).

**Automobile as tool or implement** within meaning of exemption laws, see *infra*, II, B, 5, a, (XIII), (D).

15. Me.—Martin v. Buswell, 108 Me. 263, 80 Atl. 828. N. C.—Martindale v. Whitehead, 46 N. C. 64. Eng.—Fenton v. Logan, 9 Bing. 676, 131 Eng. Reprint 767; Simpson v. Hartopp, Willis 512, 125 Eng. Reprint 1295.

16. Ga.—Hendricks v. Lewis, R. M. Charl. 105. Me.—Martin v. Buswell, 108 Me. 263, 80 Atl. 828. Mich.—Harris v. Haynes, 30 Mich. 140. Tenn. Bell v. Douglass, 1 Yerg. 397.

17. Harrison v. Martin, 7 Mo. 286.

18. Geiger v. Kobilka, 26 Wash. 171, 66 Pac. 423, 90 Am. St. Rep. 733.

19. Hutchinson v. Whitmore, 90 Mich. 255, 51 N. W. 451, 30 Am. St. Rep. 431; Stilson v. Gibbs, 46 Mich. 215, 9 N. W. 254.

20. See the statutes.

[a] "The word trade embraces within its meaning commercial traffic and it also has a limited and restricted significance which applies to mechanical pursuits; but in its broad and general sense it covers and embraces all occupations in business, with the possible exception of the learned professions and those that pertain to liberal arts and the pursuit of agriculture. . . . Some of the courts—Atwood v. De Forrest, 19 Conn. 513, and others—in giving a meaning to the word trade when found in exemption statutes apply the restricted definition, and hold it to embrace only mechanical pursuits; but on the other hand other courts hold that the word trade in its general sense embraces nearly all occupations and business with the exceptions stated, and this general meaning has been adopted in preference to the restricted one." Betz v. Maier, 12 Tex. Civ. App. 219, 33 S. W. 710, *affirmed* in Campbell v. Honaker's Heirs (Tex. Civ. App.), 166 S. W. 74.

[b] "The word profession, in its larger and broader meaning, is defined by Webster to be the 'occupation, if not mechanical or agricultural, or the like, to whatever one devotes one's self; the business which one professes to understand and follow for subsist-

occupation exempts the tools of the several trades or classes of the laboring community.<sup>21</sup> It exempts the tools of mechanics, artisans or laborers.<sup>22</sup> The courts construing the various statutes have held to be exempt the tools and instruments of music teachers,<sup>23</sup> musicians,<sup>24</sup> dentists,<sup>25</sup> butchers,<sup>26</sup> hotel keepers,<sup>27</sup> photographers,<sup>28</sup> insurance solicitors,<sup>29</sup> and milliners.<sup>30</sup> But the statutes generally do not cover large manufacturers<sup>31</sup> or merchants.<sup>32</sup> The fact that the debtor while

ence, calling, vocation, employment.'

. . . In a restricted sense it only applies to the learned professions.''  
Betz v. Maier, 12 Tex. Civ. App. 219, 33 S. W. 710.

[c] In Michigan, the statute makes certain exemptions to a debtor "to carry on the profession, trade, occupation or business." This exempts property of a manufacturer as well as that of a farmer, mechanic, merchant or professional man. Wood v. Bresnahan (Mich.), 30 N. W. 206. See also Hutchinson v. Whitmore, 90 Mich. 255, 51 N. W. 451, 30 Am. St. Rep. 431.

[d] In Which Principally Engaged. To be entitled to an exemption under a statute exempting property "to enable any person to carry on the profession . . . or business in which he is wholly or principally engaged" the business need not be extensive or occupy most of the debtor's time. It may be light and allowing interval or heavy and unremitting. Kenyon v. Baker, 16 Mich. 373, 97 Am. Dec. 158.

21. Wilkinson v. Alley, 45 N. H. 551.

[a] Conducting and operating a motion picture show is a "trade or profession" within the meaning of the statute. Campbell v. Honaker's Heirs (Tex. Civ. App.), 166 S. W. 74.

22. Wilkinson v. Alley, 45 N. H. 551.

[a] A mechanic is a workman employed in shaping and uniting materials such as wood, metal, etc., into some kind of structure, machine, or some other object, requiring the use of tools. The tools must be such as are used by the workman to shape or change the surface of lumber or other material, or create an object by manual labor. A photographer and a painter are not mechanics. Story v. Walker, 11 Lea (Tenn.) 515, 47 Am. Rep. 305. To same effect, see Tyler v. Coulthard, 95 Iowa 705, 64 N. W. 681, 58 Am. St. Rep. 452.

23. Amend v. Murphy, 69 Ill. 337.

24. Baker v. Willis, 123 Mass. 194, 25 Am. Rep. 61; Goddard v. Chaffee, 2 Allen (Mass.) 395, 79 Am. Dec. 796.

25. Maxon v. Perrott, 17 Mich. 332, 97 Am. Dec. 191. Compare, Whitcomb v. Reid, 31 Miss. 567, 66 Am. Dec. 579. See *infra*, II, B, 5, a, (IX), (B).

26. Hoyt v. Pullman (Okla.), 152 Pac. 386; Hammond v. McFarland (Tex. Civ. App.), 161 S. W. 47 (not if he merely sells meat and is not himself a butcher).

27. White v. Gemeny, 47 Kan. 741, 28 Pac. 1011, 27 Am. St. Rep. 320.

28. Davidson v. Hannon, 67 Conn. 312, 34 Atl. 1050, 52 Am. St. Rep. 282, 34 L. R. A. 718.

[a] But a photographer is not a mechanic. Story v. Walker, 11 Lea (Tenn.) 515, 47 Am. Rep. 305.

29. Davidson v. Sechrist, 28 Kan. 324; Betz v. Maier, 12 Tex. Civ. App. 219, 33 S. W. 710.

30. Woods v. Keyes, 14 Allen (Mass.) 236, under statute exempting "tools, implements and fixtures."

31. Daniels v. Hayward, 5 Allen (Mass.) 43, 81 Am. Dec. 731; Smith v. Gibbs, 6 Gray (Mass.) 298; Buckingham v. Billings, 13 Mass. 82; Parker v. Wightman, 4 Strobb. (S. C.) 363. But see Wood v. Bresnahan, 63 Mich. 614, 30 N. W. 206 under the Michigan statute.

[a] Manufacturer — Where a spectacle maker and a blacksmith formed a partnership and engaged in making spectacles and cast iron shears employing six workmen besides themselves in the business the court held that they were manufacturers and that the tools except those suitable for one person would not be exempt. Atwood v. De Forest, 19 Conn. 513.

[b] Large Establishment. — The printing or stamping blocks of a painter of oil cloths used in a business requiring an extensive building and numerous workmen would not be exempt as the "necessary tools of a workman." Richie v. McCauley, 4 Pa. 471.

32. Kan. — Bequillard v. Bartlett, 19

carrying on his trade is also a manufacturer<sup>33</sup> or merchant,<sup>34</sup> will not prevent him from claiming the exemption as to tools which he personally uses in his trade. The pursuit of agriculture is not embraced within the term "trade."<sup>35</sup>

(3.) *What Are Tools, Implements and Apparatus.*—(a.) *Tools.*—The definitions and applications of the statutes exempting tools and implements are not entirely harmonious. Generally the words are given a broad signification.<sup>36</sup> Under a more restricted construction of the statute, the word tool is defined to be some simple instrument used

Kan. 382, 27 Am. Rep. 120. **Mass.** Desmond v. Young, 173 Mass. 90, 53 N. E. 151; Wallace v. Bartlett, 108 Mass. 52; Read v. Neale, 10 Gray 242; Gibson v. Gibbs, 9 Gray 62; Wilson v. Elliott, 7 Gray 69. **Mich.**—See Wood v. Bresnahan, 63 Mich. 614, 30 N. W. 206. **Okla.**—See Hoyt v. Pullman, 152 Pac. 386. **Tex.**—See Hammond v. McFarland (Tex. Civ. App.), 161 S. W. 47.

33. *In re Robb*, 99 Cal. 202, 33 Pac. 890, 37 Am. St. Rep. 48; Seeley v. Gwillin, 40 Conn. 106.

34. See Hoyt v. Pullman (Okla.), 152 Pac. 386.

[a] The fact that the debtor sells the meat he butchers does not defeat his right to the exemption. *Hammond v. McFarland* (Tex. Civ. App.), 161 S. W. 47.

35. As to exemption of farm utensils, see *infra* II, B, 5, a, (IX), (C).

36. See the cases following.

[a] The following articles have been held to be exempt as "tools of trade": (1) A watch, where it was needed by the debtor in his daily business (*Bitting v. Vandeburgh*, 17 How. Pr. [N. Y.] 80. See also *In re Edlunds*, 35 Hun [N. Y.] 367); (2) a piano when owned by a music teacher (*Amend v. Murphy*, 69 Ill. 337. But see *Triebler v. Knabe*, 12 Md. 491, 71 Am. Dec. 607); (3) a lathe (*In re Robb*, 99 Cal. 202, 33 Pac. 890, 37 Am. St. Rep. 48); (4) a barber's chair and mirror (**Tenn.**—*Terry v. McDaniel*, 103 Tenn. 415, 53 S. W. 732, 46 L. R. A. 559; **Tex.**—*Fore v. Cooper* [Tex.], 34 S. W. 341. **Vt.**—*Allen v. Thompson*, 45 Vt. 472); (5) a cornet to one partly earning his living by playing in a band (*Baker v. Willis*, 123 Mass. 194, 25 Am. Rep. 61); (6) a violin and bow to a musician who plays in an orchestra (*Goddard v. Chaffee*, 2 Allen [Mass.] 395, 79 Am. Dec. 796); (7) nets and boats of a fisherman

(*Sammis v. Smith*, 1 Thomp. & C. [N. Y.] 444); (8) a jeweler's safe (*In re McManus*, 87 Cal. 292, 25 Pac. 413, 22 Am. St. Rep. 250, 10 L. R. A. 567); (9) a safe used by an insurance agent (*Davidson v. Sechrist*, 28 Kan. 324; *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710); (10) cheese press and knives to a cheese maker (*Fish v. Street*, 27 Kan. 270); (11) a baker's implements (*In re Osborn*, 104 Fed. 780; *In re Petersen*, 95 Fed. 417); (12) a mowing machine to one whose business is cutting hay (*Tucker v. Napier*, 1 White & W. Civ. Cas. §670); (13) a new tow line to one engaged in towing canal boats (*Fields v. Moul*, 15 Abb. Pr. [N. Y.] 6); (14) a lamp used by a jeweler (*Bequillard v. Bartlett*, 19 Kan. 582, 27 Am. Rep. 120); (15) tools, implements and fixtures of a milliner (*Woods v. Keyes*, 14 Allen [Mass.] 236, 92 Am. Dec. 765); (16) a photographer's lens used by a photographer (*Davidson v. Hannon*, 67 Conn. 312, 34 Atl. 1050, 52 Am. St. Rep. 282, 34 L. R. A. 718. But see *Story v. Walker*, 11 Lea [Tenn.] 515, 47 Am. Rep. 305); (17) pool tables to the owner of a pool hall (*Harris v. Todd* [Tex. Civ. App.], 158 S. W. 1189); (18) but not to a saloon keeper (*Goozen v. Phillips*, 49 Mich. 7, 12 N. W. 889); (19) iron safe, a set of abstracts, a cabinet and table to an insurance agent. *Davidson v. Sechrist*, 28 Kan. 324.

[b] The following have been held not exempt: (1) Cash register and refrigerator belonging to a butcher (*Hammond v. McFarland* [Tex. Civ. App.], 161 S. W. 47. But see *Hoyt v. Pullman* (Okla.), 152 Pac. 386); (2) a bread box used in peddling bread (*Stanton v. French*, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174); (3) a mill saw (*Batchelder v. Shapleigh*, 10 Me. 135, 25 Am. Dec. 213); (4) a seat on

by hand.<sup>37</sup> It does not include articles known as appliances or machines.<sup>38</sup> But some courts under a more liberal construction hold the contrary.<sup>39</sup> The term tools does not include complicated machinery,<sup>40</sup>

the stock exchange (*Leggett v. Waller*, 39 Misc. 408, 80 N. Y. Supp. 13); (5) and the chairs used in a moving picture theatre. *Campbell v. Honaker's Heirs* (Tex. Civ. App.), 166 S. W. 74.

[c] A building even though it is personal property owned and occupied by a photographer in the conduct of his business is not exempt as "tools of trade." *Holden v. Stranahan*, 48 Iowa 70.

[d] Articles necessary in carrying on a mercantile business are not "tools." *Desmond v. Young*, 173 Mass. 90, 53 N. E. 151. See also *Hammond v. McFarland* (Tex. Civ. App.), 161 S. W. 47.

[e] As to butcher's tools and implements, see *Hoyt v. Pullman* (Okla.), 152 Pac. 386.

[f] But under a statute which specifically exempts (1) various articles such as looms, spinning wheels, sewing machine, etc., the word "tool" is intended to have a more restricted meaning. *Kirksey v. Rowe*, 114 Ga. 893, 40 S. E. 990, 88 Am. St. Rep. 65. But see (2) *Rayner v. Whicher*, 6 Allen (Mass.) 292 (allowing a debtor to claim one sewing machine under an express exemption of a sewing machine and another sewing machine as a tool and implement), and (3) *Cronfeldt v. Arrol*, 50 Minn. 327, 52 N. W. 857, 36 Am. St. Rep. 648, holding the general exemption of a sewing machine in no way restricts or qualifies the specific exemption of tools.

[g] Horse as a tool or implement, see *infra*, II, B, 5, a, (XI), (A), (1).

37. Ga.—*Kirksey v. Rowe*, 114 Ga. 893, 40 S. E. 990, 88 Am. St. Rep. 65; *Lenoir v. Weeks*, 20 Ga. 596. R. I. *In re Church*, 15 R. I. 245, 2 Atl. 761. Tenn.—*Story v. Walker*, 11 Lea 515, 47 Am. Rep. 305. Vt.—*Henry v. Sheldon*, 35 Vt. 427, 82 Am. Dec. 644; *Garrett v. Patchin*, 29 Vt. 248, 70 Am. Dec. 414; *Spooner v. Fletcher*, 3 Vt. 133, 21 Am. Dec. 579; *Kilburn v. Demming*, 2 Vt. 404, 21 Am. Dec. 543. Can.—*Davidson v. Reynolds*, 16 U. C. C. P. 140.

[a] "The word tools," as used in these statutes, is presumed to embrace such implements of husbandry or of manual labor as are usually employed

in, and are appropriate to, the business of the several trades or classes of the laboring community." *Wilkinson v. Alley*, 45 N. H. 551.

[b] Mere Fact of Use Insufficient. The mere fact that specific items of property are used by a debtor in the conduct of a business does not warrant treating them as "tools or implements," if they are not ordinarily and fairly to be treated as such. *In re Zimmerman*, 202 Fed. 812.

38. *Kirksey v. Rowe*, 114 Ga. 893, 40 S. E. 990, 88 Am. St. Rep. 65; *Garrett v. Patchin*, 29 Vt. 248, 70 Am. Dec. 414.

[a] The fact that the machine supercedes a tool does not protect it from seizure. *Henry v. Sheldon*, 35 Vt. 427, 82 Am. Dec. 644.

39. *Jenkins v. McNall*, 27 Kan. 532, 41 Am. Rep. 422. See *Hoyt v. Pullman* (Okla.), 152 Pac. 386; *Smith v. Roads*, 29 Okla. 815, 119 Pac. 627; *Brummage v. Kenworthy*, 27 Okla. 431, 112 Pac. 984, Ann. Cas. 1912C, 607.

[a] A sewing machine is a tool. *Rayner v. Whicher*, 6 Allen (Mass.) 292; *Cronfeldt v. Arrol*, 50 Minn. 327, 52 N. W. 857, 36 Am. St. Rep. 648.

[b] Printing presses are held exempt by some courts (Ala.—*Sallee v. Waters*, 17 Ala. 482. Conn.—*Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166. Wash.—*Am. Paper Co. v. Sullivan*, 34 Wash. 391, 75 Pac. 991), but not by others. Kan.—*Jenkins v. McNall*, 27 Kan. 532, 41 Am. Rep. 422. Mass.—*Danforth v. Woodward*, 10 Pick. 423, 20 Am. Dec. 531; *Buckingham v. Billings*, 13 Mass. 82. Vt.—*Spooner v. Fletcher*, 3 Vt. 133, 21 Am. Dec. 579.

[c] A printing press is exempt to a debtor who derives his principal support from editing a weekly paper although he is not a practical printer and most of the work is done by employees. *Bliss v. Vedder*, 34 Kan. 57, 7 Pac. 599, 55 Am. Rep. 237; *Green v. Raymond*, 58 Tex. 80, 44 Am. Rep. 601.

40. Ga.—*Lenoir v. Weeks*, 20 Ga. 596. Mass.—*Danforth v. Woodward*, 10 Pick. 423, 20 Am. Dec. 531. N. Y. *Ford v. Johnson*, 34 Barb. 364. Tex. *Willis v. Morris*, 66 Tex. 628, 634, 1 S. W. 799. Vt.—*Spooner v. Fletcher*,

nor the several parts composing the machine.<sup>41</sup> The fact that the tools are of an improved and expensive character will not affect the right of exemption,<sup>42</sup> nor will the fact that they are new and have never been used.<sup>43</sup> But they must be held by the debtor in good faith for use as instruments of labor and means of support for himself and family.<sup>44</sup>

**Personal Use.**—Some authorities limit the statute to those tools personally used by the debtor,<sup>45</sup> but others have not so limited the application of the word.<sup>46</sup>

(b.) *Implements.*—It is difficult to define accurately<sup>47</sup> the word “im-

3 Vt. 133, 21 Am. Dec. 579; *Kilburn v. Demming*, 2 Vt. 404, 21 Am. Dec. 543.

[a] The word “tool,” either in its strict meaning or popular use, is not understood as designating complicated machinery which in order to produce a useful effect, must be worked by combining several distinct parts or separate pieces, the aid of more hands than one being necessary to perform the operation. *Danforth v. Woodward*, 10 Pick. (Mass.) 423, 20 Am. Dec. 531.

[b] A machine for the manufacture of pegs is not a tool under the statute. *Knox v. Chadbourne*, 28 Me. 160, 48 Am. Dec. 487.

[c] Mill and gin machinery are not exempt as “tools of trade.” *Cullers v. James*, 66 Tex. 494, 1 S. W. 314.

[d] A machine for splitting leather operated by steam or hand power used by a tanner is not exempt as a tool. *Henry v. Sheldon*, 35 Vt. 427, 82 Am. Dec. 644.

[e] A “bill and jenny,” a machine used in spinning and manufacturing cloth, is not exempt as a tool. *Kilburn v. Demming*, 2 Vt. 404, 21 Am. Dec. 543.

[f] But a turning lathe, weighing 600 pounds and operated both by foot and engine power, used by a machinist in his repair shop, is exempt. *Smith v. Roads*, 29 Okla. 815, 119 Pac. 627. See also *In the matter of Robb*, 99 Cal. 202, 33 Pac. 890.

41. *Danforth v. Woodward*, 10 Pick. (Mass.) 423, 20 Am. Dec. 531.

42. *Seeley v. Gwillin*, 40 Conn. 106; *Parkerson v. Wightman*, 4 Strobb. (S. C.) 363.

43. *Fields v. Moul*, 15 Abb. Pr. (N. Y.) 6.

44. Minn.—*Prosser v. Hartley*, 35 Minn. 340, 29 N. W. 156, under statute. N. H.—*Bond v. Tucker*, 65 N. H. 165,

18 Atl. 653. Ohio.—*Burgess v. Everett*, 9 Ohio St. 425.

[a] **Necessity of Immediate Use.** The tools of occupation of a farmer are exempt to the statutory limit of value whether required for immediate use or not. *Wilkinson v. Alley*, 45 N. H. 551.

45. Ala.—*Gilchrist v. Gilmer*, 9 Ala. 985. S. C.—*Parkerson v. Wightman*, 4 Strobb. 363. Vt.—*Garrett v. Patchin*, 29 Vt. 248, 70 Am. Dec. 414.

[a] A butcher's tools when used by him as a butcher, are exempt; but if he is not himself a butcher but carries on the business as an incident of a larger mercantile business, they are not exempt. *Hoyt v. Pullman* (Okla.), 152 Pac. 386. See also *Hammond v. McFarland* (Tex. Civ. App.), 161 S. W. 47.

46. See *Dowling v. Clark*, 3 Allen (Mass.) 570.

[a] A mechanic carrying on a small business employing men who perform the principal part of the labor with the tools, implements and fixtures is within the statute. *Daniels v. Hayward*, 5 Allen (Mass.) 43, 81 Am. Dec. 731.

47. *In re McManus*, 87 Cal. 292, 25 Pac. 413, 22 Am. St. Rep. 250, 10 L. R. A. 567.

[a] “Webster gives as the meaning of the word, ‘Whatever may supply a want, especially an instrument or utensil as supplying a requisite to an end; as the implements of trade, of husbandry, or of war;’ and ‘utensil’ he defines as ‘that which is used; an instrument; an implement; especially an instrument or vessel used in a kitchen, or in domestic and farming business.’ By the courts, these words are accorded a broad signification.” *In re McManus*, 87 Cal. 292, 25 Pac. 413, 22 Am. St. Rep. 250, 10 L. R. A. 567.

plements," but this word will include many things which are not tools.<sup>43</sup>

(c.) *Apparatus*.—The word "apparatus" found in many statutes is a term which is most comprehensive and will include more than is included in either "tools" or "implements."<sup>49</sup> This word is not used in a restricted sense, and includes any complex device or machine designed or prepared for the accomplishment of a special purpose.<sup>50</sup>

(4.) *Necessary Tools*.—Some statutes exempt only the necessary<sup>51</sup> tools

48. *In re McManus*, 87 Cal. 292, 25 Pac. 413, 22 Am. St. Rep. 250, 10 L. R. A. 567; *Davidson v. Reynolds*, 16 U. C. C. P. (Can.) 140.

[a] *Implements* includes with tools, utensils of domestic use, instruments of trade and husbandry but not animals. *Davidson v. Reynolds*, 16 U. C. C. P. (Can.) 140.

[b] A lathe and electric motor used by a general repairman in his business are exempt if their value is within the statutory limitation, and they are properly regarded as implements. *In re Robinson*, 206 Fed. 176.

[c] A threshing machine including tractor engine, belts, separator and all parts necessary to constitute a threshing outfit are exempt as implements to one who keeps them for the purpose of carrying on the business of threshing. *Jackman v. Lamberton*, 71 Kan. 138, 80 Pac. 55.

[d] A reaper and mower is exempt as an "implement of husbandry." *Henry v. McLean*, 1 White & W. Civ. Cas. (Tex.) §1079.

[e] A steam engine, shingle machine and saw gummer in use or lately used in business, are articles exempt under a statute exempting tools and implements. *Wood v. Bresnahan* (Mich.), 30 N. W. 206.

49. *Brummage v. Kenworthy*, 27 Okla. 431, 112 Pac. 984, Ann. Cas. 1912C, 607; *Green v. Raymond*, 58 Tex. 80, 44 Am. Rep. 601; *Harris v. Townley* (Tex. Civ. App.), 161 S. W. 5; *St. Louis Type Foundry v. Taylor* (Tex. Civ. App.), 35 S. W. 691.

50. *Harris v. Townley* (Tex. Civ. App.), 161 S. W. 5, quoting *Standard Dictionary*.

[a] The word "apparatus" as used in the Texas exemption statute embraces such minor machinery as may be operated by hand. *Willis v. Morris*, 66 Tex. 628, 1 S. W. 799.

[b] *Appliances used in producing*

*moving pictures* are exempt as apparatus. *Campbell v. Honaker's Heirs* (Tex. Civ. App.), 166 S. W. 74.

[c] A printing press, type, cases, etc., used by a publisher is exempt as apparatus. *Green v. Raymond*, 58 Tex. 80, 44 Am. Rep. 601; *Harris v. Townley* (Tex. Civ. App.), 161 S. W. 5.

[d] A paper cutter operated by hand is exempt as apparatus of a printer. *Brummage v. Kenworthy*, 27 Okla. 431, 112 Pac. 984, Ann. Cas. 1912C, 607.

[e] A Turning Lathe.—*Smith v. Roads*, 29 Okla. 815, 119 Pac. 627.

[f] A soda water fountain is not exempt as a tool or apparatus of trade. *McCord-Collins Co. v. Lazarus* (Tex.), 50 S. W. 1048.

[g] *Equipment of Restaurant*. Counters, safe, table ware, kitchen utensils, etc., constituting the equipment of a restaurant, are not such "tools or apparatus" as would be exempt under the statute. *Simmang v. Pennsylvania Fire Ins. Co.*, 102 Tex. 39, 112 S. W. 1044, 132 Am. St. Rep. 846.

51. Cal.—In the matter of *Robb*, 99 Cal. 202, 33 Pac. 890, 33 Am. St. Rep. 48. Kan.—*Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120. La.—*Prather v. Bobo*, 15 La. Ann. 524. Mass.—*Rayner v. Whicher*, 6 Allen 292; *Howard v. Williams*, 2 Pick. 80.

[a] A weaver's loom is comprised within the "necessary tools of a tradesman" and is exempt as such. *McDowell v. Shotwell*, 2 Whart. (Pa.) 26.

[b] A lathe belonging to a machinist together with its appliances of the value of two hundred dollars and used in carrying on his business was held to be a tool necessary to his trade and exempt. In the Matter of *Robb*, 99 Cal. 202, 33 Pac. 890, 33 Am. St. Rep. 48. See also *Smith v. Roads*, 29 Okla. 815, 119 Pac. 627.

[c] A sewing machine owned by a debtor engaged in the manufacture of

of trade, but others do not contain any such express limitation,<sup>52</sup> though they do impliedly require that the tool or apparatus belong to the trade or profession pursued by the party claiming the exemption.<sup>53</sup> These statutes do not require, however, that the defendant habitually earn his living by them.<sup>54</sup> The word necessary should not receive a strict construction<sup>55</sup> limiting it to those tools only which are absolutely necessary and without which the debtor could not prosecute his work at all,<sup>56</sup> but it exempts those which are reasonably necessary for the prosecution of the work advantageously and usefully.<sup>57</sup>

(5.) *Necessity That Debtor Be Engaged in His Trade.*—A debtor need not be engaged in his trade at the time of levy to claim the exemption of his tools and implements,<sup>58</sup> but the exemption may be lost by abandonment of the trade or profession in which they are used.<sup>59</sup>

ready made clothing and necessary to his business is exempt even though the owner does not know how to operate it himself. *Dowling v. Clark*, 3 Allen (Mass.) 570.

**Sewing machine as household furniture**, see *supra*, II, B, 5, a, (V), (B).

52. *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710.

[a] **A statute exempting property "to enable any person to carry on"** his business is not confined to articles absolutely necessary to carrying on the business. *Kenyon v. Baker*, 16 Mich. 373, 97 Am. Dec. 158. See *Goozen v. Phillips*, 49 Mich. 7, 12 N. W. 889.

53. *Massie v. Atchley*, 28 Tex. Civ. App. 114, 66 S. W. 582.

[a] But in *Pierce v. Gray*, 7 Gray (Mass.) 67, the court held that a shovel, pick axe, dung fork and hoe used by a debtor in tilling his garden are exempt although the debtor's principal business was the ice business. "In the country, farming and gardening is or ought to be part of every man's business."

[b] **Useful and Serviceable.**—A statute exempting all tools and apparatus extends to all that may be embraced within these terms that are useful or serviceable to be used in the business. *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710.

[c] **A typewriter of a physician** is not a tool or apparatus of his profession. *Massie v. Atchley*, 28 Tex. Civ. App. 114, 66 S. W. 582.

54. *Perkins v. Wisner*, 9 Iowa 320.

55. *In re Robb*, 99 Cal. 202, 33 Pac. 890, 37 Am. St. Rep. 48.

[a] **Where Tools Would Be Sup-**

**plied by Employer.**—The mere fact that some journeyman machinist *can* get employment with a manufacturer who will supply the implement, does not render such implement unnecessary to the trade, within the meaning of the statute. *In re Robb*, 99 Cal. 202, 33 Pac. 890, 37 Am. St. Rep. 48.

56. *Healy v. Bateman*, 2 R. I. 454, 60 Am. Dec. 94. *Contra*, *Prather v. Bobo*, 15 La. Ann. 524; *Hanna v. Bry*, 5 La. Ann. 651, 52 Am. Dec. 606.

57. *Healy v. Bateman*, 2 R. I. 454, 60 Am. Dec. 94.

[a] **Usual and Convenient.**—(1) The tools of a debtor to be exempt must be such as are necessary to carry on his trade in a usual and convenient manner. *Howard v. Williams*, 2 Pick. (Mass.) 80. (2) Necessary, in a statute exempting tools necessary for upholding life, is construed to mean convenient and useful which a man procures for his own personal use, unless extravagant. *Garrett v. Patchin*, 29 Vt. 248, 70 Am. Dec. 414.

58. Ia.—*Perkins v. Wisner*, 9 Iowa 320. Mass.—*Caswell v. Keith*, 12 Gray 351; *Pierce v. Gray*, 7 Gray 67; *Dailey v. May*, 5 Mass. 313. Mich.—*Harris v. Haynes*, 30 Mich. 140.

59. Mich.—*Harris v. Haynes*, 30 Mich. 140. Minn.—*Cable v. Hoolihan*, 98 Minn. 143, 107 N. W. 967, 116 Am. St. Rep. 348. Mo.—*Davis v. Wood*, 7 Mo. 162. N. H.—*Norris v. Hoitt*, 18 N. H. 196. Tex.—*McCord-Collins Co. v. Lazarus* (Tex.), 50 S. W. 1048; *Willis v. Norris*, 66 Tex. 628, 1 S. W. 799; *Campbell v. Honaker's Heirs* (Tex. Civ. App.), 166 S. W. 74. Wis.—*Hettinger v. Wells*, 161 Wis. 640, 155 N.

(6.) *Where Debtor Is Engaged in Several Trades.* — Where a debtor makes his living at several trades, he is allowed in several jurisdictions to claim an exemption in tools of each,<sup>60</sup> but some courts deny this right,<sup>61</sup> and the statute sometimes limits the exemption to the debtor's principal business.<sup>62</sup>

(7.) *Questions of Law and Fact.*<sup>63</sup> — Whether certain chattels are exempt as tools of a debtor's occupation is generally a mixed question of law and fact to be determined upon consideration of the debtor's employment and the nature, character, and use of the chattels claimed.<sup>64</sup>

W. 126. Can.—Wright *v.* Hollingshead, 23 Ont. App. 1.

[a] A debtor (1) conducting a moving picture show who did not show for two or three weeks but who then opened up for two or three nights to some prospective purchaser, and then closed, was held to have abandoned the business so as to subject the appliances to execution. *Anthony v. Hardin* (Tex. Civ. App.), 175 S. W. 857. (2) But the mere fact that the lease of a motion picture theater has expired and that the debtor was moving his property from the building does not show an abandonment of the business so as to forfeit the exemption. *Campbell v. Honaker's Heirs* (Tex. Civ. App.), 166 S. W. 74.

60. U. S.—*In re Robinson*, 206 Fed. 176. Conn.—*Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166. Mass.—*Howard v. Williams*, 2 Pick. 80. Mich.—*Alvord v. Lent*, 23 Mich. 369; *Kenyon v. Baker*, 16 Mich. 373, 97 Am. Dec. 158. S. C.—*Parkerson v. Wightman*, 4 Strobb. 363. Tex.—*Cone v. Lewis*, 64 Tex. 331, 53 Am. Rep. 767; *Green v. Raymond*, 58 Tex. 80, 44 Am. Rep. 601; *Campbell v. Honaker's Heirs* (Tex. Civ. App.), 166 S. W. 74; *Nichols & Co. v. Porter*, 7 Tex. Civ. App. 302, 26 S. W. 859.

[a] "A jack of all trades" as a "trade or calling is quite as legitimate and perhaps no less useful to society, and possibly quite as efficient as a means of earning a livelihood, as a trade or calling more highly specialized. . . . Suppose that . . . a mechanic qualifies himself to render efficient service both as a carpenter and a painter and purchases the necessary tools and appliances for carrying on both lines of work and depends for his livelihood upon his earnings in

both; is there any reason either in the spirit or in the letter of the statute, when fairly construed, why he should not be permitted to claim as exempt up to the value of \$500.00 (the statutory limitation) the tools of both callings? None is apparent." *Dietrich, District Judge, in In re Robinson*, 206 Fed. 176.

[b] A shoemaker who is also engaged in carrying on a small farm is entitled to an exemption of farming utensils to a reasonable amount even though shoemaking was his principal occupation. *Garrett v. Patchin*, 29 Vt. 248, 70 Am. Dec. 414.

61. Colo.—*Watson v. Lederer*, 11 Colo. 577, 19 Pac. 602, 7 Am. St. Rep. 263, 1 L. R. A. 854. Kan.—*Jenkins v. McNall*, 27 Kan. 532, 41 Am. Rep. 422 (limiting the exemption to tools of the principal business); *Guptil v. McFee*, 9 Kan. 30. Wis.—*Bevitt v. Crandall*, 19 Wis. 581.

[a] A printing press belonging to a debtor who edited a paper and was engaged as agent in loaning money is not exempt unless he derives his principal support from the printing business. *Jenkins v. McNall*, 27 Kan. 532, 41 Am. Rep. 422.

62. *Kenyon v. Baker*, 16 Mich. 373, 97 Am. Dec. 158; *Morrill v. Seymour*, 3 Mich. 65.

[a] In determining which is the principal business of a debtor the question should be to which business does he devote the most time not which is the more productive. *Smalley v. Masten*, 8 Mich. 529, 77 Am. Dec. 467.

63. See generally the title "Province of Judge and Jury."

64. N. H.—*Rice v. Wadsworth*, 59 N. H. 100. N. Y.—*Sammis v. Smith*, 1 Thomp. & C. 444. Tex.—But see *Henry v. McLean*, 1 White & W. Civ. Cas., §1079.

Whether a certain tool is necessary to carry on a trade is a question for the jury.<sup>65</sup>

(B.) BOOKS AND INSTRUMENTS OF PROFESSION.<sup>66</sup> — The statutes of many jurisdictions specifically exempt the library and instruments of professional men.<sup>67</sup> The exemption must be kept within the statutory limitation as to amount, if any.<sup>68</sup> In the absence of a specific statute there is a conflict of authorities as to whether the exemption can be claimed as "tools and implements of trade," some allowing such a claim,<sup>69</sup> and others denying it.<sup>70</sup> To entitle a professional man to the exemption of his books and instruments it is not necessary to show

65. In the Matter of Mitchell, 102 Cal. 534, 36 Pac. 840; Woods v. Keyes, 14 Allen (Mass.) 236, 92 Am. Dec. 765.

66. Books generally, see *supra*, II, B, 5, a, (V), (C).

67. See generally the statutes, and Ia.—Equitable Life Assur. Soc. v. Goode, 101 Iowa 160, 70 N. W. 113, 63 Am. St. Rep. 378, 35 L. R. A. 690. La.—Code Pr., art. 644 (exempting tools and instruments of a trade or profession); State v. St. Paul, 111 La. 71, 35 So. 389; Hanna v. Bry, 5 La. Ann. 651, 52 Am. Dec. 606; Lambeth v. Milton, 2 Rob. 81. Neb.—Roberts v. Moudy, 30 Neb. 683, 46 N. W. 1013, 27 Am. St. Rep. 426. N. Y.—Robinson's Case, 3 Abb. Pr. 466; Faxon v. Mason, 76 Hun 408, 27 N. Y. Supp. 1025. Tex.—Fowler v. Gilmore, 30 Tex. 432; Betz v. Maier, 12 Tex. Civ. App. 219, 33 S. W. 710; Tucker v. Napier, 1 White & W. Civ. Cas., §670.

[a] Office furniture of a lawyer is exempt. Abraham v. Davenport, 73 Iowa 111, 34 N. W. 767, 5 Am. St. Rep. 665.

[b] Under a statute which exempts books but provides nothing as to tables, desks and book cases, these incidentals will undoubtedly be treated as exempt also. Betz v. Maier, 12 Tex. Civ. App. 219, 33 S. W. 710.

[c] The library of a minister is exempt as a tool and instrument of a trade or profession. State v. St. Paul, 111 La. 71, 35 So. 389.

[d] A lawyer's membership in a law library. Keiher v. Shipherd, 4 Civ. Proc. (N. Y.) 274.

[e] Surgical instruments under a statute exempting tools and instruments of a trade or profession. Hanna v. Bry, 5 La. Ann. 651, 52 Am. Dec. 606.

[f] The instruments and sign of a dentist are exempt as instruments of

profession. Duperron v. Communy, 6 La. Ann. 789.

[g] A safe used by a physician as part of his office furniture is exempt as a part of his tools and instruments of his trade. Sterman v. Hann, 160 Iowa 356, 141 N. W. 934, 46 L. R. A. (N. S.) 287.

[h] Under a law exempting a horse to a practicing physician, a person practicing medicine without a diploma and a person with a diploma who does not practice are not entitled to the exemption. An instruction that the question whether the party is a practicing physician has reference to the business he is engaged in, rather than to the skill with which he exercised that business is erroneous as implying that it is immaterial whether he has any knowledge of diseases and remedies. Sutton v. Facey, 1 Mich. 243.

68. Brown v. Hoffmeister, 71 Mo. 411; Faxon v. Mason, 76 Hun 408, 27 N. Y. Supp. 1025.

69. Maxon v. Perrott, 17 Mich. 332, 97 Am. Dec. 191, a dentist's instruments are "mechanical tools."

70. *In re Church*, 15 R. I. 245, 2 Atl. 761; Demers v. O'Connor, 10 Quebec Super. 371.

[a] The books and library of a lawyer are not exempt as tools and implements of trade. Lenoir v. Weeks, 20 Ga. 596; *In re Church*, 15 R. I. 245, 2 Atl. 761.

[b] Dental instruments are not tools but instruments of profession. Whitcomb v. Reid, 31 Miss. 567, 66 Am. Dec. 579.

[c] A dentist chair is not exempt as a "common tool of trade" nor as a chair suitable for the use of a family. Burt v. Stocks Coal Co., 119 Ga. 629, 46 S. E. 828, 100 Am. St. Rep. 203.

that he habitually earns his living by his profession.<sup>71</sup> Nor is it necessary that he be the head of a family, in the absence of statute providing otherwise.<sup>72</sup>

(C.) FARMING IMPLEMENTS.—(1.) *In General*.—Some statutes exempt specific tools or implements employed in farming,<sup>73</sup> others exempt generally “farming utensils or implements of husbandry of the judgment debtor.”<sup>74</sup>

(2.) *Statutes Exempting Farming Utensils Generally*.—(a.) *To What Debtor's Statute Applies*.—It is not required that the debtor should devote himself exclusively to farming,<sup>75</sup> but agriculture must form at least a part of his means of livelihood in order to exempt the implement,<sup>76</sup> although some statutes are broad enough to include any debtor whether he is a farmer or not.<sup>77</sup> It is not required that the farmer claiming the exemption have a homestead,<sup>78</sup> or that he should be actively engaged in farming at the time of the levy if he habitually earns his living as a farmer.<sup>79</sup> Under a statute exempting all implements of husbandry necessary for the use of the family,<sup>80</sup> the fact that the debtor and his wife reside in different parts of the state either temporarily or permanently does not destroy the family and deprive it of its exemptions.<sup>81</sup>

(b.) *What Utensils Are Exempt*.—The expressions farming utensils and implements of husbandry are very broad and comprehensive,<sup>82</sup>

71. *Equitable Life Assur. Soc. v. Goode*, 101 Iowa 160, 70 N. W. 113, 63 Am. St. Rep. 378, 35 L. R. A. 690; *Perkins v. Wisner*, 9 Iowa 320.

72. *Roberts v. Moudy*, 30 Neb. 683, 46 N. W. 1013.

73. See the statutes generally, and *State v. Haggard*, 1 Humph. (Tenn.) 390.

[a] *Articles not specifically named* are not exempt under a statute such as that stated in the text. *Martin v. Buswell*, 108 Me. 263, 80 Atl. 828.

74. See the statutes and: *Cal. Spence v. Smith*, 121 Cal. 536, 53 Pac. 653, 933, 66 Am. St. Rep. 62. **Tex.** *Smith v. McBryde* (Tex. Civ. App.), 173 S. W. 234. **Wis.**—*Humphrey v. Taylor*, 45 Wis. 251, 30 Am. Rep. 738; *Bevitt v. Crandall*, 19 Wis. 581.

[a] *A reaping and mowing machine* is a farming utensil and exempt from levy of execution. *Voorhees v. Patterson*, 20 Kan. 555.

75. *McCue v. Tunstead*, 65 Cal. 506, 4 Pac. 510; *Smith v. McBryde* (Tex. Civ. App.), 173 S. W. 234.

76. *Howell v. Boyd*, 2 Cal. App. 486, 84 Pac. 315; *Tucker v. Napier*, 1 White & W. Civ. Cas. (Tex.), §670.

[a] *Hotel Keeper*.—A grain drill is not exempt as a farming implement, to

the widow of a hotel keeper, even though he owns two farms, where he hires the work on the farms done. *Reed v. Cooper's Admr.*, 30 Kan. 574, 1 Pac. 822.

[b] *A merchant having a plow and harrow for sale* cannot claim them as exempt. *Files v. Stevens*, 84 Me. 84, 24 Atl. 584, 30 Am. St. Rep. 333.

77. *Humphrey v. Taylor*, 45 Wis. 251, 30 Am. Rep. 738; *Knapp v. Bartlett*, 23 Wis. 68, 99 Am. Dec. 109.

[a] Although the debtor is not a farmer and is not engaged in any business requiring the use of a mower, he is entitled to claim the mower exempt as a farming utensil. *Humphrey v. Taylor*, 45 Wis. 251, 30 Am. Rep. 738.

78. *Smith v. McBryde* (Tex. Civ. App.), 173 S. W. 234.

79. *Pease v. Price*, 101 Iowa 57, 69 N. W. 1120; *Hickman v. Cruise*, 72 Iowa 528, 34 N. W. 316.

80. *Vern' Sayles' Tex. Civ. St.*, 1914, art. 3785.

81. *Smith v. McBryde* (Tex. Civ. App.), 173 S. W. 234.

82. See cases following.

[a] *Definition*.—“Farming utensils or implements of husbandry” means such utensils or implements as are needed and used by the farmer in con-

and will include improved and complicated implements.<sup>83</sup> In the absence of statute, it is not required that the implement be necessary,<sup>84</sup> but generally it must be shown that the implement is suitable to the occupation of the debtor.<sup>85</sup> Where a farmer is engaged in several kinds of husbandry the implements suitable and necessary to each of them are exempt.<sup>86</sup> The statute exempts those implements of husbandry used by the tenants and employees of a farmer as well as those used by himself directly.<sup>87</sup>

**Utensils Used for Hire.**—The fact that a debtor uses a necessary utensil for hire after doing his own work with it, does not work a forfeiture of the exemption,<sup>88</sup> but utensils used principally in the work of others and only to a limited extent on the debtor's own farm are not exempt.<sup>89</sup>

(c.) *Amount Exempted.*—Some statutes limit the value of the farming utensils exempted,<sup>90</sup> but others do not do so.<sup>91</sup> Where the statute fixes no limit to the amount of land which a judgment debtor may cultivate by farming, the farming utensils which he has necessary for

ducting his own farming operations. *In re Baldwin*, 71 Cal. 74, 12 Pac. 44.

[b] A logging capstan and cable used in clearing the land are farming utensils. *State v. Creech*, 18 Wash. 186, 51 Pac. 363.

83. *In re Klemp's Est.*, 119 Cal. 41, 50 Pac. 1062, 63 Am. St. Rep. 69, 39 L. R. A. 340.

[a] A mower is a farming utensil. *Humphrey v. Taylor*, 45 Wis. 251, 30 Am. Rep. 738.

[b] A threshing machine, a clover huller and a wagon used for carrying the machines from place to place are exempt as farming utensils within the meaning of the Ohio statute. *Muse v. Darrah*, 2 Ohio Dec. (Reprint) 604.

[c] Horserakes, gang plows, headers, threshing machines, and combined harvesters are exempt. *In re Klemp's Est.*, 119 Cal. 41, 50 Pac. 1062, 63 Am. St. Rep. 69, 39 L. R. A. 340.

84. *In re Klemp's Est.*, 119 Cal. 41, 50 Pac. 1062, 63 Am. St. Rep. 69, 39 L. R. A. 340.

85. Kan.—*Voorhees v. Patterson*, 20 Kan. 555. Ohio.—*Muse v. Darrah*, 2 Ohio Dec. 604. Okla.—*Nelson v. Fightmaster*, 4 Okla. 38, 44 Pac. 213. Tex.—*Henry v. McLean*, 1 White & W. Civ. Cas., §1079.

86. *Estate of Slade*, 122 Cal. 434, 55 Pac. 158.

87. *Smith v. McBryde* (Tex. Civ. App.), 173 S. W. 234.

88. *Spence v. Smith*, 121 Cal. 536, 73 Pac. 653, 933, 66 Am. St. Rep. 62;

*In re Klemp's Est.*, 119 Cal. 41, 50 Pac. 1062, 63 Am. St. Rep. 69, 39 L. R. A. 340, a combined harvester.

89. *In re McManus*, 87 Cal. 292, 25 Pac. 413, 22 Am. St. Rep. 250, 10 L. R. A. 567; *In re Estate of Baldwin*, 71 Cal. 74, 12 Pac. 44; *Nelson v. Fightmaster*, 4 Okla. 38, 44 Pac. 213.

[a] A threshing outfit consisting of a threshing engine, water tanks, threshing machine, feeding rack and cook house owned by a farmer and used to a limited extent on his own land but principally used in work for others is not such a necessary farming implement as to be entitled to exemption. *In re Estate of Baldwin*, 71 Cal. 74, 12 Pac. 44. To the same effect, *Meyer v. Meyer*, 23 Iowa 359, 92 Am. Dec. 432.

[b] A well boring apparatus and derrick used for hire and only occasionally used on the debtor's farm is not exempt as "an implement of husbandry." *Nelson v. Fightmaster*, 4 Okla. 38, 44 Pac. 213.

90. *Humphrey v. Taylor*, 45 Wis. 251, 30 Am. Rep. 738.

[a] A statute which enumerates various specific articles and then exempts other farming utensils to a certain amount means that the limitation of value applies only to the other farming utensils. *Donmyer v. Donmyer*, 43 Kan. 444, 23 Pac. 627; *Humphrey v. Taylor*, 45 Wis. 251, 30 Am. Rep. 738.

91. *Spence v. Smith*, 121 Cal. 536, 53 Pac. 653, 933, 66 Am. St. Rep. 62;

the cultivation of his land are exempt irrespective of whether he would need them for cultivating a smaller tract.<sup>92</sup>

(3.) *Farming Utensils as Tools*.—"Tools of occupation" as used in exemption statutes include many implements of husbandry;<sup>93</sup> and a statute exempting working tools of a householder applies to tools of farmers.<sup>94</sup> A statute exempting tools necessary for upholding life will include simple tools to be used by hand but not implements drawn by animals.<sup>95</sup> But the pursuit of agriculture is not embraced within the term "trade."<sup>96</sup> And it has been held a farmer is not embraced in a statute exempting tools and implements of a mechanic, miner or other person.<sup>97</sup>

(X.) *Means of Reproduction*.—Some statutes exempt to a farmer property for reproduction.<sup>98</sup> Such a statute applies to seeds for

Estate of Klemp, 119 Cal. 41, 50 Pac. 1062, 63 Am. St. Rep. 69, 39 L. R. A. 340.

92. *Spence v. Smith*, 121 Cal. 536, 53 Pac. 653, 933, 66 Am. St. Rep. 62.

93. *Me*.—*Martin v. Buswell*, 108 Me. 263, 80 Atl. 828. *Mass*.—See *Pierce v. Gray*, 7 Gray 67; *Dailey v. May*, 5 Mass. 313. *N. H*.—*Wilkinson v. Alley*, 45 N. H. 551. *Can*.—*Davidson v. Reynolds*, 16 U. C. C. P. 140.

[a] *Contra*.—*Pierce v. Gray*, 7 Gray (Mass.) 67, quotes *Dailey v. May*, 5 Mass. 313, to the effect that "Tools of a man's trade or occupation does not include the implements of husbandry, used by the husbandman in tilling his farm; for in no correct sense can oxen or horses be considered as husbandry tools; and it would be preposterous to admit that the legislature would extend this protection to the cart and plough and their gear, and leave the cattle, without which they would be of no use, to be seized upon execution," and adds that the reasoning is certainly sound; but it does not apply to tools used by the hand and foot of the laborer, of simple construction and of moderate expense.

[b] *Implements Beyond Those Necessary for Living*.—This statute will cover a hoe, a rake, a scythe and other articles of husbandry, essential to the operation of a farm to the extent of enabling the husbandman to earn a living for himself and family, but it does not include implements or machinery by which he may cultivate the soil beyond the necessities of himself and family to the extent of a profit. *Martin v. Buswell*, 108 Me. 263, 80 Atl. 828.

[c] *A potato planter*, sprayer or digger mounted on wheels and drawn by animals is not exempt as a "tool necessary for the debtor's trade or occupation." *Martin v. Buswell*, 108 Me. 263, 80 Atl. 828.

94. *In re French*, 231 Fed. 255, construing the New York code.

[a] *The term householder applies to an unmarried man*, living on a farm, having a hired woman to keep house for him, and owning most of the household goods. *In re French*, 231 Fed. 255.

[b] *A large threshing machine* requiring a number of horses for power and a number of men to operate it is not exempt as a working tool. *Ford v. Johnson*, 34 Barb. (N. Y.) 364.

95. *Garrett v. Patchin*, 29 Vt. 248, 70 Am. Dec. 414.

[a] *A grindstone* is exempt. *White v. Capron*, 52 Vt. 634.

[b] *One who carries on farming to any extent* may claim as exempt simple farming tools. One whose principal occupation is shoemaking but who lives rather isolated and does his own mending of sleds, or yokes, etc., may hold as exempt simple farming tools. *Garrett v. Patchin*, 29 Vt. 248, 70 Am. Dec. 414.

96. *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710. See *Kirksey v. Rowe*, 114 Ga. 893, 40 S. E. 990, 88 Am. St. Rep. 65.

97. *Bevitt v. Crandall*, 19 Wis. 581. But see *Watson v. Lederer*, 11 Colo. 577, 19 Pac. 602, 7 Am. St. Rep. 263, 1 L. R. A. 854.

98. See the statutes generally.

crops,<sup>90</sup> as well as animals which are used for breeding purposes.<sup>1</sup>

(XI.) **Work Animals.**—(A.) **HORSES.**—(1.) *In General.*—In nearly all states the statutes exempt one or more horses to the class of persons who earn their livelihood by the use of horses.<sup>2</sup> But a horse or horses cannot be held exempt under a statute exempting tools or implements of a trade or profession.<sup>3</sup> The word "horse" as used in exemption statutes includes a mare,<sup>4</sup> stallion,<sup>5</sup> colt,<sup>6</sup> mule,<sup>7</sup> or ass.<sup>8</sup>

(2.) *Colt.*—A colt is included in the exemption of a horse.<sup>9</sup> and

99. *Hutchinson v. Whitmore*, 90 Mich. 255, 51 N. W. 451, 30 Am. St. Rep. 431.

[a] **Seed wheat being necessary** to the business of a wheat farmer is material which, within the statutory limit of value, is exempt. *Stilson v. Gibbs*, 46 Mich. 215, 9 N. W. 254.

[b] **Owner Renting on Shares.**—Seed wheat may be claimed as exempt by one owning a farm even though he does not operate it himself but rents it on shares; and how much is "necessary" under the statute is a question for the jury. *Matteson v. Munroe*, 80 Minn. 340, 83 N. W. 153.

1. *Byous v. Mount*, 89 Tenn. 361, 17 S. W. 1037, barrows and spayed sows not exempt under statute exempting "stock hogs."

2. See generally the statutes, and the following: *Ala.*—Cook *v.* Baine, 37 Ala. 350. *Ga.*—Kirksey *v.* Rowe, 114 Ga. 893, 40 S. E. 990, 88 Am. St. Rep. 65; Moultrie *v.* Elrod, 23 Ga. 393. *Ohio.*—Burgess *v.* Everett, 9 Ohio St. 425. *Pa.*—Mardis *v.* Clarke, 19 Pa. 386. *Tex.*—Dearborn *v.* Phillips, 21 Tex. 449. *Wash.*—Mikkleson *v.* Parker, 3 Wash. Ter. 527, 19 Pac. 31. *Eng.* *Hutchins v. Chambers*, 1 Burr. 579, 97 Eng. Reprint 458.

[a] **Under the common law the landlord could distrain** "beasts of the plow" when no other sufficient distress was on the premises except growing crops. *Piggott v. Birtles*, 1 Mees. & W. (Eng.) 441.

[b] **Animals of Mechanic or Other Person.**—Where a statute exempts the tools and working animals of a mechanic, miner or other person used in carrying on his business, an assayer is within the statute and may claim as exempt a horse, harness and wagon. *Watson v. Lederer*, 11 Colo. 577, 19 Pac. 602, 7 Am. St. Rep. 263, 1 L. R. A. 854.

[c] **Work Cattle.**—Horses cannot be

claimed as exempt under a statute exempting "work cattle." *Kennedy v. Hills*, 233 Fed. 666, 147 C. C. A. 474.

3. *Ark.*—Wallace *v.* Collins, 5 Ark. 41, 39 Am. Dec. 359. *Conn.*—Ensecoe *v.* Dunn, 44 Conn. 93, 26 Am. Rep. 430. *La.*—Hanna *v.* Bry, 5 La. Ann. 651, 52 Am. Dec. 606. *Ohio.*—Koontz *v.* Bateman, 2 Ohio Dec. (Reprint) 299. *Tex.*—Tucker *v.* Napier, 1 White & W. Civ. Cas., §670. *Can.*—Davidson *v.* Reynolds, 16 U. C. C. P. 140.

[a] **A horse used by a tanner is not** an implement of trade, exempt from execution. *Wallace v. Collins*, 5 Ark. 41, 39 Am. Dec. 359.

[b] **But under a statute exempting things to enable a debtor to carry on his business, a horse and wagon may be claimed.** *Kenyon v. Baker*, 16 Mich. 373, 97 Am. Dec. 158; *Wykoff v. Wyllis*, 8 Mich. 48.

[c] **And a statute exempting "chattels" used in a debtor's occupation will include animals.** *Davidson v. Reynolds*, 16 U. C. C. P. 140.

4. *White v. Wilson*, 106 Mo. App. 406, 80 S. W. 692; *Munson v. Gashorn*, 1 Ohio Dec. (Reprint) 404.

5. **As to exemption of stallions**, see *infra*, II, B, 5, a, (XI), (A), (3).

6. **Exemption of a colt**, see *infra*, II, B, 5, a, (XI), (A), (2).

7. *La.*—Tolbert *v.* Freeman, 130 La. 47, 57 So. 580; *McElveen v. Goings*, 116 La. 977, 41 So. 229, 114 Am. St. Rep. 574. *Neb.*—State *v.* Cunningham, 6 Neb. 90. *Tex.*—Allison *v.* Brookshire, 38 Tex. 199; *Hawks v. Longbotham* (Tex. Civ. App.), 188 S. W. 734; *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710.

8. *Richardson v. Duncan*, 2 Heisk. (Tenn.) 220; *Robinson v. Robertson*, 2 Wills. Civ. Cas. (Tex.), §253.

9. *Kennedy v. Bradbury*, 55 Me. 107, 92 Am. Dec. 572; *Bowzey v. Newbegin*, 48 Me. 410; *Hall v. Miller*, 21 Tex. Civ. App. 336, 51 S. W. 36.

also, it has been held, in an exemption of a work horse or beast.<sup>10</sup> But under a statute exempting a horse by the use of which a debtor habitually earns his living, he cannot claim a colt which he does not so use.<sup>11</sup>

(3.) *Stallion*.—Where the exemption of a horse is not limited by the use to which he is put, a stallion is included.<sup>12</sup> But where the exemption is qualified by the purpose for which the horse is used, whether a stallion falls within the exemption depends upon how he is used.<sup>13</sup>

(4.) *Horse by Which Debtor Habitually Earns His Living*.—Many statutes exempt a certain number of horses by the use of which certain named debtors and other laborers habitually earn their livings.<sup>14</sup> It is im-

[a] **A colt ten months old** is a horse within the meaning of the statute and upon the levy of two mares which were mortgaged the debtor could claim his exemption in the colt. *Hall v. Miller*, 21 Tex. Civ. App. 336, 51 S. W. 36.

[b] **But in a case where the debtor had two other horses** which he used and it was not shown that the colt in question was intended to be used in a team, it was held that the colt was not exempt. *Hogan v. Neumeister*, 117 Mich. 498, 76 N. W. 65.

10. *Winfrey v. Zimmerman*, 8 Bush (Ky.) 587; *McClanahan v. McGill*, 1 Ky. Op. 178. *Contra*, *Durke v. Crane*, 112 La. 156, 36 So. 306.

[a] **A mare and a colt are exempt** from execution under a statute exempting two work horses. By the term "work beast" or "work horse" the legislature meant an animal of the horse kind which could be rendered fit for work or service as well as one of mature age and in actual use. *Winfrey v. Zimmerman*, 8 Bush (Ky.) 587.

[b] **A nineteen months old colt** is exempt under a statute exempting "two work beasts." *McClanahan v. McGill*, 1 Ky. Op. 178.

[c] **Wild Colt Not Exempt**.—But under a statute exempting work horses, a two year old colt, unbroken, and running wild on the prairie was held not exempt. *Durke v. Crane*, 112 La. 156, 36 So. 306.

[d] **Where (1) the statute exempts "two horses kept and used for team work"** a colt too young for team work is not exempt. *Sullivan v. Davis*, 50 Vt. 648. (2) Nor is a colt which is not shown to have been kept and used for team work or which the plaintiff is not shown to intend to use it for

such work. *Connell v. Fisk*, 54 Vt. 381. (3) But a colt kept and used for team work is exempt. *Rowell v. Powell*, 53 Vt. 302. (4) A colt obtained by exchanging therefor a horse that was exempt is not exempt. *Connell v. Fisk*, 54 Vt. 381.

11. *Murphy v. Harris*, 77 Cal. 194, 19 Pac. 377.

12. *Young v. Bell*, 1 Kan. App. 265, 40 Pac. 675.

13. See the statutes.

[a] **Where (1) horses suitable for farming purposes** are exempt a stallion used for work as well as breeding purposes is exempt. *Ala.*—*Allman v. Gann*, 29 Ala. 240. *Cal.*—*McCue v. Tunstead*, 65 Cal. 506, 4 Pac. 510. *Tenn.*—*Tipton v. Pickens*, 1 Swan 25. But (2) one used for breeding purposes only is not. *Robert v. Adams*, 38 Cal. 383, 99 Am. Dec. 413; *Kreig v. Fellows*, 21 Nev. 307, 30 Pac. 994.

[b] **Used To Earn Living**.—See following section.

14. *U. S.*—*In re Hindman*, 104 Fed. 331, 43 C. C. A. 558. *Cal.*—*Code Civ. Proc.*, §690, subd. 6; *Forsyth v. Bower*, 54 Cal. 639 (hackman). *Ia.*—*Code*, 1897, §4008; *Corp v. Griswold*, 27 Iowa 379.

[a] **"Necessary."**—Under Lord's Oregon Laws, §227, as amended by Laws of 1915, p. 27, making exempt a team, vehicle, harness, etc., necessary to enable any person to carry on the trade, occupation or profession by which he habitually earns his living, the term "necessary" signifies "reasonably necessary," or "convenient," or "suitable," and does not mean "indispensable" or "absolutely necessary." *Childers v. Brown* (Ore.), 158 Pac. 166.

peratively required that the debtor habitually earn his living by the use of the horse,<sup>15</sup> but it is not required that the horses be the debtor's only means of earning a living.<sup>16</sup> It is not necessary that the horse should be in actual use at the time of seizure.<sup>17</sup> And where a debtor intends to earn a living by using horses, the fact that he has not had an opportunity of using them does not deprive him of his right to exemption.<sup>18</sup> It is not necessary that the horses exempted be used or driven together.<sup>19</sup>

(5.) *Team, Span or Pair.*<sup>20</sup> — Under a statute exempting a "team," a debtor may claim his exemption in one horse,<sup>21</sup> even though the horse

[b] That the debtor has been engaged but a day or two and had not completed arrangements for the future, does not deprive him of the rights of a laborer under the statute. *Baker v. Hayzlett*, 53 Iowa 18, 3 N. W. 796.

[c] A stallion owned by a debtor whose only occupation is breeding mares is exempt under a statute exempting a horse by the use of which a laborer habitually earns his living. *Krebs v. Nicholson*, 118 Iowa 134, 91 N. W. 923, 96 Am. St. Rep. 370. See *Smith v. Dayton*, 94 Iowa 102, 62 N. W. 650, holding the stallion involved was not the team by which the debtor as farmer habitually earned his living.

15. *In re Parker*, 5 Sawy. 58, 18 Fed. Cas. No. 10,724; *Murphy v. Harris*, 77 Cal. 194, 19 Pac. 377; *Dove v. Nunan*, 62 Cal. 399; *Brusie v. Griffith*, 34 Cal. 302; *Calhoun v. Knight*, 10 Cal. 393. See also *Stanton v. French*, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174.

[a] A team used by a warehouseman in hauling wheat to and from his warehouse is not exempt as the business of such a person consists in receiving and storing wheat and not in teaming. *In re Parker*, 5 Sawy. 58, 18 Fed. Cas. No. 10,724.

[b] Use a Question for the Jury. The question whether the debtor "habitually" earns his living by peddling is a question for the jury. *Stanton v. French*, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174.

16. U. S.—*In re Hindman*, 104 Fed. 331, 43 C. C. A. 558. Cal.—*Stanton v. French*, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174. Ia.—*Consolidated Tank Line Co. v. Hunt*, 83 Iowa 6, 48 N. W. 1057, 32 Am. St. Rep. 285, 12 L. R. A. 476.

[a] A retailer of oils who uses a team of horses and a tank wagon in

making his sales may claim them as exempt, though the team is sometimes driven by his minor son, and notwithstanding the fact that some part of his sales are made from his storehouse. *Consolidated Tank Line Co. v. Hunt*, 83 Iowa 6, 48 N. W. 1057, 32 Am. St. Rep. 285, 12 L. R. A. 476.

[b] Where Used for Odd Jobs Also. Where a man used his team in peddling the bread from his bakery and at divers times did odd jobs or let his team out for hire, the court held that the team was exempt as "belonging to a peddler." *Stanton v. French*, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174.

17. *Forsyth v. Bower*, 54 Cal. 639

[a] Horses of a hackman turned out to pasture while the hack is in a paint shop are exempt. *Forsyth v. Bower*, 54 Cal. 639.

18. *Bevan v. Hayden*, 13 Iowa 122.

19. *Corp v. Griswold*, 27 Iowa 379.

20. Harness as included in "team," see *infra*, II, B, 5, a, (XII).

Wagons as included in "team," see *infra*, II, B, 5, a, (XIII), (B).

21. *Knapp v. O'Neill*, 46 Hun 317, 12 N. Y. St. 349; *Brown v. Davis*, 9 Hun (N. Y.) 43; *Cogsdill v. Brown*, 5 Hun (N. Y.) 341; *Smith v. Slade*, 57 Barb. (N. Y.) 637; *Dains v. Prosser*, 32 Barb. (N. Y.) 290; *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 568; *Eastman v. Caswell*, 8 How. Pr. (N. Y.) 75; *Wheeler v. Cropsey*, 5 How. Pr. (N. Y.) 288; *Harthouse v. Rikers*, 1 Duer (N. Y.) 606; *Quackenbush v. Danks*, 1 Denio (N. Y.) 128; *Woodward v. Murray*, 18 Johns. (N. Y.) 400.

[a] A team may consist of one or any number of animals if their aggregate value does not exceed the statutory limitation. *Wilcox v. Hawley*, 31 N. Y. 648.

is not worked in harness or to a vehicle.<sup>22</sup> It would seem, however, that the term "span of horses" contemplates animals which may be worked together,<sup>23</sup> but where the wording of the statute is a "pair of horses" the debtor may hold any two horses which he may select.<sup>24</sup>

(6.) *As Dependent on Debtor's Occupation.*—Some statutes exempt a horse to a debtor regardless of his occupation;<sup>25</sup> others only to debtors pursuing particular occupations,<sup>26</sup> as for example, teamsters, peddlers and other laborers habitually earning their livings<sup>27</sup> by the use of

[b] Debtor owning one horse and hiring another to work with it may claim his horse as exempt as being his interest in a team. *Lockwood v. Younglove*, 27 Barb. (N. Y.) 505.

22. *Noland v. Wickham*, 9 Ala. 169, 44 Am. Dec. 435.

[a] The horse might be trained to carry burdens or to supply motive power for machinery without the use of carriage, harness or other paraphernalia. *Finnin v. Malloy*, 1 Jones & S. (N. Y.) 382.

23. *Ames v. Martin*, 6 Wis. 361, 70 Am. Dec. 468, mare, and her four months old colt.

[a] A span of horses owned by two persons in partnership as partnership property are exempt from execution against both partners in like manner as though owned by one of them separately. *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219.

24. *Conway v. Roberts*, 38 Neb. 456, 56 N. W. 980.

25. See generally the statutes, and *Wilhite v. Williams*, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 281; *Young v. Bell*, 1 Kan. App. 265, 40 Pac. 675.

26. See the statutes.

[a] A person is "actually engaged in agriculture" when he derives the support of himself and family in whole or in part, from the tillage and cultivation of fields. He must cultivate something more than a garden, though it may be much less than a farm. If this condition be fulfilled, the uniting of any other business not inconsistent with the pursuit of agriculture, does not take away the protection of the statute. The statutory protection covers the agriculturist's property in the winter when he is obliged to suspend his labors in the field, as effectually as in the summer while actually engaged in rearing and harvesting crops. As a tenant his rights remain while his lease lasts and a declaration of

intention to move elsewhere does not take away from him the character of agriculturist. *Springer v. Lewis*, 22 Pa. 191.

27. See the statutes.

[a] A teamster within the statute is one who is engaged with his own team or teams in the business of teaming—that is to say, in the business of hauling freight for other parties for a consideration, by which he habitually supports himself and family. While he need not, perhaps, drive his team in person, yet he must be personally engaged in the business of teaming habitually, and for the purpose of making a living by that business. A carpenter or other mechanic who carries on the business of teaming by employing others is not within the statute. *Brusie v. Griffith*, 34 Cal. 302; *Edgecomb v. His Creditors*, 19 Nev. 149, 7 Pac. 533.

[b] When a clerk in a store owned a horse which was used by his minor son in doing hauling for hire for the benefit of the debtor's family, it was held that the horse was not exempt as it was not the means habitually used by the defendant in earning his living. *Brusie v. Griffith*, 34 Cal. 302.

[c] By "other laborer" is meant one who labors by and with the aid of his team, and not by the aid of a pick and shovel. *In re Hindman*, 104 Fed. 331, 43 C. C. A. 558; *Brusie v. Griffith*, 34 Cal. 302.

[d] One engaged in the livery business is a laborer within the statute. *Lames v. Armstrong*, 162 Iowa 327, 144 N. W. 1; *Root v. Gay*, 64 Iowa 399, 20 N. W. 489. *Contra*, *Edgecomb v. His Creditors*, 19 Nev. 149, 7 Pac. 533.

[e] An insurance agent using a team in pursuit of his business is a laborer. *Lames v. Armstrong*, 162 Iowa 327, 144 N. W. 1, 49 L. R. A. (N. S.) 691.

[f] The owner of a stallion whose

teams. In some states it is required that the debtor be the head of a family.<sup>28</sup>

(7.) *As Dependent on Use.*—Some statutes exempt a horse regardless of the use to which the horse may be put;<sup>29</sup> others restrict the exemption to horses used for certain purposes.<sup>30</sup> The exemption is sometimes limited to horses required for farming, teaming, and other actual use,<sup>31</sup> or horses kept and used for team work.<sup>32</sup> Some statutes expressly exempt "work horses,"<sup>33</sup> or are construed to be so limited.<sup>34</sup> Under others, the exemption covers only a plow horse,<sup>35</sup> or a farm horse.<sup>36</sup>

only occupation is breeding mares is a laborer. *Krebs v. Nicholson*, 118 Iowa 134, 91 N. W. 923, 96 Am. St. Rep. 370.

28. See generally the statutes, and *Wilhite v. Williams*, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 288; *Young v. Bell*, 1 Kan. App. 265, 40 Pac. 675.

29. *Wilhite v. Williams*, 41 Kan. 288, 21 Pac. 256; *Young v. Bell*, 1 Kan. App. 265, 40 Pac. 675.

30. *White v. Wilson*, 106 Mo. App. 406, 80 S. W. 692.

[a] **Need Not Be Indispensable.** Where the statute exempted property, "to enable any person to carry on the profession, trade, occupation or business in which he wholly or principally engages," it was held that a horse was exempt if suitable for the business and actually used therein even though he would not be absolutely indispensable. *Kenyon v. Baker*, 16 Mich. 373, 97 Am. Dec. 158.

Horses by which debtor habitually earns his living, see *supra*, II, B, 5, a, (XI), (A), (4).

31. *George v. Fellows*, 59 N. H. 206; *Rice v. Wadsworth*, 59 N. H. 100; *Somers v. Emerson*, 58 N. H. 48.

[a] **Must Be Actual Use of Debtor.** Under a statute exempting a horse when required for "other actual use," it is not enough that the horse may have been actually required for use of the debtor's family. It is the actual use by the debtor himself which brings it within the statute. *Somers v. Emerson*, 58 N. H. 48.

[b] **But the use of a horse in conveying the debtor's children to school and church is evidence of "actual use"** under a statute exempting a horse for farm or teaming purposes or "other actual use." *George v. Fellows*, 59 N. H. 206.

[c] **A traveling man selling goods by sample and using his horse while so engaged in driving from town to town, may claim exemption on his horse.** *Towne v. Marshall*, 64 N. H. 460, 13 Atl. 648.

32. *Webster v. Orne*, 45 Vt. 40.

[a] **Exclusive use for team work is not required.** *Webster v. Orne*, 45 Vt. 40.

33. *Noland v. Wickham*, 9 Ala. 169, 44 Am. Dec. 435.

[a] **Saddle Horse May Be Exempt as "Work Horse."**—A horse need not be broken to "gear" to be exempt as a work horse, but whether broken to trace or used under the saddle he is a "work horse." *Noland v. Wickham*, 9 Ala. 169, 44 Am. Dec. 435.

[b] **The horse of a merchant is exempt as a "working animal"** unless it appears that the horse is kept for pleasure only. *In re Peabody*, 19 Fed. Cas. No. 10,866.

34. *Robert v. Adams*, 38 Cal. 383, 99 Am. Dec. 413; *Burgess v. Everett*, 9 Ohio St. 425.

[a] **The California statute exempts "the farming utensils and implements of husbandry of the judgment debtor; also, two oxen, or two horses or two mules and their harness," etc.** This statute is held to apply only to oxen, horses, or mules suitable for and intended for the ordinary work conducted on a farm. *Murphy v. Harris*, 77 Cal. 194, 19 Pac. 377; *Robert v. Adams*, 38 Cal. 383, 99 Am. Dec. 413.

35. *Matthews v. Redwine*, 25 Miss. 99.

36. *Kirksey v. Rowe*, 114 Ga. 893, 40 S. E. 990, 88 Am. St. Rep. 65.

[a] **A horse used in running a dray is exempt under a statute exempting a "farm horse" as the word "farm" has reference to the quality and re-**

A work horse or team, to be exempt, however, must be actually used in the business of the debtor;<sup>37</sup> horses kept solely for pleasure,<sup>38</sup> and horses purchased and held for speculation,<sup>39</sup> do not come within the statute.

**Use at Time of Levy.**—It is not necessary that the horse should be in actual use at the time of levy; the exemption will continue although the use is temporarily suspended.<sup>40</sup>

If a debtor abandons the business requiring the use of the horse, his exemption ceases.<sup>41</sup>

striets the value of the horse and was not inserted with a view to prescribing the kind of work in which the animal was to be employed. *Kirksey v. Rowe*, 114 Ga. 893, 40 S. E. 990, 88 Am. St. Rep. 65.

37. **U. S.**—*In re Parker*, 5 Sawy. 58, 18 Fed. Cas. No. 10,724. **Ill.** Washburn *v.* Goodheart, 88 Ill. 229. **La.**—*Dejean & Bro. v. Lee*, 124 La. 239, 50 So. 25. **Mich.**—*Boyle v. Walsh*, 105 Mich. 237, 63 N. W. 435. **N. H.** Towne *v.* Marshall, 64 N. H. 460, 13 Atl. 648. **Vt.**—*Hickok v. Thayer*, 49 Vt. 372.

38. **U. S.**—*In re Libby*, 103 Fed. 776. **Ill.**—*Washburn v. Goodheart*, 88 Ill. 229. **Miss.**—*Savings Bank v. Young*, 87 Miss. 473, 40 So. 9, 112 Am. St. Rep. 454, 3 L. R. A. (N. S.) 693. **Ohio.**—*Burgess v. Everett*, 9 Ohio St. 425.

[a] **A race horse** (1) kept and used for racing is not exempt, although he was frequently used to carry the debtor's children to school. *In re Libby*, 103 Fed. 776. (2) But where a horse had been started in a race and had been placed in the hands of a trainer and driver of fast horses for the ostensible purpose of having him trained for racing and where prior to the levy the owner had gone to the trainer to bring him back for use on the farm and was prevented from so doing by the sickness of the horse, it was held that he was not a race horse and was exempt. *Anderson v. Ege*, 44 Minn. 216, 46 N. W. 362.

39. *Boyle v. Walsh*, 105 Mich. 237, 63 N. W. 435.

[a] **The mere fact that the debtor offers a horse for sale will not deprive him of the exemption, but if he buys it and holds it for speculation rather than the use for which it was exempted, and it is not used for such purpose it is not exempt.** *O'Donnell v. Segar*, 25 Mich. 367.

40. **Mich.**—*Tunningly v. Butcher*, 106 Mich. 35, 63 N. W. 994. **Minn.**—*Berg v. Baldwin*, 31 Minn. 541, 18 N. W. 821. **Neb.**—*Conway v. Roberts*, 38 Neb. 456, 56 N. W. 980. **N. H.**—*Cutting v. Tappan*, 59 N. H. 562. **N. Y.**—*Cogsdill v. Brown*, 5 Hun 341. **Vt.**—*Rowell v. Powell*, 53 Vt. 302.

[a] **Must Show Horse Is Suitable.** Where the statute exempts a plow horse it is sufficient to show that the horse claimed is suitable for such work and that the debtor is raising a crop, without showing actual use of the horse in the work. *Matthews v. Redwine*, 25 Miss. 99.

[b] **Where the debtor had purchased a pair of horses with the bona fide intention of engaging in the business of a teamster the horses were held to be exempt although he had not actually entered upon such business because of physical disability.** *Cleveland v. Andrews*, 5 Idaho 65, 46 Pac. 1025, 95 Am. St. Rep. 165.

[c] **Where statute exempts a horse required for actual use, a horse is exempt when so required either at the time of seizure or within a reasonable time thereafter.** *Jaquith v. Scott*, 63 N. H. 5, 56 Am. Rep. 476.

[d] **"Kept and Used for Team Work."**—Under a statute exempting "two horses kept and used for team work" an actual user at the time its exemption is claimed is not required. "Kept and used" signifies that the animal must be kept for team work and must be in actual use or it must be kept with the honest intention and purpose of the owner, within a reasonable time thereafter to use him for team work, as occasion may require, to enable him with the aid of the animal to procure a livelihood. *Steele v. Lyford*, 59 Vt. 230, 8 Atl. 736; *Rowell v. Powell*, 53 Vt. 302.

41. *Jaquith v. Scott*, 63 N. H. 5, 56 Am. Rep. 476.

**Question of Fact.**—It is a question for the jury whether the horse is kept or used for such purpose.<sup>42</sup>

(8.) *As Dependent on Value.*—Where the statute exempts a horse generally without any limitation as to value, the defendant may select a horse without regard to its value.<sup>43</sup> But where the statute limits the value of an exempt horse, the debtor cannot claim as exempt a horse of greater value than the statutory limit.<sup>44</sup> A horse worth more than the statutory amount is not exempt, although it may be the only horse the debtor owns.<sup>45</sup> And the debtor cannot protect any portion or interest in such horse.<sup>46</sup> Under a statute exempting one or two horses not exceeding in value a certain sum, a debtor may hold two if the aggregate value does not exceed the statutory limit.<sup>47</sup>

(B.) **Oxen.**—Where the statute exempts one yoke of oxen it is not necessary that the oxen should be broken but a yoke of unbroken steers are exempt as "oxen,"<sup>48</sup> and where the debtor is the owner of a single ox it will be exempt.<sup>49</sup> Where the debtor has an interest in more than one yoke of oxen, he has the right to select which yoke he

42. *Allman v. Gann*, 29 Ala. 240; *Towne v. Marshall*, 64 N. H. 460, 13 Atl. 648; *Jaquith v. Scott*, 63 N. H. 5, 56 Am. Rep. 476; *Cutting v. Tappan*, 59 N. H. 562; *Somers v. Emerson*, 58 N. H. 48.

[a] Whether a horse is required for the owner's actual use within the meaning of the statute is a question of fact. *Cutting v. Tappan*, 59 N. H. 562.

[b] Whether a suspension of business is permanent or temporary, and whether one is about to enter upon any particular business must necessarily, in many cases, be in a large degree a question of intention. *Jaquith v. Scott*, 63 N. H. 5, 56 Am. Rep. 476.

43. *Munson v. Gashorn*, 1 Ohio Dec. (Reprint) 404.

44. *Good v. Fogg*, 61 Ill. 449, 14 Am. Rep. 71; *State v. Jungling*, 116 Mo. 162, 22 S. W. 688.

[a] **Claiming Horse Under Two Statutes.**—Where one statute exempts a horse not exceeding \$100 in value and another exempts personal property and then declares that \$60 of other property shall be exempt, a debtor who has a horse worth more than \$100 but less than \$160 and has no other property may hold the horse under both statutes. *Good v. Fogg*, 61 Ill. 449, 14 Am. Rep. 71.

45. *Everett v. Herrin*, 46 Me. 357, 74 Am. Dec. 455; *Hughes v. Farrar*, 45

Me. 72; *McMartin v. Hurlburt*, 2 Ont. App. (Can.) 146.

46. *Everett v. Herrin*, 46 Me. 357, 74 Am. Dec. 455.

[a] **Offer To Pay Excess.**—Property which is indivisible and of greater value than the statutory exemption cannot be claimed by a judgment debtor or as being exempt even though the judgment debtor offers to pay the officer the excess of value in money. *Waldo v. Gray*, 14 Ill. 184.

47. *Everett v. Herrin*, 46 Me. 357, 74 Am. Dec. 455.

48. **Minn.**—*Berg v. Baldwin*, 31 Minn. 541, 18 N. W. 821. **N. Y.**—*Hart-house v. Rikers*, 1 Duer 606. **Okla.** *Nelson v. Fightmaster*, 4 Okla. 38, 44 Pac. 213. **Vt.**—*Mundell v. Hammond*, 40 Vt. 641.

[a] **Two calves less than a year old are exempt** under a statute exempting one yoke of oxen or steers. *Mundell v. Hammond*, 40 Vt. 641.

[b] **A two years old bull and a steer of the same age are exempt** which are being kept and intended by the debtor to be used as work oxen. *Nelson v. Fightmaster*, 4 Okla. 38, 44 Pac. 213.

49. **Kan.**—*Mallory v. Berry*, 16 Kan. 293. **Me.**—*Bowzey v. Newbegin*, 48 Me. 410. **Tenn.**—*Wolfenbarger v. Standifer*, 3 Sneed 659.

[a] **A bull used for work is exempt** under the statute exempting "one pair of working cattle" where the

will hold exempt.<sup>50</sup> But a debtor owning a yoke of oxen and a yoke of steers cannot claim both under a statute exempting a yoke of oxen or steers.<sup>51</sup>

(XII.) **Harness.**—Many statutes specifically exempt “the harness and tackle for teams.”<sup>52</sup> In the absence of a specific exemption, a harness is sometimes held exempt as a tool of occupation,<sup>53</sup> or implement of husbandry,<sup>54</sup> but it is not, it has been held, a common tool of trade.<sup>55</sup> An exemption of a “team” will include a harness;<sup>56</sup> and it has been held that the exemption of a horse includes not only the horse itself but such paraphernalia as is absolutely essential to its beneficial enjoyment.<sup>57</sup>

(XIII.) **Vehicles.**—(A.) **IN GENERAL.**—Many statutes specifically exempt to certain debtors a vehicle or wagon.<sup>58</sup> In the absence of a specific exemption, the exemption of a horse does not exempt a wagon.<sup>59</sup> But a “team” is sometimes construed to include in addition to the horse itself,<sup>60</sup> the debtor’s harness,<sup>61</sup> and buggy or wagon.<sup>62</sup>

(B.) **VEHICLES AS TOOLS.**—In the absence of statutes specifically exempting vehicles, they have been held exempt as tools or implements of a trade or profession.<sup>63</sup> Although not “tools” in the strict sense

debtor has no other cattle. *Bowzey v. Newbegin*, 48 Me. 410.

50. *Wilkinson v. Wait*, 44 Vt. 508.

51. *White v. Capron*, 52 Vt. 634.

52. See generally the statutes, and *Krebs v. Nicholson*, 118 Iowa 134, 91 N. W. 923, 96 Am. St. Rep. 370; *Donmyer v. Donmyer*, 43 Kan. 444, 23 Pac. 627.

53. *Rice v. Wadsworth*, 59 N. H. 100, harness of a teamster.

[a] A harness (1) is a tool of an insurance agent (*Wilhite v. Williams*, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 281. *Contra*, *Cotes v. McClure*, 27 Tex. Civ. App. 459, 66 S. W. 224), (2) and of an assayer. *Watson v. Lederer*, 11 Colo. 577, 19 Pac. 602, 7 Am. St. Rep. 263, 1 L. R. A. 854.

[b] “Things to enable a debtor to carry on his occupation includes a harness. *Wykoff v. Wyllis*, 8 Mich. 48.

54. *Smith v. McBryde* (Tex. Civ. App.), 173 S. W. 234.

55. *Kirksey v. Rowe*, 114 Ga. 893, 40 S. E. 990, 88 Am. St. Rep. 65.

56. *Van Buren v. Loper*, 29 Barb. (N. Y.) 388; *Harthouse v. Rikers*, 1 Duer (N. Y.) 606; *Morse v. Keyes*, 6 How. Pr. (N. Y.) 18; *Cogsdill v. Brown*, 5 Hun (N. Y.) 341.

57. *Anderson v. McKay*, 30 Tex. 186; *Dearborn v. Phillips*, 21 Tex. 449, 451; *Cobbs v. Coleman*, 14 Tex. 594; *Betz v. Maier*, 12 Tex. Civ. App. 219,

33 S. W. 710. *Contra*, *Somers v. Emerson*, 58 N. H. 48.

58. See generally the statutes, and the following: **Ia.**—*Baker v. Hayzlett*, 53 Iowa 18, 3 N. W. 796. **Neb.**—*State v. Cunningham*, 6 Neb. 90. **Tex.**—*Nichols v. Claiborne*, 39 Tex. 363.

[a] The Texas statute exempts a wagon “to every family.” *Cone v. Lewis*, 64 Tex. 331, 53 Am. Rep. 767; *Nichols v. Claiborne*, 39 Tex. 363.

59. *Somers v. Emerson*, 58 N. H. 48; *Carty v. Drew*, 46 Vt. 346.

60. See *supra*, II, B, 5, a, (XI), (A), (5).

61. See *supra*, II, B, 5, a, (XII).

62. *Dains v. Prosser*, 32 Barb. (N. Y.) 290 (*overruling* *Morse v. Keyes*, 6 How. Pr. [N. Y.] 18); *Van Buren v. Loper*, 29 Barb. (N. Y.) 388; *Brown v. Davis*, 9 Hun (N. Y.) 43; *Cogsdill v. Brown*, 5 Hun (N. Y.) 341; *Wolf v. Farley*, 16 N. Y. Supp. 168; *Harthouse v. Rikers*, 1 Duer (N. Y.) 606; *Eastman v. Caswell*, 8 How. Pr. (N. Y.) 75.

63. *Johnson v. Lang*, 71 N. H. 251, 51 Atl. 908, 93 Am. St. Rep. 509; *Rice v. Wadsworth*, 59 N. H. 100, wagon and sled of teamster.

[a] **As Things To Carry on Business.**—A vehicle may be exempt as property to enable a person to carry on his business. *Kenyon v. Baker*, 16 Mich. 373, 97 Am. Dec. 158; *Wykoff v. Wyllis*, 8 Mich. 48.

of the term, they have been exempted as tools because reasonably necessary for the plaintiff to prosecute his business.<sup>64</sup> Whether a vehicle is a tool in a particular case depends upon the circumstances surrounding its use,<sup>65</sup> and if there is any doubt whether it is a tool, it has been held that the question should be submitted to a jury whether its use as a tool by the debtor in his business is reasonably necessary.<sup>66</sup> A vehicle used for recreation, pleasure or convenience,<sup>67</sup> or otherwise than in a debtor's profession or occupation,<sup>68</sup> is not exempt as a tool of his occupation.

(C.) TERMS DEFINED AND APPLIED.—The word "wagon" in the exemption statutes has usually been interpreted to mean a vehicle for the transportation of goods,<sup>69</sup> but in some states the courts have con-

[b] **Illustrations.**—(1) A cart and harness are implements of husbandry (*Smith v. McBryde* [Tex. Civ. App.], 173 S. W. 234), (2) and a sled used by a farmer in drawing wood (*Parshley v. Green*, 58 N. H. 271), (3) a team, wagon and sled of a teamster (*Rice v. Wadsworth*, 59 N. H. 100), (4) an omnibus owned and used by a hotel keeper (*White v. Gemeny*, 47 Kan. 741, 28 Pac. 1011, 27 Am. St. Rep. 320), have been held exempt as tools or implements of a trade or occupation. (5) But a buggy of an insurance agent is not a tool or apparatus of his trade or profession. *Cates v. McClure*, 27 Tex. Civ. App. 459, 66 S. W. 224. *Contra*, *Wilhite v. Williams*, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 281.

[c] **A wagon fitted with patent couplings** and used in the business of selling such couplings is not a necessary "tool or implement" within the meaning of such a statute. *Gibson v. Gibbs*, 9 Gray (Mass.) 62.

64. *Richards v. Hubbard*, 59 N. H. 158, 47 Am. Rep. 188; *Parshley v. Green*, 58 N. H. 271.

65. *Richards v. Hubbard*, 59 N. H. 158, 47 Am. Rep. 188.

[a] **Physician's Wagon.**—If the practice of the physician is confined to his office, or if he attends no cases outside a hospital, or if he is a physician on shipboard, or if he visits his patients on foot, horseback or on cars a wagon and harness are not exempt. But it is otherwise if he cannot practice his profession with reasonable success without the wagon and harness. *Richards v. Hubbard*, 59 N. H. 158, 47 Am. Rep. 188.

66. *Hall v. Nelson*, 59 N. H. 573;

*Richards v. Hubbard*, 59 N. H. 158, 47 Am. Rep. 188.

67. *Richards v. Hubbard*, 59 N. H. 158, 47 Am. Rep. 188; *Parshley v. Green*, 58 N. H. 271.

68. *Richards v. Hubbard*, 59 N. H. 158, 47 Am. Rep. 188.

69. *Quigley v. Gorham*, 5 Cal. 418, 63 Am. Dec. 139.

[a] **A buggy designed for carrying persons only** is not a "wagon" within the meaning of the statute and is not exempt even though used by an insurance agent in the conduct of his business. *Gordon v. Shields*, 7 Kan. 320; *Dulgar v. Hartmeyer*, 6 Ohio Dec. (Reprint) 763.

[b] **A peddler's wagon** is not exempt under a statute exempting one cart or truck wagon. *Smith v. Chase*, 71 Me. 164.

[c] **A hearse is a "wagon"** within the meaning of the statute of Wisconsin. *Spikes v. Burgess*, 65 Wis. 428, 27 N. W. 184.

[d] **A hackney coach** is not a wagon. *Quigley v. Gorham*, 5 Cal. 418, 63 Am. Dec. 139.

[e] **A road cart and harness** owned and used by a debtor in driving a stallion from one stand to another is exempt as a "wagon or vehicle" by the use of which the debtor habitually earns his living. *Krebs v. Nicholson*, 118 Iowa 134, 91 N. W. 923, 96 Am. St. Rep. 370.

[f] **"One-Horse Wagon."**—A half interest in a two horse wagon cannot be exempted under a statute exempting a "one-horse wagon." *Kirksey v. Rowe*, 114 Ga. 893, 40 S. E. 990, 88 Am. St. Rep. 65.

strued it to mean any kind of a four wheeled vehicle regardless of what its use might be.<sup>70</sup>

A "cart" will include a four wheeled vehicle suited to husbandry.<sup>71</sup>

(D.) AUTOMOBILES. — Under a statute making a "carriage or buggy" exempt, it has been held that an "automobile" is exempt.<sup>72</sup> So, too, an automobile has been held exempt under a statute exempting a wagon or other vehicle by which the debtor habitually earns his living.<sup>73</sup> It has been held, however, that an automobile is not a "tool or implement of trade."<sup>74</sup>

(E.) BICYCLE. — A bicycle has been held to come within the meaning of the word "vehicle" as used in exemption laws,<sup>75</sup> though it is held not to be within the meaning of the word "wagon,"<sup>76</sup> or "horse,"<sup>77</sup>

70. *Kimball v. Jones*, 41 Minn. 318, 43 N. W. 74; *Allen v. Coates*, 29 Minn. 46, 11 N. W. 132, *overruling* *Dingman v. Raymond*, 27 Minn. 507, 8 N. W. 597; *Rodgers v. Ferguson*, 32 Tex. 533.

[a] A two seated upholstered carriage for easy riding only is a wagon. *Kimball v. Jones*, 41 Minn. 318, 43 N. W. 74.

[b] A buggy is exempt as a wagon. *Allen v. Coates*, 29 Minn. 46, 11 N. W. 132, *overruling* *Dingman v. Raymond*, 27 Minn. 507, 8 N. W. 597.

[c] A dray is exempt as a wagon. *Cone v. Lewis*, 64 Tex. 331, 53 Am. Rep. 767.

71. *Favers v. Glass*, 22 Ala. 621, 58 Am. Dec. 272; *Webb v. Brandon*, 4 Heisk. (Tenn.) 285.

[a] A four wheeled vehicle suited to husbandry drawn by oxen is exempt under a statute exempting one horse or ox cart, and is protected from levy and sale. *Favers v. Glass*, 22 Ala. 621, 58 Am. Dec. 272.

[b] An ox wagon was held to be exempt under a statute exempting "an ox cart." *Webb v. Brandon*, 4 Heisk. (Tenn.) 285.

72. *U. S.*—*Patten v. Sturgeon*, 214 Fed. 65, 130 C. C. A. 505. *N. J.*—*Diocese of Trenton v. Toman*, 74 N. J. Eq. 702, 70 Atl. 606. *Tex.*—*Hammond v. Pickett* (Tex. Civ. App.), 158 S. W. 174, holding "automobile" to be a "carriage," though not holding it exempt in this particular case because claimant was not head of family; *Peevhouse v. Smith* (Tex. Civ. App.), 152 S. W. 1196; *Parker v. Sweet*, 60 Tex. Civ. App. 10, 127 S. W. 881.

See also *Doherty v. Ayer*, 197 Mass. 241, 83 N. E. 677, 125 Am. St. Rep. 355, 14 L. R. A. (N. S.) 816.

[a] As a Wagon.—An automobile is not exempt under a statute exempting two horses, or two mules, one wagon, etc. *Prater v. Riechman*, 135 Tenn. 485, 187 S. W. 305.

73. *Lames v. Armstrong*, 162 Iowa 327, 144 N. W. 1, 49 L. R. A. (N. S.) 691. See also *Wickham v. Traders State Bank*, 95 Kan. 657, 149 Pac. 433, holding an automobile exempt as necessary implement for the purpose of carrying on business.

[a] *Contra*, *In re Wilder*, 221 Fed. 476, holding that a "taxicab" is not a "hack" or "coupe" within the meaning of a statute which exempts, among other things "one hack, one coupe or carriage for one or two horses, by the use of which the owner habitually earns his living."

[b] "That an automobile is a vehicle there can be no doubt, and that the motor power is gasoline instead of a horse or horses, is not material under the exemption law." *Lames v. Armstrong*, 162 Iowa 327, 144 N. W. 1, 49 L. R. A. (N. S.) 691.

74. *Eastman Mfg. Co. v. Thomas*, 82 S. C. 509, 64 S. E. 401.

75. *Roberts v. Parker*, 117 Iowa 389, 90 N. W. 744, 94 Am. St. Rep. 316, 57 L. R. A. 764.

[a] A bicycle owned by a painter and paper hanger and bill poster used by him in his business was held to be exempt though such vehicles were not known when the statute was passed. *Roberts v. Parker*, 117 Iowa 389, 90 N. W. 744, 94 Am. St. Rep. 316, 57 L. R. A. 764.

76. *Shadewald v. Phillips*, 72 Minn. 520, 75 N. W. 717.

77. *Smith v. Horton*, 19 Tex. Civ.

or "tool of trade."<sup>78</sup> Some statutes specifically exempt bicycles.<sup>79</sup>

(F.) NECESSITY OF USE.—The same rule as to use would apply to wagons as to horses, hence the wagon need not be in actual use at time of levy to be exempt.<sup>80</sup>

(XIV.) Stock in Trade.—(A.) IN GENERAL.—Many statutes exempt "stock in trade" to a certain amount.<sup>81</sup>

(B.) MERCHANTS.—The statute exempting "stock in trade" is held by some courts not to exempt articles purchased by a debtor and kept for sale for speculation merely in the character of a merchant.<sup>82</sup> But others hold the contrary.<sup>83</sup> To entitle the debtor to the exemption, the business or trade must be a lawful one.<sup>84</sup>

App. 28, 46 S. W. 401, even though useful for the same purpose.

78. *Smith v. Horton*, 19 Tex. Civ. App. 28, 46 S. W. 401.

[a] A bicycle owned and used by an architect as a means of locomotion in superintending the construction of building is not exempt as a tool or apparatus of his trade. *Smith v. Horton*, 19 Tex. Civ. App. 28, 46 S. W. 401.

79. See generally the statutes, and *Shadewald v. Phillips*, 72 Minn. 520, 75 N. W. 717.

80. *Forsyth v. Bower*, 54 Cal. 639; *Wolf v. Farley*, 16 N. Y. Supp. 168.

As to necessity that work animals be in use, see *supra*, II, B, 5, a, (XI), (A), (7).

81. See generally the statutes and the cases cited *infra*, this section.

Exemption as provisions of groceries kept for sale, see *supra*, II, B, 5, a, (VII).

As "personal property," see *supra*, II, B, 5, a, (II).

[a] Under the Michigan statute (1) exempting tools, implements, materials, stock, or "other things" to enable any person to carry on an occupation or business, a farmer may claim an exemption as property necessary to the business of farming, from hay, oats, corn, a yearling steer, a heifer, two spring calves, and clover seed and cornstalks up to the statutory limit of value. *Hutchinson v. Whitmore*, 90 Mich. 255, 51 N. W. 451, 30 Am. St. Rep. 431. (2) Seed wheat owned by a farmer may be exempt to the statutory valuation as "other things" necessary to enable one to carry on his business. *Stilson v. Gibbs*, 46 Mich. 215, 9 N. W. 254.

82. U. S.—*In re Schwartz*, 21 Fed. Cas. No. 12,503; *Ex parte Robinson*, 1

Bond 39, 20 Fed. Cas. No. 11,933. Kan.—*Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120; *Guptil v. McFees*, 9 Kan. 30. Minn.—*Grimes v. Bryne*, 2 Minn. 89.

[a] The Minnesota statute exempts the tools and instruments of a mechanic and then declares in addition thereto stock in trade shall be exempt. The latter clause is dependent on the first and a merchant is not embraced within it. *Grimes v. Bryne*, 2 Minn. 89.

[b] A statute exempting the materials or stock designed and procured by a debtor and necessary for carrying on his trade or business and intended to be used or wrought therein does not exempt the stock of a merchant. *Read v. Neale*, 10 Gray (Mass.) 242; *Wilson v. Elliot*, 7 Gray (Mass.) 69.

83. U. S.—*In re Bjornstad*, 9 Biss. 13, 3 Fed. Cas. No. 1,453. Colo.—*Weil v. Nevitt*, 18 Colo. 10, 31 Pac. 487; *Martin v. Bond*, 14 Colo. 466, 24 Pac. 326. Mich.—See *Coville v. Bentley*, 76 Mich. 248, 42 N. W. 1116, 15 Am. St. Rep. 312, under a statute exempting stock, tools and other things to enable the debtor to carry on his business. Wis.—*Wicker v. Comstock*, 52 Wis. 315, 9 N. W. 25.

[a] Liquors are exempt as "stock in trade" to the statutory amount where the government recognizes the sale of intoxicating liquors as lawful. *Weil v. Nevitt*, 18 Colo. 10, 31 Pac. 487.

[b] A new stock purchased with the proceeds of other articles retained under the exemption law is exempt under the Pennsylvania statute. *Hanley v. O'Donald*, 30 Pa. 261.

84. *Walsch v. Call*, 32 Wis. 159, un-

(C.) ARTISANS AND MANUFACTURERS.—The term “stock in trade” when applied to artisans means material which the debtor uses in the manufacture of the goods or merchandise of his trade and which have been provided and held for the purpose of enabling him to make a beneficial and profitable use of his tools as a means of support;<sup>85</sup> but in order that stock in trade may be exempt the owner must be engaged or about to engage in manufacturing or other business in which such stock is or is about to be used.<sup>86</sup> The words “stock in trade” embrace not only the raw materials from which the mechanic intends to manufacture goods,<sup>87</sup> but the manufactured goods themselves also.<sup>88</sup> The fact that the articles so manufactured had been mixed with a stock of merchandise for sale would not affect the exemption;<sup>89</sup> but where merchandise or material are kept partly for sale and partly for use in manufacture they lose their identity as stock in trade.<sup>90</sup> If an exempt stock in trade is disposed of in the ordinary course of trade and replaced by goods of like kind the latter are still exempt,<sup>91</sup> but where a debtor procures stock and material for carrying on his trade and afterwards changes his original design, the exemption of such stock and material would cease.<sup>92</sup>

Where the amount of exempt stock in trade is limited, the debtor

licensed liquor dealer not entitled to exemption.

85. *Kan.*—*Miller v. Weeks*, 46 *Kan.* 307, 26 *Pac.* 694. *Mass.*—*Eager v. Taylor*, 9 *Allen* 156. *Mich.*—*Stewart v. Welton*, 32 *Mich.* 56. *Minn.*—*Hillyer v. Remore*, 42 *Minn.* 254, 44 *N. W.* 116; *Prosser v. Hartley*, 35 *Minn.* 340, 29 *N. W.* 156; *Grimes v. Bryne*, 2 *Minn.* 89.

[a] A quantity of shingles and lumber are exempt to a carpenter as stock and material in trade. *Hutchinson v. Roe*, 44 *Mich.* 389, 6 *N. W.* 870.

[b] A merchant tailor who is the head of a family and resident of the state is entitled to an exemption of his stock in trade up to the statutory limitation of value, and is entitled to select such portion for exemption as he may see fit. *Rice v. Nolan*, 33 *Kan.* 28, 5 *Pac.* 437.

86. *Hillyer v. Remore*, 42 *Minn.* 254, 44 *N. W.* 116; *Prosser v. Hartley*, 35 *Minn.* 340, 29 *N. W.* 156.

87. *Bequillard v. Bartlett*, 19 *Kan.* 382, 27 *Am. Rep.* 120.

88. *Bequillard v. Bartlett*, 19 *Kan.* 382, 27 *Am. Rep.* 120; *Stewart v. Welton*, 32 *Mich.* 56; *Smalley v. Masten*, 8 *Mich.* 529, 77 *Am. Dec.* 467.

[a] Unfinished burial cases and caskets upon which additional labor, expense and material must be ex-

pendent in order to render them salable are “stock and material in trade.” *McAbe v. Thompson*, 27 *Minn.* 134, 6 *N. W.* 479.

89. *Kan.*—*Bequillard v. Bartlett*, 19 *Kan.* 382, 27 *Am. Rep.* 120. *Mass.*—*Eager v. Taylor*, 9 *Allen* 156. *Minn.*—*Hillyer v. Remore*, 42 *Minn.* 254, 44 *N. W.* 116.

[a] Goods manufactured for particular customers upon special orders and goods manufactured for sale to customers generally are included in “stock of trade.” *Bequillard v. Bartlett*, 19 *Kan.* 382, 27 *Am. Rep.* 120.

[b] Suits of clothes manufactured by a tailor in his dull times and intended for sale or to be used for masquerade suits are exempt as stock in trade. *Fischer v. McIntyre*, 66 *Mich.* 681, 33 *N. W.* 762.

90. *Eager v. Taylor*, 9 *Allen* (Mass.) 156; *Hillyer v. Remore*, 42 *Minn.* 254, 44 *N. W.* 116.

[a] An occasional sale from stock or material will not defeat the right of exemption when the debtor does not hold himself out as a dealer. *Eager v. Taylor*, 9 *Allen* (Mass.) 156.

91. *Dodd & Co. v. Thompson*, 63 *Ga.* 393; *Hanley v. O'Donald*, 30 *Pa.* 261.

92. *Stevenson v. White*, 5 *Allen* (Mass.) 148.

can claim of manufactured and unmanufactured goods, only such an amount as in the aggregate equals the statutory limit.<sup>93</sup>

(XV.) **Share in Intestate Estate.**<sup>94</sup>—Statutes sometimes allow certain debtors to claim an exemption in property of a decedent,<sup>95</sup> but the exemption would not prevail against debts owed by the legatee to the estate.<sup>96</sup>

(XVI.) **Burial Lot.**—Some statutes exempt to the head of a family a burying lot either in a public or private burying ground;<sup>97</sup> and under such statutes upon the death of the head of the family the lot descends to the heirs of the deceased and the exemption still continues.<sup>98</sup> When land has been dedicated by a cemetery company for use as a public burial place, the unsold lots therein are exempt from levy on an execution against the company.<sup>99</sup>

(XVII.) **Military Equipment.**—Some statutes exempt the arms and equipment of members of the militia.<sup>1</sup> To claim the exemption the debtor must be properly enrolled in the militia.<sup>2</sup> Where the statute imposes certain prerequisites, they must be complied with to obtain the exemption.<sup>3</sup> The exemption continues only so long as the debtor

93. *Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120.

94. **Setting homestead apart to deceased's family**, see 11 STANDARD PROC. 384.

95. *Ala.*—*Bell v. Hall*, 76 Ala. 546. *Pa.*—*Irwin's Estate*, 31 Pittsb. Leg. J. (O. S.) 23, 14 Pittsb. Leg. J. (N. S.) 23. *S. C.*—*Swandale v. Swandale*, 25 S. C. 389.

96. *Duffy v. Duffy*, 155 Mo. 144, 55 S. W. 1002; *Lietman's Est. v. Lietman*, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374. See 12 STANDARD PROC. 948.

97. See generally the statutes, and: *Ala.*—Code, 1907, §4163. *Ariz.*—Rev. St., 1913, §3302. *Colo.*—Rev. St., 1908, §3628. *Conn.*—Gen. St., 1902, §907. *N. Y.*—*Cox v. Stafford*, 14 How. Pr. 519.

98. *Derby v. Derby*, 4 R. I. 414.

99. *Mich.*—*Avery v. Forest Lawn Cem. Co.*, 127 Mich. 125, 86 N. W. 538. *Neb.*—*First Nat. Bank v. Hazels*, 63 Neb. 844, 89 N. W. 378, 56 L. R. A. 765. *N. J.*—*Spear v. Locust Wood Cemetery Co.*, 72 N. J. Eq. 821, 66 Atl. 1068. *Tex.*—*Oakland Cemetery Co. v. People's Cemetery Assn.*, 93 Tex. 569, 57 S. W. 27, 55 L. R. A. 503.

[a] See *Bloomington Cemetery Assn. v. People*, 139 Ill. 16, 28 N. E. 1076, holding the property of a cemetery association which has not been used for burial purposes is not exempt unless so exempted by its charter.

[b] **The fact that the owner derived revenue from the sale of lots** would not defeat the exemption. *First Nat. Bank, etc. v. Hazels*, 63 Neb. 844, 89 N. W. 378.

1. See generally the statutes.

[a] **During the war of the Rebellion** many statutes exempted the property of soldiers actually enrolled for service during the term of enlistment and for a designated period thereafter. *Jefferis v. Shearer*, 5 Phila. (Pa.) 330.

[b] **The arms of an artilleryman** are exempt under the statute referred to in the text. *Crocker v. Hunt*, 2 McCord (S. C.) 352.

[c] **A horse and saddle** are not exempt within the meaning of military equipment and accoutrements as used by the statute. *Fry v. Canfield*, 4 Vt. 9.

2. *Ga.*—*Hendricks v. Lewis*, R. M. Charl. 105. *Ia.*—*Swisher v. Swisher*, 157 Iowa 55, 137 N. W. 1076. *Tex.*—*Choate v. Redding*, 18 Tex. 579.

[a] **Sufficient Enrollment.**—A written memorandum made by a captain of a company of horse artillery of an application to him by a member of his company to enroll his horse for service is sufficient enrollment under the militia law to exempt the horse. *Shields v. Craney*, 3 Wend. (N. Y.) 274.

3. *Southwell v. Harley*, 3 Rich. (S. C.) 180.

[a] **Registering.**—Under a statute granting an exemption to a trooper of

is obliged by law to furnish his own equipment, however.<sup>4</sup>

(XVIII.) **Public Property.** — The right to levy upon public property is treated elsewhere in this work.<sup>5</sup>

(XIX.) **Proceeds of Exempt Property.** — (A.) **PROCEEDS OF SALE OR EXCHANGE.**<sup>6</sup> — Generally where by the exchange of exempt property, property of like kind has been obtained, it stands in place of the former and is exempt,<sup>7</sup> but money or property not exempt, though received in exchange for exempt property, is not entitled to exemption.<sup>8</sup> If the debtor stands by and allows property out of which he might claim an exemption to be sold under process of the court, he cannot claim his exemption out of the proceeds of the sale;<sup>9</sup> but this rule would not apply where the rights of the debtor were invaded and the property converted in whole or in part into money against his will. The money collected therefrom would be exempt.<sup>10</sup> A credit for

a troop horse duly entered and registered with the captain, entering and registering such horse with the captain, is a condition precedent of the exemption. *Southwell v. Harley*, 3 Rich. (S. C.) 180.

4. *Owen v. Gray*, 19 Vt. 543.

5. See II, B, 3.

6. As to exemption of property purchased with pension money, see *supra* II, B, 5, a, (III), (B).

7. **Ga.**—*Johnson v. Redwine*, 105 Ga. 449, 33 S. E. 676; *Dodd & Co. v. Thompson*, 63 Ga. 393; *Johnson v. Franklin & Whitney*, 63 Ga. 378; *Morris v. Tennent*, 56 Ga. 577. **Ill.**—*Washburn v. Goodheart*, 88 Ill. 229. **Ore.**—*Blackford v. Boak*, 73 Ore. 61, 143 Pac. 1136. **Tex.**—*Schneider & Bro. v. Bray*, 59 Tex. 668; *Kingsland, Ferguson & Co. v. McGowan Bros.*, 3 Wills. Civ. Cas. §32.

[a] When exempt property has been exchanged, whether legally or not, for other property of like kind the latter stands in place of the former so long as the transaction is not repudiated by any of the parties in interest. A creditor who is not injured thereby cannot complain. *Morris v. Tennent*, 56 Ga. 577.

[b] Where exemption depends on allotment by three freeholders, and property exempted by allotment is exchanged for property of the same kind, the latter is not to be exempt without a new allotment. *Lloyd v. Durham*, 60 N. C. 282.

8. **Ala.**—*Pool v. Reid*, 15 Ala. 826. **Ark.**—*Bennett v. Hutson*, 33 Ark. 762. **Ga.**—*Pate v. Oglethorpe Fertilizer Co.*, 54 Ga. 515. **Ill.**—*Avery Planter Co. v. Cole*, 61 Ill. App. 494. **Ia.**—*Harrier v.*

*Fassett*, 56 Iowa 264, 9 N. W. 217; *Friedlander v. Mahoney*, 31 Iowa 311. **Minn.**—*In re How*, 59 Minn. 415, 61 N. W. 456, 61 Minn. 217, 63 N. W. 627. **Mo.**—*Steele v. Leonori*, 28 Mo. App. 675. **N. Y.**—*Hudson v. Plets*, 11 Paige 180; *Salsbury v. Parsons*, 36 Hun 12. **Pa.**—*Knabb v. Drake*, 23 Pa. 489, 62 Am. Dec. 352; *Charles v. Oatman*, 2 Clark 452. **Tex.**—*Watkins v. Davis*, 61 Tex. 414; *Kingsland, Ferguson & Co. v. McGowan Bros.*, 3 Wills. Civ. Cas. §32. **Vt.**—*Scott v. Brigham*, 27 Vt. 561; *Edson v. Trask*, 22 Vt. 18.

[a] In Iowa it is held that the statute exempting certain specific property does not allow a debtor to dispose of it and hold the proceeds. If he parts with the property the exemption ceases. *In re Brogan's Est.* (Iowa), 157 N. W. 952.

[b] A colt not exempt under the statute as being kept for team work is not exempt because it was received in exchange for a horse that was exempt. *Connell v. Fisk*, 54 Vt. 381.

9. *Surratt v. Young*, 55 Ark. 447, 18 S. W. 539; *Brown v. Peters*, 53 Ark. 182, 13 S. W. 729; *Chambers v. Perry*, 47 Ark. 400, 1 S. W. 700; *Norris v. Kidd*, 28 Ark. 485, 499; *Weaver's Appeal*, 18 Pa. 307; *Miller's Appeal*, 16 Pa. 300.

As to necessity for claim of exemption, see 11 STANDARD PROC. 475.

10. **Cal.**—*Houghton v. Lee*, 50 Cal. 101. **Ga.**—*Harrell v. Harrell*, 77 Ga. 130, 3 S. E. 12. **Ia.**—*Kaiser v. Seaton*, 62 Iowa 463, 17 N. W. 664. **Kan.**—*Mitchell v. Milhoan*, 11 Kan. 617. **N. Y.**—*Tillotson v. Wolcott*, 48 N. Y. 188; *Cooney v. Cooney*, 65 Barb. 524.

the sale price of exempt property,<sup>11</sup> or for a loan from the proceeds of a sale of such property, is not exempt. Some courts hold that the proceeds of a sale of exempt property designed for investment in other exempt property to replace that sold are exempt whether in the hands of the debtor or the purchaser,<sup>12</sup> and some hold broadly that as the sale by the debtor of exempt property violates no rights of his creditors, the proceeds thereof are exempt.<sup>13</sup>

(B.) INSURANCE MONEY FOR DESTRUCTION OR INJURY.—In the majority of states where exempt property is destroyed by fire and there is a policy of insurance thereon the proceeds of such policy is exempt;<sup>14</sup> but in some states the rule is otherwise.<sup>15</sup>

(C.) JUDGMENT FOR INJURY THERETO OR PURCHASE PRICE.—A judgment for the value of exempt property is itself exempt from levy,<sup>16</sup> at least

Tex.—Howard *v.* Tandy, 79 Tex. 450, 15 S. W. 578; Wittenberg *v.* Lloyd, 49 Tex. 633. Vt.—Keyes *v.* Rines, 37 Vt. 260, 86 Am. Dec. 707; Stebbins *v.* Feeler, 29 Vt. 289. Wis.—Below *v.* Robbins, 76 Wis. 600, 45 N. W. 416, 20 Am. St. Rep. 89, 8 L. R. A. 467.

11. Ill.—Avery Planter Co. *v.* Cole, 61 Ill. App. 494; Reade *v.* Kerr, 52 Ill. App. 467. Ia.—Harrier *v.* Fassett, 56 Iowa 264, 9 N. W. 217. Vt.—Scott *v.* Brigham, 27 Vt. 561; Edson *v.* Trask, 22 Vt. 18.

12. Cullen *v.* Harris, 111 Mich. 20, 69 N. W. 78, 66 Am. St. Rep. 380; Blackford *v.* Boak, 73 Ore. 61, 143 Pac. 1136.

[a] **Intention To Reinvest.**—Money arising from a sale of exempt property where there is a bona fide intention of investing it in other exempt property is exempt. Kingsland, Ferguson & Co. *v.* McGowan Bros., 3 Wills. Civ. Cas. §32.

13. King *v.* Tompkins' Admr., 15 Ky. L. Rep. 29. See Bridgers *v.* Howell, 27 S. C. 425, 3 S. E. 790, holding money necessary to make up the debtor's personal property exemption invested in land in the wife's name can not be subjected by creditors.

[a] **Property purchased with exempt insurance money** collected on a life policy, is exempt from liability for all debts of the beneficiary contracted prior to the death of the insured. Booth *v.* Martin, 158 Iowa 434, 139 N. W. 888; Cook *v.* Allee, 119 Iowa 226, 93 N. W. 93. See, however, Friedlander *v.* Mahoney, 31 Iowa 311. As to insurance money generally, see *supra*. II, B, 5, a, (III). (D).

14. Ala.—Ellis *v.* Pratt City, 111 Ala.

629, 20 So. 649, 56 Am. St. Rep. 76, 33 L. R. A. 264. Ariz.—Wilson *v.* Lowry, 5 Ariz. 335, 52 Pac. 777. Ark.—Probst *v.* Scott, 31 Ark. 652. Cal.—Houghton *v.* Lee, 50 Cal. 101. Ia.—Reynolds *v.* Haines, 83 Iowa 342, 49 N. W. 851, 32 Am. St. Rep. 311, 13 L. R. A. 719. Minn.—See Fletcher *v.* Staples, 62 Minn. 471, 64 N. W. 1150. N. Y.—Bliss *v.* Raynor, 91 Hun 250, 36 N. Y. S. 156; Cooney *v.* Cooney, 65 Barb. 524. Pa. Strouse's Exr. *v.* Becker, 44 Pa. 206. Tenn.—Wright *v.* Brooks, 101 Tenn. 601, 49 S. W. 828. Tex.—Harris *v.* Todd (Tex. Civ. App.), 158 S. W. 1189; Ward *v.* Goggan, 4 Tex. Civ. App. 274, 23 S. W. 479. Wash.—Puget Sound Dressed Beef, etc. Co. *v.* Jeffs, 11 Wash. 466, 39 Pac. 962. See also Winsor *v.* McLachlan, 12 Wash. 154, 40 Pac. 727.

[a] **If a physician's library** is destroyed by fire, the indemnity secured by the insurance stands in place of the books and would not be subject to his debts any more than the books themselves. Reynolds *v.* Haines, 83 Iowa 342, 49 N. W. 851, 32 Am. St. Rep. 311, 13 L. R. A. 719.

15. Ill.—Monniea *v.* German Ins. Co., 12 Ill. App. 240. Miss.—Smith *v.* Ratcliff, 66 Miss. 683, 6 So. 460, 14 Am. St. Rep. 606. N. H.—Wooster *v.* Page, 54 N. H. 125, 20 Am. Rep. 128.

16. Cal.—Beekman *v.* Manlove, 18 Cal. 388. Minn.—Wylie *v.* Grundysen, 51 Minn. 360, 53 N. W. 805, 38 Am. St. Rep. 509, 19 L. R. A. 33; Henry *v.* Traynor, 42 Minn. 234, 44 N. W. 11; Temple *v.* Scott, 3 Minn. 419. Miss. Johnson *v.* Edde, 58 Miss. 664. Mo. Wabash R. Co. *v.* Bowring, 103 Mo. App. 158, 77 S. W. 106. N. H.—See Robinson *v.* Burke, 70 N. H. 2, 45 Atl.

until the debtor has had a reasonable time in which to reinvest the proceeds.<sup>17</sup> But this exemption applies to the judgment only to the extent of the value of the exempt property and not to exemplary damages awarded,<sup>18</sup> or the value of non-exempt property included in the judgment,<sup>19</sup> though the exemption does extend to the costs embodied in the judgment.<sup>20</sup>

(XX.) **Property or Money in Lieu of Exemption.**—Under some statutes the debtor has a right to claim as exempt other property where he does not own the kind of property specifically exempted by the statute.<sup>21</sup> In some cases he has been allowed to claim money instead of other property,<sup>22</sup> but this rule is not universal.<sup>23</sup> In other cases the

713, 85 Am. St. Rep. 595. **N. Y.**—Tillotson v. Wolcott, 48 N. Y. 188; Andrews v. Rowan, 28 How. Pr. 126. *Contra*, Mallory v. Norton, 21 Barb. 424. **Pa.**—Steel v. McKerrihan, 172 Pa. 280, 33 Atl. 570; Wilson v. McElroy, 32 Pa. 82. **S. D.**—Davidson v. Meyers, 29 S. D. 57, 135 N. W. 720; Long v. Collins, 15 S. D. 259, 88 N. W. 571. **Tenn.**—Crawford v. Carroll, 93 Tenn. 661, 27 S. W. 1010, 42 Am. St. Rep. 943, 26 L. R. A. 415. **Tex.**—Howard v. Tandy, 79 Tex. 450, 15 S. W. 578. **Vt.**—Stebbins v. Peeler, 29 Vt. 289. **Wis.**—Below v. Robbins, 76 Wis. 600, 45 N. W. 416, 20 Am. St. Rep. 89, 8 L. R. A. 467. *Contra*, Mallory v. Norton, 21 Barb. (N. Y.) 424.

[a] **Trover and replevin** being concurrent remedies, the fact that a party could have replevied exempt property will not prevent him from claiming as exempt a judgment for the conversion thereof. Below v. Robbins, 76 Wis. 600, 45 N. W. 416, 20 Am. St. Rep. 89, 8 L. R. A. 467. *Contra*, Mallory v. Norton, 21 Barb. (N. Y.) 424.

17. Tillotson v. Wolcott, 48 N. Y. 188; Cooney v. Cooney, 65 Barb. (N. Y.) 524; Cameron v. Fay, 55 Tex. 58; Wittenberg v. Lloyd, 49 Tex. 633.

18. Johnson v. Edde, 58 Miss. 664; Knabb v. Drake, 23 Pa. 489, 62 Am. Dec. 352.

19. Burke v. Hance, 76 Tex. 76, 13 S. W. 163, 18 Am. St. Rep. 28.

20. Long v. Collins, 16 S. D. 625, 94 N. W. 700, 102 Am. St. Rep. 724.

21. **U. S.**—*In re* Gerber, 186 Fed. 693, 108 C. C. A. 511; *In re* Crook, 219 Fed. 979. **Mich.**—Hutchinson v. Whitmore, 90 Mich. 255, 51 N. W. 451, 30 Am. St. Rep. 431; Wykoff v. Wyllis, 8 Mich. 48. **Mo.**—State v. Beamer, 73 Mo. 37; Mahan v. Scruggs, 29 Mo. 282; State v. Farmer, 21 Mo. 160; Day v. Burnham, 82 Mo. App. 538; State *ex rel.* Henneke v. Wolf, 81 Mo. App. 586;

State v. Finn, 8 Mo. App. 261; State v. Kurtzeborn, 2 Mo. App. 335. **Neb.**—Williams v. Golden, 10 Neb. 432, 6 N. W. 766. **Pa.**—Buchi v. Pund, 9 Pa. Dist. 446. **Wis.**—Cunningham v. Rodby, 101 Wis. 378, 77 N. W. 740.

[a] **Fixtures in Lieu of Stock in Trade.**—A debtor who is a merchant may claim fixtures as exempt in lieu of his statutory exemption of "stock in trade." Cunningham v. Britson, 101 Wis. 378, 77 N. W. 740.

[b] **Debtor Must Own Property Selected.**—State v. Freeman, 173 Mo. App. 294, 153 S. W. 726.

22. **U. S.**—*In re* Swanson, 213 Fed. 353; *In re* May, 16 Fed. Cas. No. 9,326. **Ill.**—Fanning v. First Nat. Bank, 76 Ill. 53; Powell v. Daily, 61 Ill. App. 552. **Md.**—Fowler v. State, 99 Md. 594, 58 Atl. 444; Bramble v. State, 41 Md. 435. **Mich.**—Wykoff v. Wyllis, 8 Mich. 48. **Mo.**—Paddock v. Lance, 94 Mo. 283, 6 S. W. 241; State v. Finn, 8 Mo. App. 261. **S. C.**—Gray v. Putnam, 51 S. C. 97, 28 S. E. 149.

[a] A wife living with her husband where neither have a homestead is entitled to \$500.00 (the statutory exemption) in lieu of a homestead, out of a fund arising from a sale in partition of an undivided interest in real estate inherited by the husband while insolvent. Gillett v. Miller, 5 Ohio Cir. Dec. 588, 12 Ohio Cir. Ct. 209.

**Whether money is exempt** under statute exempting personal property, see supra II, B, 5, a, (II) and (III).

23. **Creditors' Collection Assn. v. Bisbee**, 80 Wash. 358, 141 Pac. 886; Carter v. Davis, 6 Wash. 327, 33 Pac. 833.

[a] **"Other Property."**—"Where a statute after exempting to each household certain specified personal property and continues as follows: "pro-

debtor has been allowed to select a chose in action such as a debt or judgment, and where so selected the debt or judgment becomes as exempt as though it had been specifically mentioned in the statute.<sup>24</sup>

**Provisions.**—Some statutes allow a debtor who has not the statutory amount of provisions, to make up the deficiency from other named articles in lieu of the provisions.<sup>25</sup> But in the absence of such statute, this is not permissible.<sup>26</sup>

**b. Property of What Persons.**—(I.) **Residents and Citizens.**—(A.)

**NECESSITY OF BEING RESIDENT OR CITIZEN.**—Exemption laws being as a rule designed for the protection of families within the state, their beneficial provisions are very often extended only to residents,<sup>27</sup> or

vided that if such householder does not possess nor desire to retain the property named, he may select and retain other property not to exceed (a specified amount),” the words “other property” refer only to other property of like nature to that specifically mentioned, and hence do not include money. *Creditors’ Collection Assn. v. Bisbee*, 86 Wash. 358, 141 Pac. 886.

**24. Ga.**—*Johnson v. Redwine*, 105 Ga. 449, 33 S. E. 676. **Ky.**—*Miller v. Mahoney*, 16 Ky. L. Rep. 799, 29 S. W. 879. **Mo.**—*Day v. Burnham*, 82 Mo. App. 538; *Wagner v. North Furniture Co.*, 63 Mo. App. 206.

**[a] In Hands of Another.**—Notes and accounts up to the statutory limit of value belonging to a debtor but found in the hands of another may be claimed as exempt in lieu of other personal property. *Miller v. Mahoney*, 16 Ky. L. Rep. 799, 29 S. W. 879.

**25. Crops.**—(1) A statute allowing an exemption where there are not sufficient provisions of “so much of the live stock suitable for the purpose, and of growing crop, if any, as may be necessary,” embraces crops that are suitable for breadstuffs and animal food only. A tobacco crop is not included. *Herndon v. Waters’ Exr.*, 14 Ky. L. Rep. 667; *Hayden v. Crutchfield’s Exr.*, 3 Ky. L. Rep. 83. (2) The statute of Kentucky has since been amended so as to exempt “any crop on hand.” *Millay v. White*, 86 Ky. 170, 5 S. W. 429.

**[a] Improvements on real estate** cannot be assigned to a debtor in lieu of provisions not on hand under a statute providing for a substitution of personal property in such case. *Lawson v. Barlow Co.*, 21 Ky. L. Rep. 308, 51 S. W. 314.

**[b] Proceeds of Attached Property.**

Where a debtor did not have on hand the provisions exempt by statute he was entitled to have set apart out of the proceeds of the attached property \$40.00 for each member of his family and his right to the exemption would not be affected by the fact that his children had property in their own right. *Crigler v. Connor*, 15 Ky. L. Rep. 751.

**26. Seligson & Co. v. Staples**, 1 White & W. Civ. Cas. (Tex.), §1070.

**27. U. S.**—*In re Dinglehoeft*, 109 Fed. 866. **Ala.**—*McCrary v. Chase*, 71 Ala. 540; *Boykin v. Edwards*, 21 Ala. 261; *Allen v. Manasse*, 4 Ala. 554. **Ark.** *Person v. Williams-Echols Dry Goods Co.*, 113 Ark. 467, 169 S. W. 223, 59 Am. St. Rep. 122; *McAlister & Co. v. Robins*, 100 Ark. 540, 140 S. W. 732. **Colo.** *Wymond v. Amsbury*, 2 Colo. 213. **Fla.** *Post v. Bird*, 28 Fla. 1, 9 So. 888. **Ga.** *Kyle v. Montgomery*, 73 Ga. 337. **Ind.** *Finley v. Sly*, 44 Ind. 266; *Norman v. Bellman*, 16 Ind. 156; *Hoagland v. Roe*, 8 Ind. 275; *Green v. Simon*, 17 Ind. App. 360, 46 N. E. 693. **Ind. Ter.** *Reeves v. Reeves*, 2 Ind. Ter. 444, 51 S. W. 1079. **Ia.**—*Russell v. Dilley*, 159 N. W. 189; *Union County Inv. Co. v. Messix*, 152 Iowa 412, 132 N. W. 823; *Lyon v. Callopy*, 87 Iowa 567, 54 N. W. 476, 43 Am. St. Rep. 396. **Minn.** *Thompson v. Peterson*, 122 Minn. 223, 142 N. W. 307; *Grimstad v. Lofgren*, 105 Minn. 286, 117 N. W. 515, 127 Am. St. Rep. 566. **Mo.**—*Mignogna v. Chiaffarelli*, 151 Mo. App. 359, 131 S. W. 769; *McDowell v. Friedman Bros. Shoe Co.*, 135 Mo. App. 276, 115 S. W. 1028; *Dinkins v. Crunden-Martin Woodenware Co.*, 99 Mo. App. 310, 73 S. W. 246. **N. C.**—*Cromer v. Self*, 149 N. C. 164, 62 S. E. 885; *Latta v. Bell*, 122 N. C. 639, 30 S. E. 15; *Jones v. Alsbrough*, 115 N. C. 46, 20 S. E. 170. **S. C.**

citizens<sup>28</sup> of the state. But unless the statute expressly or impliedly restricts the exemptions to residents, the courts have no authority to do so and the exemptions must apply to all persons litigant, residents as well as non-residents.<sup>29</sup>

Rookard v. Atlanta & C. Air Line Ry. Co., 89 S. C. 371, 71 S. E. 992. **Tenn.** Keelin v. Graves, 129 Tenn. 103, 165 S. W. 232; Hawkins v. Pearce, 11 Humph. 44. **Utah.**—Snow v. West, 35 Utah 206, 99 Pac. 674, 136 Am. St. Rep. 1047. **W. Va.**—Stein v. Staats, 74 W. Va. 357, 81 S. E. 1132; State v. Allen, 48 W. Va. 154, 35 S. E. 990, 86 Am. St. Rep. 29, 50 L. R. A. 284. **Wis.**—Commercial Nat. Bank v. Chicago, etc. Ry. Co., 45 Wis. 172.

[a] A resident alien whose family is not in the state is as much entitled to exemption as is a citizen, if he has a fixed intention to abandon his foreign home and settle permanently in the state with his family. *People v. McCloy*, 2 Neb. 7.

28. *Wood v. Bresnahan*, 63 Mich. 614, 30 N. W. 206; *McHugh v. Curtis*, 48 Mich. 262, 12 N. W. 163; *Dock v. Cauldwell*, 19 Pa. Super. 51; *McWilliams v. Newlin*, 1 Chest. Co. Rep. (Pa.) 50; *Wilkins v. Rubineam*, 15 W. N. C. (Pa.) 128; *Collom's Appeal*, 12 W. N. C. (Pa.) 309; *Snow v. Dill*, 6 W. N. C. (Pa.) 330.

[a] Bona fide citizenship is necessary. *Dock v. Cauldwell*, 19 Pa. Super. 51.

[b] "Every citizen" means, when used in an exemption statute, not only the native born or naturalized citizen, but every inhabitant of the country. *Cobbs v. Coleman*, 14 Tex. 594.

[c] The exemption of a fishing boat applies to citizens only, other exemptions may be claimed by non-residents. *Everett v. Herrin*, 46 Me. 357, 74 Am. Dec. 455.

[d] Limitation To Protect Creditors.—"Each state has its own exemption laws for the benefit of its own citizens. If non-residents are permitted to participate in the benefit thus provided, they may claim it in every state in which they happen to own property. This would likely work great injury to creditors by withdrawing from their grasp, money or property which should in justice be applied to the payment of their claims." *Collom's Appeal*, 12 W. N. C. (Pa.) 309.

29. **Ill.**—*Wabash R. Co. v. Dougan*,

142 Ill. 248, 31 N. E. 594, 34 Am. St. Rep. 74; *Mineral Point R. Co. v. Barron*, 83 Ill. 365; *Menzie v. Kelly*, 8 Ill. App. 259. **Kan.**—*Kansas City, etc. R. Co. v. Gough*, 35 Kan. 1, 10 Pac. 89; *Missouri P. R. Co. v. Maltby*, 34 Kan. 125, 8 Pac. 235. **Me.**—*Everett v. Herrin*, 46 Me. 357, 74 Am. Dec. 455. **Neb.**—*Wright v. Chicago, B. & Q. R. Co.*, 19 Neb. 175, 27 N. W. 90. **N. H.**—*Hill v. Loomis*, 6 N. H. 263. **Ohio.**—*Sproul v. McCoy*, 26 Ohio St. 577; *State v. O'Brien*, 7 Ohio Cir. Dec. 386, 14 Ohio Cir. Ct. 300. **Ore.**—*Bond v. Turner*, 33 Ore. 551, 54 Pac. 158, 44 L. R. A. 430. **Pa.**—*Matson v. Bryan*, 8 Pa. Co. Ct. 355; *Linsemmayer v. Smythe*, 3 Pa. Co. Ct. 400. **Tex.**—*Bell v. Indian Live Stock Co.*, 11 S. W. 344; *Carroll v. First State Bank (Tex. Civ. App.)*, 148 S. W. 818. **Vt.**—*Haskill v. Andros*, 4 Vt. 609, 24 Am. Dec. 645. **Wis.**—*Lowe v. Stringham*, 14 Wis. 222.

[a] In *Lowe v. Stringham*, 14 Wis. 223, the debtor was a non-resident and it was held that he was entitled to the benefit of the exemption laws, the court saying: "The statute makes no discrimination between temporary and permanent residents, nor does it purport to confine its privileges to residents at all. It exempts certain articles of the debtor and his family, and we think it would be entirely inconsistent with the beneficent intentions of the statute, as well as with the dignity of a sovereign state, to say that the temporary sojourner, or even the stranger within our gates, was not entitled to its protection."

[b] "Nothing short of the express language of a statute would justify us in saying that a person may, by virtue of an execution, be stripped of his wearing apparel, his necessary household furniture, and his only cow, merely because he resides under another government, when a person residing here would not be subject to the same inconvenience and distress." *Haskill v. Andros*, 4 Vt. 609, 24 Am. Dec. 645.

[c] Non-residents, heirs or legatees can claim the exemption of the proceeds of life insurance provided for by

(B.) WHO ARE RESIDENTS. — (1.) *In General.* — The question of residence, where it is an element in the debtor's right to exemption, is largely one of intention as manifested by acts and circumstances<sup>30</sup> from which it must appear that the debtor, at the time of the levy,<sup>31</sup> or, in some jurisdictions, before sale of the property under levy,<sup>32</sup> had an actual,<sup>33</sup> as distinguished from a technical,<sup>34</sup> residence in the state. It need not amount, it seems, to a domicile,<sup>35</sup> though in many respects identical therewith,<sup>36</sup> but it must be something more than a temporary sojourn in or a passing through the state.<sup>37</sup> The residence need not have been for any particular period,<sup>38</sup> nor need it be in any particular county in the state.<sup>39</sup>

Code 1892, §1965. *Borodofski v. Feld*, 88 Miss. 31, 40 So. 816.

30. *Ark.*—*McAlister & Co. v. Robins*, 100 Ark. 540, 140 S. W. 732. *Minn.* *Thompson v. Peterson*, 122 Minn. 228, 142 N. W. 307. *Mo.*—*McDowell v. Friedman Bros. Shoe Co.*, 135 Mo. App. 276, 115 S. W. 1028. *N. C.*—*Jones v. Alsbrook*, 115 N. C. 46, 20 S. E. 170. *W. Va.*—*Stein v. Staats*, 74 W. Va. 357, 81 S. E. 1132.

31. *Ala.*—*McCrary v. Chase*, 71 Ala. 540. *Colo.*—*Wymond v. Amstbury*, 2 Colo. 213. *Mo.*—*Caldwell v. Renfro*, 99 Mo. App. 376, 73 S. W. 340. *S. C.* *Gray v. Putnam*, 51 S. C. 97, 28 S. E. 149.

32. *Stein v. Staats*, 74 W. Va. 357, 81 S. E. 1132; *State v. Allen*, 48 W. Va. 154, 35 S. E. 990, 86 Am. St. Rep. 29, 50 L. R. A. 284.

[a] One who has become legally non-resident may before sale of his property under levy and at the time he claims its exemption therefrom, by a change of intention and circumstances in good faith again become a resident of the state, and be entitled to the benefit of the exemption law. *Stein v. Staats*, 74 W. Va. 357, 81 S. E. 1132.

33. *Stotesbury v. Kirtland*, 35 Mo. App. 148; *Steele v. Leonori*, 28 Mo. App. 675; *Jones v. Alsbrook*, 115 N. C. 46, 20 S. E. 170; *Munds v. Cassidey*, 98 N. C. 558, 4 S. E. 353.

[a] That non-residence as used in attachment laws (1) has not the same meaning as in exemption laws. See *Grimestad v. Lofgren*, 105 Minn. 286, 117 N. W. 515, 127 Am. St. Rep. 566. But (2) the West Virginia courts seem to give the term the same meaning in both cases. *State v. Allen*, 48 W. Va. 154, 35 S. E. 990, 86 Am. St. Rep. 29, 50 L. R. A. 284. And see *Clark v. Ward*,

12 Gratt. (53 Va.) 440; *Moore v. Holt*, 10 Gratt. (51 Va.) 284.

34. *Cromer v. Self*, 149 N. C. 164, 62 S. E. 885.

[a] "Although the legal domicile of the defendant may remain for some purposes in the state of Missouri, yet that he had in fact, prior to the filing of his answer, become a non-resident of this state, in such a sense as debars him from claiming the privilege of our exemption laws." *Stotesbury v. Kirtland*, 35 Mo. App. 148. See also *Cromer v. Self*, 149 N. C. 164, 62 S. E. 885.

35. *In re Dinglehoef*, 109 Fed. 866. See *Jones v. Alsbrook*, 115 N. C. 46, 20 S. E. 170. Compare preceding note.

[a] "Residence indicates permanency of occupation as distinct from lodging or boarding or temporary occupation but does not include so much as domicile which requires an intention continued with residence. *In re Dinglehoef*, 109 Fed. 866. And see *State v. Allen*, 48 W. Va. 154, 35 S. E. 990, 86 Am. St. Rep. 29, 50 L. R. A. 284.

[b] But that domicile in the state is intended, see *Keelin v. Graves*, 129 Tenn. 103, 165 S. W. 232.

36. See discussion following.

37. *In re Dinglehoef*, 109 Fed. 866.

[a] Sojourning in a boarding house for a short period does not constitute one a resident. *In re Dinglehoef*, 109 Fed. 866.

38. *Union County Inv. Co. v. Messix*, 152 Iowa 412, 132 N. W. 823; *Chesney v. Francisco*, 12 Neb. 626, 12 N. W. 94.

[a] *Intention To Remain.*—"If he has actually come within the state with the intention of remaining he shall be considered a resident." *Union County Inv. Co. v. Messix*, 152 Iowa 412, 132 N. W. 823.

39. *Mark v. State*, 15 Ind. 98.

(2.) *Family in Another State.*—Generally it is the debtor's residence and not that of his family which controls, and his right to exemptions is not defeated by the fact that the family resides outside the state,<sup>40</sup> unless the statute makes actual residence with the family essential.<sup>41</sup> However, the statute may make residence of the debtor's family within the state the criterion, notwithstanding his temporary or permanent abode is beyond the jurisdiction.<sup>42</sup>

(3.) *Removal From State.*—If a right of exemption existed at the time of the levy, it is not defeated as to that levy by a removal from the state pending the trial or determination of the right of exemption.<sup>43</sup> But as to subsequent levies made after the removal, the right of exemption may be lost because of the loss of the necessary residence.<sup>44</sup> To become a non-resident within the meaning of the exemption laws, there must be something more than an intention to remove to another state,<sup>45</sup> even though such intention is coupled with preparations,<sup>46</sup> or an actual

[a] **Residence upon an Indian reservation** is sufficient to entitle defendant to exemptions reserved to residents. *Coey v. Cleghorn*, 10 Idaho 166, 79 Pac. 72, 109 Am. St. Rep. 199.

[b] **In transit from house to house through different counties** as well as in a single county the debtor is protected. *Mark v. State*, 15 Ind. 98.

[c] **Avoiding Criminal Process.** Where an execution debtor had left the house where he resided with his family to avoid criminal process, and though frequently seen in the county, his usual whereabouts were unknown, he is not thereby deprived of his right of exemption. *Norman v. Bellman*, 16 Ind. 156.

[d] **One who secretly absconds** and whose whereabouts are unknown may still be a resident householder, in the absence of any proof that he did not intend to return to his family. *Green v. Simon*, 17 Ind. App. 360, 46 N. E. 693.

40. *Kan.*—*Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. 747; *Fish v. Street*, 27 Kan. 270. *Ky.*—*Stirman v. Smith*, 8 Ky. L. Rep. 781. *Mich.*—*Pettit v. Muskegon Booming Co.*, 74 Mich. 214, 41 N. W. 900.

[a] **Sending his family to another state** with the intention of following them and making his home there as soon as he could dispose of his property does not deprive the debtor of the benefits of the state exemption laws. *Stirman v. Smith*, 8 Ky. L. Rep. 781.

[b] **Though her husband reside outside the state, a woman, head of a fam-**

ily, may claim exemptions as a resident. *Fish v. Street*, 27 Kan. 270.

41. *Ala.*—*Allen v. Manasse*, 4 Ala. 554. *Colo.*—*Schwartz v. Birnbaum*, 21 Colo. 21, 39 Pac. 416. *Neb.*—*Chesney v. Francisco*, 12 Neb. 626, 12 N. W. 94; *People v. McClay*, 2 Neb. 7.

42. *Bonnel v. Dunn*, 28 N. J. L. 153.

[a] **"The statute meant to provide for the comfort of families residing in this state, and hence the language used is not, the property of any debtor residing in this state having a family but the property of any debtor having a family residing in this state shall be reserved for the use of the family."** *Bonnel v. Dunn*, 28 N. J. L. 153.

43. *McCrary v. Chase*, 71 Ala. 540; *Caldwell v. Renfro*, 99 Mo. App. 376, 73 S. W. 340.

44. See *supra*, II, B, 5, b, (I), (A).

45. *Ill.*—*Winslow v. Benedict*, 70 Ill. 120. *Ia.*—*Russell v. Dilley*, 159 N. W. 189. *Minn.*—*Grimestad v. Lofgren*, 105 Minn. 286, 117 N. W. 515, 127 Am. St. Rep. 566. *Pa.*—*Springer v. Lewis*, 22 Pa. 191.

46. *Ala.*—*Herzfeld v. Beazley*, 106 Ala. 447, 17 So. 623. *Ark.*—*McAlister & Co. v. Robins*, 100 Ark. 540, 140 S. W. 732. *Ia.*—*Graw v. Manning*, 54 Iowa 719, 7 N. W. 150. *Ky.*—*Anthony A. C. & Co. v. Wade*, 1 Bush 110; *Stirman v. Smith*, 10 Ky. L. Rep. 665, 10 S. W. 131; *Rasco v. Sheet*, 8 Ky. L. Rep. 703.

[a] **Packing up to leave for another state.** *Anthony A. C. & Co. v. Wade*, 1 Bush (Ky.) 110.

[b] **Delivering furniture to railroad**

inception of the journey.<sup>47</sup> But a removal to another state with no intention of returning,<sup>48</sup> or with a vague and indefinite intent to return,<sup>49</sup> will constitute the debtor a non-resident and defeat his exemption. It is otherwise where he goes to another state for a temporary purpose only, intending to return to his former abode as soon as practicable or convenient.<sup>50</sup>

for shipment by one who intends to quit the state permanently. *Herzfeld v. Beazley*, 106 Ala. 447, 17 So. 623; *Wood v. Bresnahan*, 63 Mich. 614, 30 N. W. 206.

[c] **Sending family to another state** with the intention of following is not sufficient. *Stirman v. Smith*, 10 Ky. L. Rep. 665, 10 S. W. 131.

[d] **In Iowa** by §3076 of the code, a debtor who has "started to leave" the state has exempt only the ordinary wearing apparel of himself and family and such other property in addition as he may select in all not exceeding seventy-five dollars in value. Under this provision a defendant has "started to leave" the state, when he makes preparations to leave. *Graw v. Manning*, 54 Iowa 719, 7 N. W. 150.

[e] **"About To Leave the State."** In Missouri the statute allows execution against any person who is about to leave the state. *Mignogna v. Chiapparelli*, 151 Mo. App. 359, 131 S. W. 769.

47. *Anthony A. C. & Co. v. Wade*, 1 Bush (Ky.) 110; *Bonnel v. Dunn*, 28 N. J. L. 153.

[a] **In Transitu.**—"An avowed intention on his part to remove, and a packing up for that purpose, did not deprive him of the character of house-keeper; nor would he cease to be such while in transitu from one place to another any more than an intention to remove would deprive a man of his residence or domicile." *Anthony v. Wade*, 1 Bush (Ky.) 110.

[b] **In West Virginia**, where non-residence under exemption statutes means the same thing as it does in attachment, a debtor becomes a non-resident when he actually begins his journey to the other state with the intention to abandon his residence. *State v. Allen*, 48 W. Va. 154, 35 S. E. 990, 86 Am. St. Rep. 29, 50 L. R. A. 284.

48. **La.**—*Lambeth v. Milton*, 2 Rob. 81. **Mich.**—*McHugh v. Curtis*, 48 Mich. 262, 12 N. W. 163. **Minn.**—*Orr v. Box*, 22 Minn. 485. **Mo.**—*Stotesbury v. Kirt-*

*land*, 35 Mo. App. 148. **N. C.**—*Cromer v. Self*, 149 N. C. 164, 62 S. E. 885. **Pa.** *Dock v. Cauldwell*, 19 Pa. Super. 51.

[a] **An absconding debtor** who has departed the state without any intention of returning and becomes a resident of another jurisdiction cannot avail himself of the benefits of exemption laws. *Grimestad v. Lofgren*, 105 Minn. 286, 117 N. W. 515, 127 Am. St. Rep. 566; *Orr v. Box*, 22 Minn. 485.

[b] **A fugitive from justice** who leaves the state to escape the consequences of crime, intending to remain away indefinitely, is a non-resident within the exemption laws. *Cromer v. Self*, 149 N. C. 164, 62 S. E. 885.

[c] **Facts evidencing an intention** on the part of one who deserted his wife and left the state, not to return to the state, sufficiently refute his claim of citizenship. *Dock v. Cauldwell*, 19 Pa. Super. 51.

49. *Stotesbury v. Kirtland*, 35 Mo. App. 148.

[a] **An indeterminate or floating intention** to return to the state from which removed is not sufficient. *McDowell v. Friedman Bros. Shoe Co.*, 135 Mo. App. 276, 115 S. W. 1028.

[b] **At Some Uncertain Time.**—One who has been a resident but has removed from the state with the expectation of returning at some uncertain time is not entitled to exemptions. *Munds v. Cassidy*, 98 N. C. 558, 4 S. E. 353.

50. **Ala.**—*Herzfeld v. Beazley*, 106 Ala. 447, 17 So. 623. **Ark.**—*Birdsong v. Tuttle*, 52 Ark. 91, 12 S. W. 158, 20 Am. St. Rep. 156. **Mich.**—*Erickson v. Draskowski*, 94 Mich. 551, 54 N. W. 283. **Minn.**—*Thompson v. Peterson*, 122 Minn. 228, 142 N. W. 307. **Mo.**—*Griffith v. Bailey*, 79 Mo. 472; *McDowell v. Friedman Bros. Shoe Co.*, 135 Mo. App. 276, 115 S. W. 1028. **N. C.**—*Chitty v. Chitty*, 118 N. C. 647, 24 S. E. 517, 32 L. R. A. 394. **Tenn.**—*Keelin v. Graves*, 129 Tenn. 103, 165 S. W. 232.

[a] **Prolonged Absence.**—"But, at all events, one who is domiciled in

(II.) **Family Relation.**—(A.) **IN GENERAL.**—It is not so much the debtor himself as it is his family that exemption laws aim to protect.<sup>51</sup> The person, it is true, is sometimes described simply as “debtor” and “defendant,”<sup>52</sup> and again certain exemptions are reserved to individ-

Tennessee, although he may be temporarily absent from the state for a considerable length of time on business, is entitled to hold his exempt property free from attachment or execution for debt, even though such absence be so prolonged as to justify an attachment in lieu of personal service as to other kinds of property.” *Keelin v. Graves*, 129 Tenn. 163, 165 S. W. 232.

[b] **A bona fide residence prior to departure** must have been acquired, otherwise a declared intention to return will not avail anything. *In re Dinglehoeft*, 109 Fed. 866.

[c] “In order to determine whether one is a resident of this state in this sense, it is necessary, in some instances, to ascertain the intent of the party. When one has been such a resident, a removal from its limits, with intent not to return, will at once deprive him of the privileges incident to his residence here; but the absence may be intended to be of such a temporary nature as to avoid the consequences above—it is for the jury to determine. In which case it may be important to learn the purpose of the party and the circumstances of the removal. Was it for the purpose of engaging in business? the kind of business? did he take with him all his property?” *Jones v. Alsbrough*, 115 N. C. 46, 20 S. E. 170.

51. **Ala.**—*Keiffer v. Barney*, 31 Ala. 192; *Sallee v. Waters*, 17 Ala. 482. **Ind.** *Green v. Simon*, 17 Ind. App. 360, 46 N. E. 693. **Ky.**—*McMurray v. Shuck*, 6 Bush 111, 99 Am. Dec. 662; *Bell v. Keach*, 80 Ky. 42, 3 Ky. L. Rep. 520. **Me.**—*Everett v. Herrin*, 46 Me. 357, 74 Am. Dec. 455. **N. Y.**—*Blake v. Bolte*, 9 Misc. 714, 30 N. Y. Supp. 209. **Tex.**—*Ray v. Curry* (Tex. Civ. App.), 126 S. W. 26. **Wash.**—*Peerless Pacific Co. v. Burekhard*, 90 Wash. 221, 155 Pac. 1037.

[a] “The evident purpose and meaning of the law-making power in placing the exempted property beyond the reach of creditors, was to enable the head of the household to provide for himself and his family or those who

are living with him and dependent upon him for a support.” *Brooks v. Collins*, 11 Bush (Ky.) 622.

[b] “The object of the exemption laws was doubtless to protect from execution, and secure to the immediate family of the debtor, he being a bona fide housekeeper, the enumerated articles; the family consisting of those that the debtor was in legal contemplation bound to provide for by obligations higher than such as bound him to pay his debts, and who, from tender years and other disabilities were unable to provide for themselves.” *McMurray v. Shuck*, 6 Bush (Ky.) 111, 99 Am. Dec. 662.

[c] **Form of Statute Immaterial.** “Though the particular statute under consideration, as is the case here, makes the exemptions in favor of the judgment debtor *eo nomine*, the courts do not regard them as conferring a personal right upon the debtor, but rather as declaring a family right which may be asserted effectively by the wife or any other person upon whom, for the time, the care of the family has been cast.” *Mennell v. Wells*, 51 Mont. 141, 149 Pac. 954.

[d] **The statute exempting the wearing apparel** of a householder and his family was designed for the protection of poor and destitute families and not for the benefit of one who is neither a householder nor dependent upon a householder for his support. *Bowne v. Witt*, 19 Wend (N. Y.) 475. *Compare Bumpus v. Maynard*, 38 Barb. (N. Y.) 626.

[e] **Operatives hired by the debtor** to prosecute his business either in cultivating a farm or the performance of other service, are not intended to be protected by the exemption laws. *McMurray v. Shuck*, 6 Bush (Ky.) 111, 99 Am. Dec. 662.

52. *In re Eberhart's Appeal*, 39 Pa. 509, 80 Am. Dec. 536; *Swaney v. Doumont*, 44 Pa. Super. 49; *Strouse's Exr. v. Becker*, 38 Pa. 190, 80 Am. Dec. 474; *Fisher v. Elliott*, 11 Phila. (Pa.) 344, 33 Leg. Int. 140.

[a] **A terre tenant** is neither de-

uals, irrespective of their connection with a family;<sup>53</sup> but the debtor to whom exemptions are allowed is usually designated as "part of a family,"<sup>54</sup> "member of the family,"<sup>55</sup> or "head of a family."<sup>56</sup>

(B.) WHAT CONSTITUTES A FAMILY.—Just what the term "family" means within the contemplation of exemption statutes is difficult of ascertainment. From the various definitions thereof appearing in the cases,<sup>57</sup> it may be deduced that a family exists within the purview of

fendant nor debtor within the meaning of the statute. *In re Eberhart's Appeal*, 39 Pa. 509, 80 Am. Dec. 536.

[b] A sub-tenant or assignee of the original tenant who has never been recognized by the landlord cannot claim the exemption on a distress levied upon his goods, where the process is in the name of the original lessee. *Rosenberger v. Hallowell*, 3 Phila. (Pa.) 330.

[c] "The goods of the wife of a tenant on the demised premises may be seized for rent and the wife is not entitled as against the landlord to the benefit of the exemption law. She is not a defendant nor debtor within the meaning of the act. *Swaney v. Doumont*, 44 Pa. Super. 49.

[d] A garnishee, debtor of the defendant, is entitled to the exemption. *Fisher v. Elliott*, 11 Phila. (Pa.) 344, 33 Leg. Int. 140.

53. *Snow v. West*, 35 Utah 206, 99 Pac. 674, 136 Am. St. Rep. 1047; *Geiger v. Kobilka*, 26 Wash. 171, 66 Pac. 423, 90 Am. St. Rep. 733.

[a] Wearing apparel in actual use is exempt to all persons on grounds of common justice. *Mumpus v. Maynard*, 38 Barb. (N. Y.) 626.

[b] Aged and infirm persons are sometimes given exemptions. *Allen v. Pearce*, 101 Ga. 316, 28 S. E. 859, 65 Am. St. Rep. 306, 39 L. R. A. 710.

54. *Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. 747.

[a] Part of Family.—Where a single man, twenty-five years of age, resides in Kansas and his father and mother and unmarried sister reside in Illinois and the son has not resided with his father and mother and unmarried sister for about seven years, he is not a part of his father's family within the meaning of the exemption laws even though he helps support his mother and sisters. *Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. 747.

55. *Bowne v. Witt*, 19 Wend. (N. Y.) 475.

56. *Ala.—McAlister & Co. v. Rob-*

*ins*, 100 Ark. 540, 140 S. W. 732. Fla. *Jetton Lumb. Co. v. Hall*, 67 Fla. 61, 64 So. 440, 51 L. R. A. (N. S.) 1121. Ga.—*Bennett v. Trust Company*, 106 Ga. 578, 32 S. E. 625; *Smith v. Berman*, 8 Ga. App. 262, 68 S. E. 1014. Ind. *Green v. Simon*, 17 Ind. App. 360, 46 N. E. 693. Ia.—*Blair v. Fritz*, 162 Iowa 716, 144 N. W. 611; *Lames v. Armstrong*, 162 Iowa 327, 144 N. W. 1, 49 L. R. A. (N. S.) 691; *Union County Inv. Co. v. Messix*, 152 Iowa 412, 132 N. W. 823; *Pease v. Price*, 101 Iowa 57, 69 N. W. 1120. Kan.—*Harrison v. Foster*, 94 Kan. 284, 146 Pac. 355; *Jackman v. Lambertson*, 71 Kan. 138, 80 Pac. 55. Ky.—*Jarboe v. Hayden*, 133 Ky. 378, 117 S. W. 961. Mo.—*Mignogna v. Chiaffarelli*, 151 Mo. App. 359, 131 S. W. 769. Mont.—*Mennell v. Wells*, 51 Mont. 141, 149 Pac. 954. N. D.—*Woods v. Teeson*, 31 N. D. 610, 154 N. W. 797. Okla.—*Nicholson v. Binion*, 158 Pac. 384. S. C.—*Rookard v. Atlanta & C. Air Line Ry. Co.*, 89 S. C. 371, 71 S. E. 992. Tex.—*Carroll v. First State Bank* (Tex. Civ. App.), 148 S. W. 818; *Ray v. Curry* (Tex. Civ. App.), 126 S. W. 26. Wash.—*Peerless Pacific Co. v. Burekhard*, 90 Wash. 221, 155 Pac. 1037.

[a] "Person with a family." *Wilson's Assignee v. Wilson*, 101 Ky. 731, 42 S. W. 404.

57. See cases following.

[a] "A 'family' is a collection of persons living under one roof, having one head or management. . . . The relation existing among the group must be of a permanent and domestic character." *Blair v. Fritz*, 162 Iowa 716, 144 N. W. 611.

[b] "A collective body of persons who live in one house under one head or manager." *Duncan v. Frank*, 8 Mo. App. 286.

[c] "The word 'family' as used in the exemption laws, we think embraces a collective body of persons, generally relatives and servants—a household, living together in one house or curtil-

these laws where there is a domestic association of persons upon one of whom devolves the duty, moral or legal, to support the others and a corresponding state of dependence upon the part of the members so supported.<sup>58</sup> The group must be of a domestic and permanent character.<sup>59</sup> The relation is one of social status, not of mere contract,<sup>60</sup> and an abiding together temporarily as strangers or for convenience, there being no legal or moral obligation on the part of one to support the others, does not constitute the group a family.<sup>61</sup> It is sometimes regarded as essential that the defendant members reside with the debtor.<sup>62</sup> Estrangement or temporary separation is, however, not usually considered sufficient to disrupt the family relation;<sup>63</sup> but continued separ-

age—and does not embrace separate individuals who have no common home.” *Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. 747.

[d] **Support or Dependence.**—“To constitute one or more persons, with another, living together in the same house, a family, it must appear that they are being supported by that other in whole or in part, and are dependent on him therefor and, further, that he is under a natural or moral obligation to render such support.” *Sheehy v. Scott*, 128 Iowa 551, 104 N. W. 1139, 4 L. R. A. (N. S.) 365.

[e] **Relationship and Residence.** “To constitute a family within the meaning of the act, the relation of parent and child, or that of husband and wife, must exist; there must be a condition of dependence on the one or the other of these relations; but it is not necessary that all the dependents should live under the same roof, or that the family should live together; it is the relation and the dependence on that relation, not the aggregation of the individuals, that constitutes a family—*Abercrombie v. Alderson*, 9 Ala. 981; *Allen v. Manassee & Mosely*, 4 Ala. 554.” *Sallee v. Waters*, 17 Ala. 482.

[f] **For other definitions, see:** *Ark.* *Harbison v. Vaughn*, 42 Ark. 539. *Cal.* *Re Lamb's Est.*, 95 Cal. 397, 30 Pac. 568; *Lawson v. Lawson*, 15 Cal. App. 496, 115 Pac. 461, 464. *Ill.*—*Holnbeck v. Wilson*, 159 Ill. 148, 42 N. E. 169. *Ia.*—*Arnold v. Waltz*, 53 Iowa 706, 6 N. W. 40, 36 Am. St. Rep. 248. *Kan.* *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529; *Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. 747. *Ky.*—*Carter v. Adams*, 9 Kv. L. Rep. 91, 4 S. W. 36. *Miss.*—*Pearson v. Miller*, 71 Miss. 379, 14 So. 731, 42 Am. St. Rep. 470. *Mo.* *Murdock v. Dalby*, 13 Mo. App. 41;

*Duncan v. Frank*, 8 Mo. App. 286. *S. C.* *Moyer v. Drummond*, 32 S. C. 165, 10 S. E. 952, 17 Am. St. Rep. 850, 7 L. R. A. 747; *Bradley v. Rodelsperger*, 3 S. C. 226. *Tex.*—*Wilson v. Cochran*, 31 Tex. 677. *Vt.*—*Town of Landgrove v. Town of Pawlet*, 20 Vt. 309.

58. See the cases in the preceding note.

59. *In re Opava*, 235 Fed. 779; *Blair v. Fritz*, 162 Iowa 716, 144 N. W. 611.

60. *Ky.*—*Scholl v. Laurenz*, 14 Ky. L. Rep. 228. *Mo.*—*State v. Kane*, 42 Mo. App. 253; *Murdock v. Dalby*, 13 Mo. App. 41. *Tex.*—*Roco v. Green*, 50 Tex. 483.

61. *Blair v. Fritz*, 162 Iowa 716, 144 N. W. 611; *Blake v. Bolte*, 9 Misc. 714, 30 N. Y. Supp. 209.

62. See *U. S.*—*Jones v. Gray*, 3 Woods 494, 13 Fed. Cas. No. 7,463. *Kan.*—*Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. 747. *Mo.*—*Duncan v. Frank*, 8 Mo. App. 286.

But see *Sallee v. Waters*, 17 Ala. 482.

[a] **A married woman** residing in the state, who has no children, and whose husband is a non-resident, has no family within the contemplation of the exemption law. *Keiffer v. Barney*, 31 Ala. 192.

[b] **A single man**, residing in Kansas while his father, mother and sister reside in Illinois, and he has been absent from them for seven years, is not part of the family within the exemption laws. *Zimmerman v. Franke*, 34 Kan. 650, 9 Pac. 747.

63. *Ark.*—*Gates v. Steele*, 48 Ark. 539, 4 S. W. 53. *Ky.*—*Carrington v. Herrin*, 4 Bush 624. *Mich.*—*Pettit v. Muskegon Boom Co.*, 74 Mich. 214, 41 N. W. 900. *Mo.*—*Whitehead v. Tapp*, 69 Mo. 415; *State v. Fin*, 8 Mo. App. 261. *N. Y.*—*Woodward v. Murray*, 18

ation of either spouse, amounting to desertion, will sometimes destroy the relation.<sup>64</sup> Among the various groups constituting a family in the sense of the statute may be mentioned husband and wife;<sup>65</sup> parent and child;<sup>66</sup> brothers and sisters;<sup>67</sup> brother supporting a brother;<sup>68</sup> a sister supporting her sister;<sup>69</sup> an aunt or uncle and nieces or nephews;<sup>70</sup> grandparent and grandchild;<sup>71</sup> widow and servants;<sup>72</sup> and guardian and minor child.<sup>73</sup>

Johns. 400. **Tex.**—Smith v. McBryde (Tex. Civ. App.), 173 S. W. 234; Shook v. Shook (Tex. Civ. App.), 145 S. W. 682.

[a] "The man who has a wife and child dependent on him for support is the head of a family, though they do not reside under the same roof. The wife and child not appearing to have any permanent home elsewhere than with plaintiff's relator, their domicile was with him, though there may have been a temporary separation for economical or other causes." State v. Finn, 8 Mo. App. 261.

64. Linton v. Crosby, 56 Iowa 386, 9 N. W. 311, 41 Am. Rep. 107; Hammond v. Pickett (Tex. Civ. App.), 158 S. W. 174.

[a] Where after divorce from bed and board the husband moves to another state, and contributes nothing to the support of the wife and child who continue to live in the other state, the group under such circumstances does not constitute a family. Hammond v. Pickett (Tex. Civ. App.), 158 S. W. 174.

65. Cal.—Williams v. Young, 17 Cal. 403. Ga.—Nelson v. Commercial Bank, 80 Ga. 328, 9 S. E. 1075; Dismuke v. Eady, 80 Ga. 289, 5 S. E. 494; Barfield v. Barfield, 72 Ga. 668. Ill.—Kitchell v. Burgevin, 21 Ill. 40. Ky.—Holburn v. Pfanmiller's Admr., 114 Ky. 831, 71 S. W. 940; Dowd v. Hurley, 78 Ky. 260. La.—Hebert v. Mayer, 47 La. Ann. 563, 17 So. 131. Miss.—Trotter v. Dobbs, 38 Miss. 198. S. C.—Chafee & Co. v. Rainey, 21 S. C. 11. Tenn.—Dye v. Cooke, 88 Tenn. 275, 12 S. W. 631, 17 Am. St. Rep. 882; Morgan v. Fowler, 2 Yerg. 450. Va.—Oppenheim v. Myers, 99 Va. 582, 39 S. E. 218.

[a] Though Alone and Without Children.—Cox v. Stafford, 14 How. Pr. (N. Y.) 519.

66. Ark.—Hollis v. State, 59 Ark. 211, 27 S. W. 73, 43 Am. St. Rep. 28. Ill.—People v. Stitt, 7 Ill. App. 294. Ia.—Parsons v. Livingston, 11 Iowa

104, 77 Am. Dec. 135. Ky.—Wilson's Assignee v. Wilson, 101 Ky. 731, 42 S. W. 404; Herring v. Johnston, 24 Ky. L. Rep. 1940, 72 S. W. 793. La.—Hardin v. Wolf, 29 La. Ann. 333. Mich.—Stilson v. Gibbs, 53 Mich. 280, 18 N. W. 815. Mo.—Nash v. Norment, 5 Mo. App. 545. N. Y.—Cantrell v. Conner, 6 Daly 224, 51 How. Pr. 45; Robinson's Case, 3 Abb. Pr. 466. Ohio.—Sears v. Hanks, 14 Ohio St. 298, 84 Am. Dec. 378. Tex.—Farmer v. Hale, 14 Tex. Civ. App. 73, 37 S. W. 164.

[a] A Widower and His Mother. Parsons v. Livingston, 11 Iowa 104, 77 Am. Dec. 135.

67. U. S.—In re Opava, 235 Fed. 779. Ill.—Wike v. Garner, 179 Ill. 257, 53 N. E. 613. Ind.—Graham v. Crockett, 18 Ind. 119. Ky.—McMurray v. Shuck, 6 Bush 111, 99 Am. Dec. 662. Mo.—Wade v. Jones, 20 Mo. 75, 61 Am. Dec. 584; Duncan v. Frank, 8 Mo. App. 286. S. C.—Moyer v. Drummond, 32 S. C. 165, 10 S. E. 952, 17 Am. St. Rep. 850, 7 L. R. A. 747.

[a] A man and his widowed sister and her children. Wade v. Jones, 20 Mo. 75, 61 Am. Dec. 584.

68. Webster v. McGauvran, 8 N. D. 274, 78 N. W. 80.

69. Chamberlain v. Brown, 33 S. C. 597, 11 S. E. 439.

70. American Nat. Bank v. Cruger, 31 Tex. Civ. App. 17, 71 S. W. 784.

71. U. S.—Ladiga v. Roland, 2 How. 581, 11 L. ed. 387. Fla.—Adams v. Clark, 48 Fla. 205, 37 So. 734. Ga.—Hall v. Matthews, 68 Ga. 490. Kan.—Cross v. Benson, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560. Ky.—Sweeney v. Ross, 12 Ky. L. Rep. 861, 15 S. W. 357; Collins v. Gibson, 12 Ky. L. Rep. 1338, 54 S. W. 945. La.—Hebert v. Mayer, 48 La. Ann. 938, 20 So. 170. Tex.—Smith v. Wright, 13 Tex. Civ. App. 480, 36 S. W. 324.

72. Race v. Oldridge, 90 Ill. 250, 32 Am. Rep. 27.

73. Rountree v. Dennard, 59 Ga. 629, 27 Am. Rep. 401.

(C.) HEAD OF THE FAMILY. — (1.) *In General*. — There can be but one head of the family within the meaning of the statutes,<sup>74</sup> and who that person is must be ascertained from the facts of each case.<sup>75</sup> Statutes sometimes define the term or at least designate the persons included therein.<sup>76</sup> In general the head of the family is the one who controls, supervises and manages the affairs of the household and whose duty it is to support the same,<sup>77</sup> even though he contribute in part only.<sup>78</sup> That the obligation to render such support is merely a moral one is sufficient in some states to constitute the person head of a family,<sup>79</sup> but elsewhere a legal obligation must be shown.<sup>80</sup>

74. *Forbes v. Groves*, 134 Mo. App. 729, 115 S. W. 451.

[a] Both husband and wife have, however, been held entitled to exemptions of real and personal property owned by them respectively. *Friday v. Glasser*, 14 Pa. Super. 94.

75. *Jetton Lumber Co. v. Hall*, 67 Fla. 61, 64 So. 440, 51 L. R. A. (N. S.) 1121.

76. Kan.—*Harrison v. Foster*, 94 Kan. 284, 146 Pac. 355; *Seymour, Sabin & Co. v. Cooper*, 26 Kan. 539. Mont.—*Mennell v. Wells*, 51 Mont. 141, 149 Pac. 954. Utah.—*Bunker B. Coons*, 21 Utah 164, 60 Pac. 549. Wash.—*Peerless Pacific Co. v. Burekhard*, 90 Wash. 221, 155 Pac. 1037.

77. U. S.—*In re Morrison*, 110 Fed. 734. Ga.—*Bennett v. Trust Company*, 106 Ga. 578, 32 S. E. 625; *Holloway v. Holloway*, 86 Ga. 576, 12 S. E. 943, 22 Am. St. Rep. 484, 11 L. R. A. 518; *Marsh v. Lazenby*, 41 Ga. 153; *Smith v. Berman*, 8 Ga. App. 262, 68 S. E. 1014. Ia.—*Blair v. Fritz*, 162 Iowa 716, 144 N. W. 611. La.—*Taylor v. McElvin*, 31 La. Ann. 283. Mo.—*Broyles v. Cox*, 153 Mo. 242, 54 S. W. 488, 77 Am. St. Rep. 714; *Ridenour-Baker Groc. Co. v. Monroe*, 142 Mo. 165, 43 S. W. 633; *Forbes v. Groves*, 134 Mo. App. 729, 115 S. W. 451. N. D.—*Webster v. McGauvran*, 8 N. D. 274, 78 N. W. 80. Okla.—*Rotater v. King*, 13 Okla. 37, 73 Pac. 291.

[a] Occupying a position of honor in the family, with some control in its affairs and contributing occasionally to its support, is not sufficient. *Forbes v. Groves*, 134 Mo. App. 729, 115 S. W. 451.

[b] "It is one thing to aid and assist in the support of the family, and quite another to assume control of the household and manage and supervise the matters about the house. And, we might add, it is one thing to be hon-

ored as the patriarch of the family, and quite another to possess real and final authority in its affairs." *Forbes v. Groves*, 134 Mo. App. 729, 115 S. W. 451.

[c] One who lived with his son, and in lieu of paying board, gave the family the use of the house and lot rent free, worked in the garden a little and once in a while bought something for the table, is not the head of the family. *Forbes v. Groves*, 134 Mo. App. 729, 115 S. W. 451.

[d] Not Necessary To Be Husband or Father.—*Ridenour-Baker Grocery Co. v. Monroe*, 142 Mo. 165, 43 S. W. 633.

[e] The occupation of the claimant or the use to which the articles are put cannot affect his right of exemption as head of a family. *Wilhite v. Williams*, 41 Kan. 288, 21 Pac. 256; *Young v. Bell*, 1 Kan. App. 265, 40 Pac. 675.

78. *Forbes v. Groves*, 134 Mo. App. 729, 115 S. W. 451; *Ness v. Jones*, 10 N. D. 587, 88 N. W. 706, 88 Am. St. Rep. 755. See also next following section.

79. *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584; *Forbes v. Groves*, 134 Mo. App. 729, 115 S. W. 451; *State v. Kane*, 42 Mo. App. 253.

[a] "While there was no legal obligation on the part of this widow to support the minor children of her husband, yet we think that, inasmuch as she undertook to keep them together, and to care for and support them, as the evidence shows she did, they all remained members of the testator's family, and she thereby became the head of that family." *Holloway v. Holloway*, 86 Ga. 576, 12 S. E. 943.

80. Ala.—*Sallee v. Waters*, 17 Ala. 482. Ga.—*Dendy v. Gamble*, 64 Ga. 528; *Calhoun v. McLendon*, 42 Ga. 405. But see *Holloway v. Holloway*, 86 Ga. 576, 12 S. E. 943, 22 Am. St. Rep. 484, 11 L. R. A. 518. N. Y.—*Blake v. Bolte*,

(2.) *The Husband*.—Where the wife and husband are living together the law recognizes the husband as the head of the family,<sup>81</sup> notwithstanding he may contribute little,<sup>82</sup> or nothing,<sup>83</sup> to the support of the family. The husband may continue to be the head of the family, though he be living apart from his wife,<sup>84</sup> contributes nothing to her support,<sup>85</sup> and has attempted to procure a divorce,<sup>86</sup> or is adjudicated insane.<sup>87</sup>

(3.) *The Wife*.—Under certain circumstances the wife may become the head of the family. She has been regarded as such in some cases where she is the main support of the family,<sup>88</sup> where she is separated from her husband by agreement,<sup>89</sup> or is divorced from him,<sup>90</sup> or has

9 Misc. 714, 30 N. Y. Supp. 209. *Ohio*. *Riley v. Hitzler*, 49 Ohio St. 651, 32 N. E. 753.

[a] **The father of an illegitimate child**, who resides with and supports the child and its mother, is not the "head of a family," or a "householder," as defined in statutes providing that every person who has residing with him or her and under his care and maintenance his or her minor child, is a householder and head of a family. The term "child" means legitimate child. *Peerless Pac. Co. v. Burkhardt*, 90 Wash. 221, 155 Pac. 1037.

81. *Ga.*—*Bennett v. Trust Company*, 106 Ga. 578, 32 S. E. 625; *Robson v. Walker*, 74 Ga. 823; *Morgan v. State*, 63 Ga. 307; *Neal v. Sawyer*, 62 Ga. 352; *Smith v. Berman*, 8 Ga. App. 262, 68 S. E. 1014. *Ill.*—*Clinton v. Kidwell*, 82 Ill. 427; *Arnold v. Coleman*, 88 Ill. App. 608; *Farwell Co. v. Martin*, 65 Ill. App. 55; *Temple v. Freed*, 21 Ill. App. 238. *La.*—*Fuselier v. Buckner*, 28 La. Ann. 594. *Okla.*—*Nicholson v. Binion*, 158 Pac. 384.

[a] **A wife who carries on business** in her own name and with her own money is still not the head of the family, where it appears she did not exclusively control the earnings and the business in general. *Farwell Co. v. Martin*, 65 Ill. App. 55.

82. *Ness v. Jones*, 10 N. D. 587, 88 N. W. 706, 88 Am. St. Rep. 755.

83. *Johnson v. Little*, 90 Ga. 781, 17 S. E. 294; *Muir v. Howell*, 37 N. J. Eq. 39.

[a] **Where physically unable to work** and possessed of no property or means of support, he is still the head of the family. *Johnson v. Little*, 90 Ga. 781, 17 S. E. 294.

[b] **Though the wife support the minor children and the husband as well**, he being too lazy to work, that

does not make her the head of the family. *Barry v. Western Assur. Co.*, 19 Mont. 571, 49 Pac. 148, 61 Am. St. Rep. 530.

[c] **The husband's liability for the wife's contracts** made for the necessities of support and maintenance is sufficient to constitute him head of the family though he contributes nothing to the support of the family. *Ray v. Curry* (Tex. Civ. App.), 126 S. W. 26.

84. *Keiffer v. Barney*, 31 Ala. 192; *Ray v. Curry* (Tex. Civ. App.), 126 S. W. 26.

85. *Ray v. Curry* (Tex. Civ. App.), 126 S. W. 26. See *supra* this section.

86. *Ray v. Curry* (Tex. Civ. App.), 126 S. W. 26.

87. *Neal v. Sawyer*, 62 Ga. 352; *Union County Inv. Co. v. Messix*, 152 Iowa 412, 132 N. W. 823; *Van Doran v. Marden*, 48 Iowa 186.

88. *Ark.*—*Memphis & L. R. Ry. Co. v. Adams*, 46 Ark. 159. *Kan.*—*Harrison v. Foster*, 94 Kan. 284, 146 Pac. 355. *Ky.*—*Wilson's Assignee v. Wilson*, 101 Ky. 731, 42 S. W. 404. *La.*—*Ginsberg v. Groner*, 117 La. 268, 41 So. 569. *Minn.*—*Boelter v. Klossner*, 74 Minn. 272, 77 N. W. 4, 73 Am. St. Rep. 347.

But see section immediately preceding.

[a] **Though the spouses live together and contribute jointly to the family support**, the wife may claim exemption under Gen. St., 1894, §5459. *Boelter v. Klossner*, 74 Minn. 272, 77 N. W. 4, 73 Am. St. Rep. 347.

[b] **Where the wife owns and manages the hotel wherein she, her husband and child reside**, she is entitled to exemptions as head of a family. *Harrison v. Foster*, 94 Kan. 284, 146 Pac. 355.

89. *Kenley v. Hudelson*, 99 Ill. 493, 39 Am. Rep. 31.

90. *Hammond v. Pickett* (Tex. Civ. App.), 158 S. W. 174.

been abandoned by him,<sup>91</sup> or where her husband has absconded.<sup>92</sup>

(4.) *A Widower*.—A widower is entitled to claim exemptions as head of a family where he is under a moral or legal obligation to support dependents,<sup>93</sup> but not otherwise.<sup>94</sup>

(5.) *A Widow*.—A widow with dependents, adult or minor, is the head of a family.<sup>95</sup> Her claim to exemptions, as such must, however, rest

91. **Ark.**—*White v. Swann*, 68 Ark. 102, 56 S. W. 635, 82 Am. St. Rep. 282; *Hollis v. State*, 59 Ark. 211, 27 S. W. 73, 43 Am. St. Rep. 28. **Ill.**—*Berry v. Hanks*, 28 Ill. App. 51; *People v. Stitt*, 7 Ill. App. 294. **Ky.**—*Baum v. Turner*, 25 Ky. L. Rep. 600, 76 S. W. 129. **Mo.** *Nash v. Norment*, 5 Mo. App. 545. **Mont.**—*Mennell v. Wells*, 51 Mont. 141, 149 Pac. 954. **Neb.**—*Frazier v. Syas*, 10 Neb. 115, 4 N. W. 934, 35 Am. Rep. 466. **Ohio.**—*Regan v. Zeeb*, 28 Ohio St. 483, 487.

[a] **Judgment Against Husband**.—A wife who has been abandoned may as the "head of the family" claim exemption as against judgment creditors of the husband. *Mennell v. Wells*, 51 Mont. 141, 149 Pac. 954.

92. **Fla.**—*Jetton Lumber Co. v. Hall*, 67 Fla. 61, 64 So. 440, 51 L. R. A. (N. S.) 1121. **Ia.**—*Union County Inv. Co. v. Messix*, 152 Iowa 412, 132 N. W. 823. **Mich.**—*Freehling v. Bresnahan*, 61 Mich. 540, 28 N. W. 531, 1 Am. St. Rep. 617. **Mo.**—*Griffith v. Bailey*, 79 Mo. 472; *Thomas & Son v. Brown*, 168 Mo. App. 667, 154 S. W. 423; *Martin v. Barnett*, 158 Mo. App. 375, 138 S. W. 538; *First Nat. Bank v. Morkamp*, 130 Mo. App. 118, 108 S. W. 1085. **Neb.** *State v. Wilson*, 31 Neb. 462, 48 N. W. 147; *Frazier v. Syas*, 10 Neb. 115, 4 N. W. 934, 35 Am. Rep. 466. **N. D.** *First Int. Bank v. Lee*, 25 N. D. 197, 141 N. W. 716. **Pa.**—*McCarthy's Appeal*, 68 Pa. 217; *Meitzler's Appeal*, 73 Pa. 368.

93. **Ala.**—*Sallee v. Waters*, 17 Ala. 482. **Fla.**—*Adams v. Clark*, 48 Fla. 205, 37 So. 734. **Ga.**—*Blackwell v. Broughton*, 56 Ga. 390. **Ind.**—*Bunnell v. Hay*, 73 Ind. 452. **Ia.**—*Parsons v. Livingston*, 11 Iowa 104, 77 Am. Dec. 135. **Ky.** *Collins v. Gibson*, 21 Ky. L. Rep. 1338, 54 S. W. 945. **La.**—*Lyons v. Andry*, 106 La. 356, 31 So. 38, 87 Am. St. Rep. 299, 55 L. R. A. 724; *Woods v. Perkins*, 43 La. Ann. 347, 9 So. 48. **N. H.**—*Barney v. Leeds*, 51 N. H. 253. **Tenn.**—*Flannegan v. Stifel*, 3 Tenn. Ch.

464. **Tex.**—*Farmer v. Hale*, 14 Tex. Civ. App. 73, 37 S. W. 164.

94. **Cal.**—*Santa Cruz Bank v. Cooper*, 56 Cal. 339; *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304. **Ga.**—*Walker v. Thomason*, 77 Ga. 682. **Ill.**—*Holnbeck v. Wilson*, 159 Ill. 148, 42 N. E. 169. **Ind.**—*Gregg v. Brickley*, 27 Ind. App. 154, 59 N. E. 1072. **Kan.**—*Gibson v. Gross*, 8 Kan. App. 548, 54 Pac. 796. **Ky.**—*Louisville Bkg. Co. v. Anderson*, 106 Ky. 744, 44 S. W. 636; *Bosquett v. Hall*, 90 Ky. 566, 13 S. W. 244, 29 Am. St. Rep. 404, 9 L. R. A. 551; *Carter v. Adams*, 9 Ky. L. Rep. 91, 4 S. W. 36. **Miss.**—*Powers v. Sample*, 72 Miss. 187, 16 So. 293; *Hill v. Franklin*, 54 Miss. 632. **Okla.**—*Betts v. Mills*, 8 Okla. 351, 58 Pac. 957. **Tex.** *Whitehead v. Nickelson*, 48 Tex. 517; *Mullins v. Looke*, 8 Tex. Civ. App. 138, 27 S. W. 926. **Va.**—*Oppenheim v. Myers*, 99 Va. 582, 39 S. E. 218.

But see *Hesnard v. Plunkett*, 6 S. D. 73, 60 N. W. 159.

[a] **Where living apart from his children**, whom he placed with his relatives, he is not the head of a family. *Gibson v. Gross*, 8 Kan. App. 548, 54 Pac. 796.

95. **Ga.**—*Holloway v. Holloway*, 86 Ga. 576, 12 S. E. 943, 22 Am. St. Rep. 484, 11 L. R. A. 518. **Ia.**—*Blair v. Fritz*, 162 Iowa 716, 144 N. W. 611. **Kan.**—*Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560. **Ky.** *Brooks v. Collins*, 11 Bush 622; *Riley v. Smith*, 9 Ky. L. Rep. 615, 5 S. W. 869. **Neb.**—*Chamberlain Bkg. House v. Zutavern*, 59 Neb. 623, 81 N. W. 858. **N. Y.**—*Cantrell v. Conner*, 6 Daly 224, 51 How. Pr. 45. **S. C.**—*Rookard v. Atlanta & C. Air Line Ry. Co.*, 89 S. C. 371, 71 S. E. 992. **Tenn.**—*Bachman v. Crawford*, 3 S. Humph. 213, 39 Am. Dec. 163. **Tex.**—*Wolfe v. Buckley*, 52 Tex. 641; *Smith v. Wright*, 13 Tex. Civ. App. 480, 36 S. W. 324. **Va.** *Oppenheim v. Myers*, 99 Va. 582, 39 S. E. 218.

[a] **A widow and servants have been**

upon an obligation to contribute to the support of those who have a right to look to her for it.<sup>96</sup>

(6.) *Single Persons*.—A single person may be the head of a family when he has persons residing with him to whom he must furnish support<sup>97</sup> in consequence of some moral or legal obligation.<sup>98</sup> Thus a son may be the head of a family,<sup>99</sup> even though the father or mother be still alive.<sup>1</sup> An unmarried woman may also become the head of a family.<sup>2</sup>

(D.) *SURVIVING WIDOW AND CHILDREN*.—Statutes in many states reserve to the surviving widow and children the exemptions that were allowed to the decedent in his lifetime.<sup>3</sup> The word children as used in this

held to constitute a family of which the widow was the head. *Race v. Oldridge*, 90 Ill. 250, 32 Am. Rep. 27.

96. Ill.—*Rock v. Haas*, 110 Ill. 528. Ia.—*Fullerton v. Sherrill*, 114 Iowa 511, 87 N. W. 419; *Emerson v. Leonard*, 96 Iowa 311, 65 N. W. 153, 59 Am. St. Rep. 372. Mo.—*Murdock v. Dalby*, 13 Mo. App. 41. Ohio.—*Brown v. Parham*, 25 Ohio Cir. Ct. 640.

97. U. S.—*In re Opava*, 235 Fed. 779; *Bailey v. Comings*, 16 N. B. R. 382, 2 Fed. Cas. No. 733. Cal.—*Ellis v. White*, 47 Cal. 73. Ia.—*Blair v. Fritz*, 162 Iowa 716, 144 N. W. 611. Kan.—*Seymour, Sabin & Co. v. Cooper*, 26 Kan. 539. Ky.—*Bell v. Keach*, 80 Ky. 42. Mo.—*Sternberg v. Levy*, 150 Mo. 617, 60 S. W. 1114, 53 L. R. A. 438; *Forbes v. Groves*, 134 Mo. App. 729, 115 S. W. 451; *Jarboe v. Jarboe*, 106 Mo. App. 459, 79 S. W. 1162. Okla.—*Roteler v. King*, 13 Okla. 37, 73 Pac. 291.

[a] Where a Roman Catholic priest lived with his sister, to whom under agreement he turned over all his earnings outside of his expenses for clothing, etc., she to maintain the household and keep as her property whatever was saved, he is "head of a family." *In re Opava*, 235 Fed. 779.

[b] A bachelor living on a farm with whom a widowed sister lives, having her furniture there and paying no board, is the head of a family. *Bailey v. Comings*, 16 N. B. R. 382, 2 Fed. Cas. No. 733.

[c] "It is not essential that a man be married to be the head of a family. It is enough to satisfy the statute if he contribute, in part, to the support of those who have a moral, though not a legal, claim on him." *Forbes v. Groves*, 134 Mo. App. 729, 115 S. W. 451.

98. Ala.—*Cochran v. Miller*, 74 Ala.

50; *Abercrombie v. Alderson*, 9 Ala. 981. Ga.—*Calhoun v. McLendon*, 42 Ga. 405. Ky.—*Gunn v. Gudehus*, 15 B. Mon. 447. N. Y.—*Bowne v. Witt*, 19 Wend. 475. S. C.—*Garaty v. Du Bose*, 5 S. C. 493. Tex.—*In re Summers*, 3 Nat. Bankr. Reg. 84. Va.—*Calhoun v. Williams*, 32 Gratt. (73 Va.) 18, 34 Am. Rep. 759.

99. Cal.—*Lawson v. Lawson*, 15 Cal. App. 496, 115 Pac. 461, 464. Ga.—*Marsh v. Lazenby*, 41 Ga. 153. Ia.—*Blair v. Fritz*, 162 Iowa 716, 144 N. W. 611. Kan.—*Seymour, Sabin & Co. v. Cooper*, 26 Kan. 539. Mo.—*Broyles v. Cox*, 153 Mo. 242, 54 S. W. 488, 77 Am. St. Rep. 714; *State v. Kane*, 42 Mo. App. 253. Okla.—*Roteler v. King*, 13 Okla. 37, 73 Pac. 291. S. C.—*Scott v. Mosely Bros.*, 54 S. C. 375, 32 S. E. 450. Tex.—*Barry v. Hale*, 2 Tex. Civ. App. 668, 21 S. W. 783. Utah.—*Bunker v. Coons*, 21 Utah 164, 60 Pac. 549. Vt.—*Hyser v. Mansfield*, 72 Vt. 71, 47 Atl. 105. Wis.—*Connaughton v. Sands*, 32 Wis. 387.

1. *Blair v. Fritz*, 162 Iowa 716, 144 N. W. 611.

[a] The presumption is that in such cases the child is not the head of the family, and the burden therefore is on him to establish such headship. *Blair v. Fritz*, 162 Iowa 716, 144 N. W. 611.

2. *Arnold v. Waltz*, 53 Iowa 706, 6 N. W. 40, 36 Am. St. Rep. 248; *Chamberlain v. Brown*, 33 S. C. 597, 11 S. E. 439.

[a] When living with children of deceased sister whom she supports. *Arnold v. Waltz*, 53 Iowa 706, 6 N. W. 40, 36 Am. St. Rep. 248.

[b] When supporting relatives whom she is under a moral obligation to care for, she is head of a family. *American Bank v. Cruger*, 31 Tex. Civ. App. 17, 71 S. W. 784.

3. Ia.—*In re Smith's Estate*, 165

connection includes in some jurisdictions adults as well as minors,<sup>4</sup> but in others it embraces minors alone.<sup>5</sup> It is not essential to the assertion of the exemption by the children that the widow be alive.<sup>6</sup>

(III.) **Householders.**—In a few of the states exemptions are reserved to persons who at the time were "householders."<sup>7</sup> A householder has been defined as one upon whom rests the duty of supporting the members of his family or household.<sup>8</sup> Like "head of a family" with which

Iowa 614, 146 N. W. 836; Perkins v. Hinckley, 71 Iowa 499, 32 N. W. 469. **Kan.**—Spencer v. Barker, 96 Kan. 360, 149 Pac. 736. **Ky.**—Myers's Admr. v. Forsythe, 10 Bush 394. **Miss.**—Grafton v. Smith, 66 Miss. 408, 6 So. 209; Hickman v. Ruff, 55 Miss. 549; Mason v. O'Brien, 42 Miss. 420; Holliday v. Holland, 41 Miss. 528; Wally v. Wally, 41 Miss. 657; Whitley v. Stephenson, 38 Miss. 113; Williams v. Hale, 12 Smed. & M. 562. **N. Y.**—See Becker v. Becker, 47 Barb. 497. **N. D.**—Woods v. Teeson, 31 N. D. 610, 154 N. W. 797 (construing §7731, Comp. Laws 1913, allowing \$500 to heads of families in addition to absolute exemptions, as not relating to survivors of deceased persons); Fore v. Fore's Est., 2 N. D. 260, 50 N. W. 712. **Pa.**—Matter of Wood, 1 Ashm. 314. **Tenn.**—Sneed v. Jenkins, 90 Tenn. 137, 16 S. W. 64; Johnson v. Henry, 12 Heisk. 696; Vincent, 1 Heisk. 333. **Tex.**—Abney v. Pope, 52 Tex. 288; Williams v. Hall, 33 Tex. 212; Fowler v. Gilmore, 30 Tex. 432. **Va.**—Edgewood Dist. Co. v. Rosser's Admr., 116 Va. 624, 82 S. E. 716.

[a] **Separation from husband** destroys the widow's right to exemption where there was no sufficient cause for the separation. Nye's Appeal, 126 Pa. 341, 17 Atl. 618, 12 Am. St. Rep. 873. 24 W. N. C. 121; Fyock's Est., 9 Lanc. L. Rev. (Pa.) 89.

4. Spencer v. Barker, 96 Kan. 360, 149 Pac. 736; Edgewood Dist. Co. v. Rosser's Admr., 116 Va. 624, 82 S. E. 716.

5. Cofer v. Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54.

6. Taylor v. Winnie, 59 Kan. 16, 51 Pac. 890, 68 Am. St. Rep. 339; Whitcomb v. Reid, 31 Miss. 567, 66 Am. Dec. 579.

7. **U. S.**—*In re* French, 231 Fed. 255. **Ind.**—Bipus v. Deer, 106 Ind. 135, 5 N. E. 894; Lowry v. McAlister, 86 Ind. 543; Gregg v. Brickley, 27 Ind. App. 154, 59 N. E. 1072. **Miss.**—Pear-

son v. Miller, 71 Miss. 379, 14 So. 731, 42 Am. St. Rep. 470. **N. Y.**—Brigham v. Bush, 33 Barb. 596; Griffin v. Sutherland, 14 Barb. 456; Woodward v. Murray, 18 Johns. 400; Chamberlain v. Darrow, 46 Hun 45; Fink v. Fraenkle, 20 Civ. Proc. 402, 14 N. Y. Supp. 440. **Wash.**—Peerless Pacific Co. v. Burckhard, 90 Wash. 221, 155 Pac. 1037; Peterson v. Bingham, 13 Wash. 178, 43 Pac. 22.

8. Astley v. Capron, 89 Ind. 167.

[a] **Other Definitions.**—(1) "A person who has members of his family dependent upon him for support, and who does support them is householder within the meaning of the law." Lowry v. McAlister, 86 Ind. 543. (2) "The term householder as used in the statute has a very well defined meaning and imports the master or head of a family who reside together and constitute a household." Chamberlain v. Darrow, 46 Hun (N. Y.) 48. (3) "All of this judicial reasoning, goes to establish that only a householder's property is exempt; that a householder is the master of a household; and that a household is a family living together, however, not necessarily wife and children, but it must be a family, small or large, for which he provides." Fink v. Fraenkle, 14 N. Y. Supp. 140. (4) The term householder "does not mean simply a housekeeper, but also a 'master or chief of a family.'" Griffin v. Sutherland, 14 Barb. (N. Y.) 456. (5) "A 'householder' may be said to be a person owning or holding and occupying a house." Pearson v. Miller, 71 Miss. 379, 14 So. 731, 42 Am. St. Rep. 470. (6) "The word householder, in this statute, means the head, master, or person who has the charge of, and provides for, a family." Bowne v. Witt, 19 Wend. (N. Y.) 475.

[b] **The following instruction defining a householder** was upheld in Astley v. Capron, 89 Ind. 167: "As to what constitutes a householder within the meaning of the statute, I in-

it is sometimes used synonymously,<sup>9</sup> the term usually, though not always,<sup>10</sup> imports an obligation to contribute to the support of dependents.<sup>11</sup> The householder need not be a husband or a father.<sup>12</sup> A single man,<sup>13</sup> a married woman,<sup>14</sup> a widow,<sup>15</sup> and a widower,<sup>16</sup> have been held

struct you that a householder is the father or head of a family whom he supports or assists in supporting. It is not necessary that the family should keep house in the ordinary sense of that term. The father, as head of a family, may put his family out to board and still be entitled to the benefit of the law." And see *Ind. Carpenter v. Dame*, 10 Ind. 125. *Mich. Pettit v. Muskegon Booming Co.*, 74 Mich. 214, 41 N. W. 900. *N. Y.—Brigham v. Bush*, 33 Barb. 596; *Woodward v. Murray*, 18 Johns. 400. *Wash.—Peerless Pacific Co. v. Burekhard*, 90 Wash. 221, 155 Pac. 1037; *Peterson v. Bingham*, 13 Wash. 178, 43 Pac. 22.

[c] **Effect of Hiring Domestic Servant.**—"The fact that the appellant secured the services of others to prepare and furnish food, and to take care of his furniture and rooms did not take from him the character of householder. The employment of the persons for the purpose mentioned was not in effect different from the hiring of servants and paying them daily or weekly wages." *Bunnell v. Hay*, 73 Ind. 452.

9. *Chamberlain v. Darrow*, 46 Hun (N. Y.) 48; *Peterson v. Bingham*, 13 Wash. 178, 43 Pac. 22.

10. *Bipus v. Deer*, 106 Ind. 135, 5 N. E. 894; *Kelley v. McFadden*, 80 Ind. 536.

[a] **One without a wife, child or other dependent**, who, with a hired servant, occupies a house and maintains a household, is a householder within the meaning of the exemption law. *Kelley v. McFadden*, 80 Ind. 536.

11. *Gregg v. Brickley*, 27 Ind. App. 154, 59 N. E. 1072; *Chamberlain v. Darrow*, 46 Hun (N. Y.) 48.

[a] **A father living alone** is not a householder though he have adult and minor children residing elsewhere, who are not dependent upon him and to whom he is under no obligation to support. *Gregg v. Brickley*, 27 Ind. App. 154, 59 N. E. 1072.

[b] **A widower with adult children** who had homes of their own is not a householder. The fact that his

daughter-in-law came to his house weekly, doing washing and baking and such things as were required to put the house in order, her children coming with her and usually remaining there over night, and sometimes two nights, but still residing at the house of her husband, who provided for her, was not effectual to make his home a household. *Chamberlain v. Darrow*, 46 Hun (N. Y.) 48.

[c] **An unmarried man** keeping house, with no children or dependents living with him is not entitled to exemptions as a householder. *Peterson v. Bingham*, 13 Wash. 178, 43 Pac. 22.

[d] **An unmarried physician**, having no family or any person for whom he provides is not entitled to exemptions. *Fink v. Fraenkle*, 20 Civ. Proc. 402, 14 N. Y. Supp. 140.

12. *U. S.—In re French*, 231 Fed. 255. *Ind.—Kelley v. McFadden*, 80 Ind. 536; *Graham v. Crockett*, 18 Ind. 119. *Miss.—Pearson v. Miller*, 71 Miss. 379, 14 So. 731, 42 Am. St. Rep. 470.

13. *In re French*, 231 Fed. 255; *Hutchinson v. Chamberlin*, 11 N. Y. Leg. Obs. 248.

[a] **A person living in a hired house** and keeping servants and boarders is a householder. *In re French*, 231 Fed. 255; *Van Vechten v. Hall*, 14 How. Pr. (N. Y.) 436; *Hutchinson v. Chamberlin*, 11 N. Y. Leg. Obs. 248. 14. *Brigham v. Bush*, 33 Barb. (N. Y.) 596.

[a] **Sole Traders.**—Especially in states where the statutes authorize her to carry on business transactions independent of their husbands. *Brigham v. Bush*, 33 Barb. (N. Y.) 596.

15. *Brigham v. Bush*, 33 Barb. (N. Y.) 596.

[a] **Though the widow remarries** and her second husband lives with her she may be a householder and claim an exemption as such, where she supports dependents. *Brigham v. Bush*, 33 Barb. (N. Y.) 596.

16. *Bipus v. Deer*, 106 Ind. 135, 5 N. E. 894, living with his daughter and contributing to the living expenses of her family.

to be householders. Actual housekeeping is not necessary to make one a householder.<sup>17</sup> The character of householder is not lost by a temporary ceasing of housekeeping, and storing of the property,<sup>18</sup> nor during a removal of the family from one place of residence to another;<sup>19</sup> nor need the family over which the claimant has headship and control be kept together as a unit continuously.<sup>20</sup>

(IV.) **Housekeeper.**—Where the statute gives certain exemptions to “a housekeeper with a family,”<sup>21</sup> it is not sufficient that the debtor be a housekeeper but he must be one with a family.<sup>22</sup> The family contemplated are those who reside with or compose the household of the debtor,<sup>23</sup> and whom he is under a natural or legal obligation to support.<sup>24</sup> A temporary abandonment of his home does not deprive him

[a] **Where living with his three children** at the house of his father-in-law, and supporting them, he is a householder. *Lowry v. McAlister*, 86 Ind. 543.

17. *Astley v. Capron*, 89 Ind. 167.

18. *Griffin v. Sutherland*, 14 Barb. (N. Y.) 456.

19. *Woodward v. Murray*, 18 Johns. (N. Y.) 406.

[a] **In Transitu.**—“To say, that a family, while in the act of removal, and on the highway, may be deprived of their bed, and their cow, on execution, because they did not, for the time, inhabit a dwelling-house, would be a perversion of the statute. So long as they remain together as a family without being broken up, and incorporated into other families, the privilege remains. It was designed as a protection for poor and destitute families.” *Woodward v. Murray*, 18 Johns. (N. Y.) 400.

20. *Bunnell v. Hay*, 73 Ind. 452; *Pearson v. Miller*, 71 Miss. 379, 14 So. 731, 42 Am. St. Rep. 470.

[a] **Temporary Separation.**—“The education of children, the illness of any members of the family, requiring change of climate, or mere absence, however protracted, if only temporary, for pleasure or recreation, will not, of course, dissolve the family relationship or break up the household.” *Pearson v. Miller*, 71 Miss. 379, 14 So. 731, 42 Am. St. Rep. 470.

[b] **Temporary absence in another state** does not change the debtor's character as a householder if he contemplates returning to his family when his business in the other state is finished. *Astley v. Capron*, 89 Ind. 167.

[c] **But one supporting a grandfather** has been denied exemptions as

a householder, where the grandfather lives and eats at another house. *Pearson v. Miller*, 71 Miss. 379, 14 So. 731, 42 Am. St. Rep. 470.

21. *Brooks v. Collins*, 11 Bush (Ky.) 622; *Seaton v. Marshall*, 6 Bush (Ky.) 429, 99 Am. Dec. 683; *Carrington v. Herrin*, 4 Bush (Ky.) 624; *Gunn v. Gudehus*, 15 B. Mon. (Ky.) 447; *Scholl v. Laurenz*, 14 Ky. L. Rep. 228; *Doolin v. Dugan*, 12 Ky. L. Rep. 749; *Carter v. White*, 10 Ky. L. Rep. 588; *Clark v. Miller*, 9 Ky. L. Rep. 402; *Carter v. Adams*, 9 Ky. L. Rep. 91, 4 S. W. 36.

22. *Gunn v. Gudehus*, 15 B. Mon. (Ky.) 447; *Carter v. Adams*, 9 Ky. L. Rep. 91, 4 S. W. 36.

23. *Seaton v. Marshall*, 6 Bush (Ky.) 429, 99 Am. Dec. 683.

[a] **A partial separation** from him will not destroy the household. *Seaton v. Marshall*, 6 Bush (Ky.) 429, 99 Am. Dec. 683, holding that a widower was a housekeeper with a family where it appeared that he had two infant daughters whom he kept in the care of his mother, providing for them; and sending one of them to school from his mother's house, while he himself occupied a single room, about one mile distant, as an office and dwelling, without servants or other family than his children, who were sometimes with him at his office where he lodged and cooked and ate his meals.

24. *Brooks v. Collins*, 11 Bush (Ky.) 622; *Seaton v. Marshall*, 6 Bush (Ky.) 429, 99 Am. Dec. 683; *Scholl v. Laurenz*, 14 Ky. L. Rep. 228; *Carter v. Adams*, 9 Ky. L. Rep. 91, 4 S. W. 36; *Clark v. Miller*, 9 Ky. L. Rep. 402; *Peerless Pacific Co. v. Burckhard*, 90 Wash. 221, 155 Pac. 1037.

[a] **Widower and his dead wife's**

of his character as housekeeper with a family;<sup>25</sup> nor do preparations to remove to another state.<sup>26</sup>

(V.) **Persons Engaged in Particular Occupations.**—(A.) **IN GENERAL.** In most states statutes exist exempting from execution property in the hands of persons engaged in designated occupations. Whether or not the debtor comes within any of the classes enumerated must be determined as of the time of the seizure.<sup>27</sup> The conditions of one occupation existing, a party is not deprived of the exemption, because he unites therewith another business not inconsistent with the former.<sup>28</sup>

(B.) **PARTICULAR APPLICATIONS.**—Statutes thus exempt certain enumerated articles to various persons such as physicians,<sup>29</sup> farmers,<sup>30</sup>

mother whom he supported. *Scholl v. Laurenz*, 14 Ky. L. Rep. 228.

[b] **A widower having two married daughters**, both of whom with their husbands board with him, cannot be considered as a "housekeeper with a family." *Carter v. Adams*, 9 Ky. L. Rep. 91, 4 S. W. 36.

[c] **Illegitimate Son.**—A defendant living in adultery with a woman, by whom he had a son, is under a natural and moral obligation to support the son, and the persons thus dwelling together constitute a household. *Bell v. Keach*, 80 Ky. 42.

[d] **Duty To Support Sufficient.**—In order to constitute a "family" within the meaning of the statute "housekeeper with a family," it is not necessary that the persons living with the debtor should be dependent upon him for support in the narrow and restricted sense of the word. It will suffice if the duty to support exists though the parties actually support themselves. *Doolin v. Dugan*, 12 Ky. L. Rep. 749.

[e] **Father and Self Supporting Daughter.**—A debtor was entitled to the exemptions allowed to a "housekeeper with a family," although his family consisted only of a daughter who supported herself by teaching school, and when not teaching, made her home with her father, fully compensating him for her board by the performance of household duties." *Doolin v. Dugan*, 12 Ky. L. Rep. 749.

25. *Carrington v. Herrin*, 4 Bush (Ky.) 624.

[a] **Where in consequence of domestic trouble** the debtor was staying at the house of a sister when the levy was made, but still continued to recognize the residence of his wife and children as his home, his character as housekeeper with a family continued.

*Carrington v. Herrin*, 4 Bush (Ky.) 624.

26. *Raseo v. Sheet & Son*, 8 Ky. L. Rep. 703. See *supra*, II, B, 5, b, (I), (A), (3).

27. **Cal.**—*Robert v. Adams*, 38 Cal. 383, 99 Am. Dec. 413; *Howell v. Boyd*, 2 Cal. App. 486, 84 Pac. 315. **La.**—*Ray v. Hayes*, 28 La. Ann. 641. **Pa.**—*Springer v. Lewis*, 22 Pa. 191.

28. *Edgecomb v. His Creditors*, 19 Nev. 149, 7 Pac. 533; *Springer v. Lewis*, 22 Pa. 191.

[a] **An agriculturist may in winter keep tavern, work as a tailor, or occupy himself in any other business without losing his character as one "actually engaged in the science of agriculture."** *Springer v. Lewis*, 22 Pa. 191.

29. *Sutton v. Facey*, 1 Mich. 243.

30. **Cal.**—*Howell v. Boyd*, 2 Cal. App. 486, 84 Pac. 315. **Ia.**—*Pease v. Price*, 101 Iowa 57, 69 N. W. 1120. **La.**—*Ray v. Hayes*, 28 La. Ann. 641. **Wash.**—*State v. McNeill*, 58 Wash. 47, 107 Pac. 1028, 137 Am. St. Rep. 1038.

[a] **If he is engaged in the business of farming** (1) it is enough. *Robert v. Adams*, 38 Cal. 383, 99 Am. Dec. 413; *Brusie v. Griffith*, 34 Cal. 302; *Howell v. Boyd*, 2 Cal. App. 486, 84 Pac. 315. (2) He need not actually do the acts that would constitute him a farmer. **Cal.**—*Howell v. Boyd*, 2 Cal. App. 486, 84 Pac. 315. **Ia.**—*Pease v. Price*, 101 Iowa 57, 69 N. W. 1120. **Wash.**—*State v. McNeill*, 58 Wash. 47, 107 Pac. 1028, 137 Am. St. Rep. 1038. (3) But where a farmer had given up every vestige of farming, sold most of his farming implements, sold his summer-fallow, the seeder, given up all leases he had, declared that he was tired of hard work, that crops were getting poor, and there was nothing in it,

agriculturists,<sup>31</sup> peddlers,<sup>32</sup> teamsters,<sup>33</sup> laborers,<sup>34</sup> or, as expressed in

abandoned his property, at least some of which he expected his father to take, sell and pay his debt in the bank, and according to his own statement did not know what he was going to do when he left California and has not found out since, it is sufficient to show that he was not engaged in farming. *Howell v. Boyd*, 2 Cal. App. 486, 84 Pac. 315.

[b] If a farmer at time of seizure, the fact that he was forced to quit farming the year following in consequence of the seizure, does not deprive him of his exemption. *Ray v. Hayes*, 28 La. Ann. 641.

[c] Temporary residence in town does not defeat his right if he intends to resume farming. *Pease v. Price*, 101 Iowa 57, 69 N. W. 1120.

31. *Simons v. Lovell*, 7 Heisk. (Tenn.) 510.

[a] **Agriculture Defined.**—The term agriculture “is used to signify that species of cultivation which is intended to raise grain and other field crops for man and beast. It is equivalent to husbandry, and husbandry, Webster defines to be the business of a farmer, comprehending agriculture or tillage of the ground, the raising, managing and fattening of cattle and other domestic animals, the management of the dairy and whatever the land produces.” *Simons v. Lovell*, 7 Heisk. (Tenn.) 510.

[b] **Cultivating a garden on a city lot**, does not constitute one an agriculturist. A butcher, therefore, who raises some vegetables on his acre lot is not entitled to the exemption. *Simons v. Lovell*, 7 Heisk. (Tenn.) 510.

[c] **Suspension during winter of his labors in the field** does not divest the agriculturer of his exemption. *Springer v. Lewis*, 22 Pa. 191.

32. *Stanton v. French*, 83 Cal. 194, 23 Pac. 355.

[a] **One who delivers bread to his wife's customers** is not a peddler as that term is used in the exemption statutes. *Stanton v. French*, 83 Cal. 194, 23 Pac. 355.

33. *Dove v. Nunan*, 62 Cal. 399.

[a] “**In the sense of the statute**, one is a teamster who is engaged with his own team or teams in the business of teaming, that is to say, in the busi-

ness of hauling freight for other parties, for a consideration, by which he habitually supports himself and family.” *Edgecomb v. His Creditors*, 19 Nev. 149, 7 Pac. 533.

[b] **A livery stable keeper** is not a teamster within the statute. *Edgecomb v. His Creditors*, 19 Nev. 149, 7 Pac. 533.

[c] **A coal dealer**, who used a team to haul coal and other commodities for other people for hire, occasionally hauling coal and wood from the coal yard to the place of retail, is not a teamster. *Dove v. Nunan*, 62 Cal. 399.

34. *Pennsylvania Coal Co. v. Costello*, 33 Pa. 241.

[a] **Laborer Defined.**—(1) “One who subsists by physical toil in distinction from one who subsists by professional skill. Where physical toil is the main ingredient of the services rendered, although directed and made more valuable by skill, the person performing them is a laborer within the meaning of the statute.” *Williams v. Link*, 64 Miss. 641. 1 So. 907. (2) “The common and ordinary signification of the term ‘labor’ accords, we think, with the definition given by the best lexicographers, and is understood to be physical toil. And the term ‘laborer’ is ordinarily employed to denote one who subsists by physical toil, in distinction from one who subsists by professional skill. The exception of claims for labor would not, therefore, ordinarily be understood to embrace the services of the clergyman, physician, lawyer, commission merchant, or salaried officer, agent, railroad, or other contractors, but would be confined to claims arising out of services, where physical toil was the main ingredient, although directed and made more valuable by mechanical skill; . . . and we are constrained to think that the term ‘labor’ was used in its primary and popular signification, restricted to claims arising from physical toil.” *Weymouth v. Sanborn*, 43 N. H. 171, 80 Am. Dec. 144. (3) For other definitions, see *Ark.*—*Taylor v. Hathaway*, 29 Ark. 597. *Minn.*—*Wildner v. Ferguson*, 42 Minn. 112, 43 N. W. 794. *N. Y.* *Dean v. De Wolf*, 82 N. Y. 626; *Erierson v. Brown*, 38 Barb. 390. *Ore.* *Johnston v. Barrills*, 27 Ore. 251, 41

some statutes, "other" laborers,<sup>35</sup> mechanics,<sup>36</sup> public officers,<sup>37</sup> those engaged in a "trade or profession,"<sup>38</sup> and to men in military service.<sup>39</sup>

c. *Against What Liabilities Exemption Prevails.*—(I.) In General. The exemptions allowed debtors by the various statutes are frequently if not generally limited to particular debts.<sup>40</sup> In addition thereto, the

Pac. 656, 50 Am. St. Rep. 717. Pa. Wentroth's Appeal, 82 Pa. 469; Seider's Appeal, 46 Pa. 57. Va.—Farinholt v. Luckhard, 90 Va. 936, 21 S. E. 817, 44 Am. St. Rep. 953.

35. Lames v. Armstrong, 162 Iowa 327, 144 N. W. 1, 49 L. R. A. (N. S.) 691; Krebs v. Nicholson, 118 Iowa 134, 91 N. W. 923, 96 Am. St. Rep. 370.

[a] **Meaning of Term.**—The construction to be given the words "other labors" should be such as to confine them to other laborers ejusdem generis with those named. Edgecomb v. His Creditors, 19 Nev. 149, 7 Pac. 533.

[b] **A Thresher.**—One whose principal business is that of thresher, though he derived some support from fishing and trapping, comes within the contemplation of the term "and other laborer." Jackman v. Lambertson, 71 Kan. 138, 80 Pac. 55.

36. U. S.—In re Bjornstad, 9 Biss. 13, 3 Fed. Cas. No. 1,453. Kan.—Gup-til v. McFee, 9 Kan. 30. Minn. Grimes v. Bryne, 2 Minn. 89.

[a] **A tailor** is within the exemption to a "mechanic, miner, or other person, etc." In re Jones, 2 Dill. 343, 13 Fed. Cas. No. 7,445.

[b] **An abstractor of titles** is not a mechanic within code 1873, §3072. Tyler v. Coulthard, 95 Iowa 705, 64 N. W. 681, 58 Am. St. Rep. 452. The code provision exempts to debtor, resident and head of family, tools, etc., of "farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor."

[c] **One who is neither a householder nor the head of a family** may be a mechanic within the meaning of subdivision 6, §5248 of Ballinger's Code. Geiger v. Kobilka, 26 Wash. 171, 66 Pac. 423, 90 Am. St. Rep. 733.

[d] **Need Not Be Married Man.** §5248, subd. 6, 2 Ball. Ann. Codes & St., exempts to a "mechanic and his family" certain articles of property. This term is construed to mean to a mechanic or his family, consequently

the mechanic need not be a married man. Geiger v. Kobilka, 26 Wash. 171, 66 Pac. 423, 90 Am. St. Rep. 733.

37. See the title "Officers."

38. In re Parker, 5 Sawy. 58, 18 Fed. Cas. No. 10,724; Betz v. Maier, 12 Tex. Civ. App. 219, 33 S. W. 710.

[a] **A publisher** of a weekly newspaper is included in the term "trade or profession." Green v. Raymond, 58 Tex. 80, 44 Am. Rep. 601.

[b] **Members of a firm of printers** belong to a trade within the statute. St. Louis Foundry v. International Live Stock P. & P. Co., 74 Tex. 651, 12 S. W. 842, 15 Am. St. Rep. 870.

[c] **A drayman** is within the statute. Cone v. Lewis, 64 Tex. 331, 333, 53 Am. Rep. 767.

[d] **A warehouseman** is not entitled to the exemption reserved to debtors engaged in "trade, occupation or profession." In re Parker, 5 Sawy. 58, 18 Fed. Cas. No. 10,724.

39. Ia.—Steffenbiel v. Gifford, 23 Iowa 515; Abrahams v. Bartlet, 18 Iowa 513. N. J.—Walker v. Anderson, 18 N. J. L. 217. N. Y.—Shields v. Craney, 3 Wend. 274. Pa.—Jefferis v. Shearer, 5 Phila. 330.

[a] **A law of Texas** enacted in 1843 exempted from forced sale the property of "such persons as are now in the army of Texas, or as may hereafter be mustered into the service of the republic by virtue of the law of the land." Highsmith v. Ussery, 25 Tex. Supp. 97.

[b] **"That the individual property** of every volunteer soldier from this state, not above the rank of captain shall be and is hereby declared exempt during the term he shall be in said service and two months thereafter from levy and sale . . . under or by virtue of any judgment or decree rendered or hereafter to be rendered by any of the courts of this state." Steffenbiel v. Gifford, 23 Iowa 515.

40. See generally the statutes, and the discussion herein.

**Insurance money** is usually exempt

statutes have made specific exceptions as to certain classes of debts.<sup>41</sup> Such statutes do not make the specified debts a lien on the debtor's property,<sup>42</sup> but simply render otherwise exempt property liable to seizure and sale for the specified debts.<sup>43</sup>

In harmony with the rule that exemption statutes will be liberally construed in favor of the debtor, the exceptions thereto are to be strictly construed,<sup>44</sup> and a creditor seeking to claim the benefits thereof must bring himself within them.<sup>45</sup> He must have a proper judgment or decree.<sup>46</sup> Some statutes require that the judgment and execution contain a statement showing that the cause of action is within the statutory exception,<sup>47</sup> but otherwise this is not necessary.<sup>48</sup>

(II.) **Limitation of Exemption to Judgments on Contract.**—(A.) **IN GENERAL.** Many statutes allow exemptions only against executions issued for the collection of any debt or of debts contracted.<sup>49</sup> These statutes are gen-

from certain named debts only. See II, B, 5, a, (III), (D), (2), (a).

**Exemption to heir against debt owing the estate,** see 12 STANDARD PROC. 948.

41. See *Hobbs v. Eaton*, 38 Ind. App. 628, 78 N. E. 333, and *infra*, this section.

42. *Mich.*—*Lillibridge v. Walsh*, 104 Mich. 153, 62 N. W. 172, 97 Mich. 459, 56 N. W. 854. *Minn.*—*Nickerson v. Crawford*, 74 Minn. 366, 77 N. W. 292, 73 Am. St. Rep. 354. *Mo.*—*Straus v. Rothan*, 102 Mo. 261, 14 S. W. 940.

**Exception as to purchase money debt as creating a lien,** see *infra*, II, B, 5, e, (VI), (D).

43. *Nickerson v. Crawford*, 77 Minn. 366, 77 N. W. 292, 73 Am. St. Rep. 354.

44. *Dickinson v. Rahn*, 98 Ill. App. 245 (construing an exception as to wages); *Epps v. Epps*, 17 Ill. App. 196; *Kelly v. Hines*, 6 Ohio Dec. (Reprint) 988, construing exception in favor of claims for work and labor. But see *Whitaker v. Elliott*, 73 N. C. 186 (holding the words in a constitutional exception are not to be taken in a narrow and technical sense); *Farmer v. Greer Fertilizer Co.*, 102 S. C. 285, 86 S. E. 639.

45. *Ill.*—*Dickinson v. Rahn*, 98 Ill. App. 245. *N. D.*—*Wagner v. Olson*, 3 N. D. 69, 54 N. W. 286. *Pa.*—*Moskovitz v. Orangers*, 13 Pa. Dist. 153.

[a] **Where the exception applies only to certain subdivisions of the statute,** the right to subject the property by virtue of the exception depends upon whether the property is within the subdivision to which the

exception applies. *Feenstra v. Tanis*, 145 Mich. 409, 108 N. W. 674.

**Determination whether action is in contract or tort under the exemption statutes,** see *infra*, II, B, 5, e, (II), (A).

**Effect of character of process upon right of exemption against a claim for rent,** see *infra*, II, B, 5, e, (XI).

46. *McGaughey v. Meek*, 1 White & W. Civ. Cas. (Tex.) §1196.

[a] **A creditor who has unadjudicated claims enforceable against exempt property cannot on that account seize such property on an ordinary judgment for debt.** *McGaughey v. Meek*, 1 White & W. Civ. Cas. (Tex.) §1196.

47. *Bundy v. Harris*, 151 Ill. App. 461 (wages); *Hart v. Mayhugh*, 75 Mo. App. 121; *Buis v. Cooper*, 63 Mo. App. 196, judgment for services.

[a] **A judgment omitting these recitals is valid as a general judgment,** however. *Hart v. Mayhugh*, 75 Mo. App. 121; *Buis v. Cooper*, 63 Mo. App. 196.

48. *Rogers v. Brackett*, 34 Minn. 279, 25 N. W. 601 (relating to purchase money); *Shreck v. Gilbert*, 52 Neb. 813, 73 N. W. 276, where action is for money received by an attorney for another.

49. **U. S.**—*In re Owens*, 6 Biss. 432, 18 Fed. Cas. No. 10,632 under Indiana statute. *Ala.*—*Northern v. Hanners*, 121 Ala. 587, 25 So. 817, 77 Am. St. Rep. 74; *McDaniel v. Johnston*, 110 Ala. 526, 19 So. 35; *Penton v. Diamond*, 92 Ala. 610, 9 So. 175; *Schuessler v. Dudley*, 80 Ala. 547, 2 So. 526, 60 Am. Rep. 124. *Ark.*—*Kirby's Dig.* §§3903,

erally held to be confined to judgments upon contract,<sup>50</sup> but some cases hold otherwise.<sup>51</sup> Although the statute may not expressly so declare, the exemption is allowed where the judgment is upon an implied as well as an express contract.<sup>52</sup>

The determination whether the action is contract or otherwise for this purpose is not to be tested by the form of action solely,<sup>53</sup> but rather by the cause of action as set out in the complaint.<sup>54</sup> This fact must be determined by the pleadings and issues in the case.<sup>55</sup>

3904; *Miller v. Minturn*, 73 Ark. 183, 83 S. W. 918; *Massie v. Enyart*, 33 Ark. 688. Ind.—*State ex rel. Kelly v. Morgan*, 160 Ind. 474, 67 N. E. 186; *Goldthait v. Walker*, 134 Ind. 527, 34 N. E. 378; *De Hart v. Haun*, 126 Ind. 378, 26 N. E. 61; *Keller v. McMahan*, 77 Ind. 62; *Terrell v. State*, 66 Ind. 570; *State ex rel. Haven v. Melogue*, 9 Ind. 196; *Donaldson v. Banta*, 5 Ind. App. 71, 29 N. E. 362. Ind. Ter.—*Gaines v. Toles*, 1 Ind. Ter. 543, 37 S. W. 946. Miss.—*Smith v. Brown*, 28 Miss. 810. Pa.—*Bradley v. West Chester St. Ry. Co.*, 160 Pa. 72, 28 Atl. 500, 34 W. N. C. 78; *Pierce's Appeal*, 103 Pa. 27; *Kenyon v. Gould*, 61 Pa. 292; *Lane v. Baker*, 2 Grant Cas. 424; *Pierce v. Lewis*, 27 W. N. C. 400; *Washburn v. Baldwin*, 10 Phila. 472; *Danner v. Fritz*, 2 North. 67. Va.—*Jewett v. Ware*, 107 Va. 802, 60 S. E. 131.

[a] A judgment in a suit for injury to goods in transportation by a common carrier is one for a "debt" within the statute. *McDaniel v. Johnston*, 110 Ala. 526, 19 So. 35.

[b] An action for breach of promise of marriage although in form trespass, is in substance contract and the defendant is entitled to his exemption. *Keim v. Brumbaugh*, 29 Pa. Super. 557.

[c] An action of debt for rent collected for the plaintiff is within the statute, allowing exemption from judgments on contract. *Bank v. Ziegler*, 4 Kulp (Pa.) 407.

[d] A decree settling partnership accounts is *ex contractu* so as to entitle the defendant to his exemption. *Walbridge v. Bell*, 4 Walk. (Pa.) 354; *McTague v. Rehill*, 2 Montg. Co. L. Rep. (Pa.) 35.

[e] A claim for rent is a "debt contracted." *Crane v. Waggoner*, 33 Ind. 83; *Mason v. O'Brien*, 42 Miss. 420.

50. See *infra*, II, B, 5, c, (II), (B).

[a] By judgments upon "debts contracted" the legislature meant judgments upon personal contract. *Edwards v. Mahon*, 5 Phila. (Pa.) 531.

[b] By "judgments obtained on contract" "is undoubtedly meant judgments on contract of the person against whom they may be executed—that is, judgments against the persons of the parties which may be levied on the goods or lands of the debtor generally, and not judgments *de terris* against specific real estate, which may be executed against such estate, without any contract whatever between the plaintiff and the owner." *Laucks' Appeal*, 24 Pa. 426.

51. See *infra*, II, B, 5, c, (II), (B).

52. *Johnson v. Collier*, 161 Ala. 204, 49 So. 761.

53. *Johnson v. Collier*, 161 Ala. 204, 49 So. 761.

54. *Johnson v. Collier*, 161 Ala. 204, 49 So. 761; *McDaniel v. Johnston*, 110 Ala. 526, 19 So. 35.

55. *Gentry v. Purcell*, 84 Ind. 83; *Green v. Simon*, 17 Ind. App. 360, 46 N. E. 693. See *Pickrell v. Jerauld*, 1 Ind. App. 10, 27 N. E. 433, 50 Am. St. Rep. 192, holding certain parol evidence inadmissible.

As to the determination whether action is *ex contractu* or *ex delicto*, see 1 STANDARD PROC. 413; 4 STANDARD PROC. 625, 641, 651; 5 STANDARD PROC. 359; 10 STANDARD PROC. 222.

[a] Duty of Sheriff.—When a claim of exemption is lodged with the sheriff, he has a right and it is his duty to look to the judgment on which the execution was issued and to the complaint upon which the judgment is based to determine whether the debtor is entitled to an exemption, but he cannot go beyond this. *Johnson v. Collier*, 161 Ala. 204, 49 So. 761. Compare *McLaren v. Anderson*, 81 Ala. 106, 8 So. 188.

[b] A phrase in the judgment, "without relief from valuation and

Where a plaintiff waives the tort and sues wholly in contract, the debtor is entitled to his exemption.<sup>56</sup>

**Judgment for Money Lost on a Wager.**—A cause of action for the recovery of money lost by wagering, is one founded upon contract within the statute,<sup>57</sup> but it is otherwise where the action is brought by the state to recover the money lost for the loser's wife or children.<sup>58</sup>

(B.) WHERE JUDGMENT IS IN TORT. — A statute allowing exemptions against an execution on a judgment for a debt does not give an exemption from execution on a judgment in a tort action,<sup>59</sup> though some cases hold the contrary.<sup>60</sup> Under such a statute the debtor is not en-

appraisement laws," is not conclusive that the judgment is one upon contract. *Gentry v. Purcell*, 84 Ind. 83.

[c] **The use of terms importing tortious acts** in characterizing the procurement of a contract and its breach will not convert the action from contract to tort. *Jewett v. Ware*, 107 Va. 802, 60 S. E. 131.

56. Ark.—*St. Louis, I. M. & S. Ry. Co. v. Hart*, 38 Ark. 112. Ind.—*Nowling v. McIntosh*, 89 Ind. 593, holding no waiver appeared. Pa.—*Wireman v. Mueller*, 20 W. N. C. 19, 7 Atl. 592, 18 W. N. C. 84; *Bank v. Ziegler*, 4 Kulp 467.

[a] **The waiver must appear upon the pleadings and issues.** *Nowling v. McIntosh*, 89 Ind. 593.

57. *Johnson v. Collier*, 161 Ala. 204, 49 So. 761.

[a] **A judgment on a complaint containing a count for money had and received and a count for so much money lost by plaintiff on a wager is a judgment in contract and the exemption prevails against it.** *Johnson v. Collier*, 161 Ala. 204, 49 So. 761.

58. *State ex rel. Kelly v. Morgan*, 160 Ind. 474, 67 N. E. 186, holding the amount recovered is a penalty to suppress gambling.

59. Ala.—*Johnson v. Collier*, 161 Ala. 204, 49 So. 761; *Richardson v. McCreary & Co.*, 158 Ala. 65, 48 So. 341, 132 Am. St. Rep. 17; *Taylor v. Dwyer*, 131 Ala. 91, 32 So. 509; *Northern v. Hanners*, 121 Ala. 587, 25 So. 817, 77 Am. St. Rep. 74; *Dangaix v. Lunsford*, 112 Ala. 403, 20 So. 639; *Wright v. Jones*, 103 Ala. 539, 15 So. 852; *Stuckey v. McKibbin*, 92 Ala. 622, 8 So. 279; *Meredith v. Holmes*, 68 Ala. 190. Ark.—*Miller v. Minturn*, 73 Ark. 183, 83 S. W. 918; *Cason v. Bone*, 43 Ark. 17; *Smith v. Ragsdale*, 36 Ark. 297; *Massie v. Enyart*, 33 Ark. 688. Ga.

*Davis v. Henson*, 29 Ga. 345. Ind. *Ries v. McClatchey*, 128 Ind. 125, 27 N. E. 349; *De Hart v. Haun*, 126 Ind. 378, 26 N. E. 61; *Russell v. Cleary*, 105 Ind. 502, 5 N. E. 414; *Nowling v. McIntosh*, 89 Ind. 593; *State v. Melogue*, 9 Ind. 196; *Donaldson v. Banta*, 5 Ind. App. 71, 29 N. E. 362. Ind. Ter.—*Gaines v. Toles*, 1 Ind. Ter. 543, 37 S. W. 946. Pa.—*Kenyon v. Gould*, 61 Pa. 292; *Gangwere's Appeal*, 36 Pa. 466; *Kirkpatrick v. White*, 29 Pa. 176; *Pierce v. Lewis*, 27 W. N. C. 400. Va.—*Whiteacre v. Rector*, 29 Gratt. (70 Va.) 714, 26 Am. Rep. 420.

[a] **A judgment in a slander suit against the husband for tortious language of the wife is not a judgment resulting from his marriage contract or its breach but for her tort and there is no exemption allowed to the husband.** *McCabe v. Berge*, 89 Ind. 225.

60. Ill.—*Loomis v. Gerson*, 62 Ill. 11; *Conroy v. Sullivan*, 44 Ill. 451, under a statute exempting property from any debt contracted and a statute declaring it to be the object of the legislature to prevent alienation in any case except by the consent of the wife. N. C.—*Oakley v. Lasater*, 89 S. E. 1063; *Gill v. Edwards*, 87 N. C. 76; *Dellinger v. Tweed*, 66 N. C. 206. Wis.—*Smith v. Omans*, 17 Wis. 395.

[a] **Debt or Liability Contracted.** Under a statute making certain exemptions from forced sales "for any debt or liability contracted" it was contended that the word debt included only that which is owing upon agreement and that if there were any doubt about it the use of the word contracted removed it. But it was held otherwise, the court saying: "But this is giving to those words a much narrower sense than that in which they were obviously used. For the word 'liability,' used in conjunction with

titled to an exemption as against a judgment for damages for obtaining property by false pretenses,<sup>61</sup> or for damages for the unlawful detention of real<sup>62</sup> or personal<sup>63</sup> property, or for damages for trespass,<sup>64</sup> fraud or deceit,<sup>65</sup> misconduct of an officer,<sup>66</sup> or malpractice of a physician or surgeon.<sup>67</sup>

(C.) WHERE JUDGMENT IS FOR A PENALTY.—A judgment for a statutory penalty is not a judgment for a "debt contracted,"<sup>68</sup> and it has been held that a judgment in an action of debt for penalty is not within the statute.<sup>69</sup>

(D.) WHERE JUDGMENT IS ON BOND—Judgments on bonds of fiduciaries and officials are judgments on contract within the exemption statutes according to some authorities,<sup>70</sup> but not according to others.<sup>71</sup> Bonds or recognizances required in the course of a suit or in a proceeding on a judgment or on execution are held not to be contracts within the meaning of the statute,<sup>72</sup> although there is authority to the con-

the word 'debt,' is broad enough to include all claims, whether founded upon tort or contract. And although there may be a technical distinction between 'debt' and 'damages,' still the word 'debt' itself is commonly and generally used to describe all obligations to pay money, whether arising from contract or imposed by law as a compensation for injuries. And in this general sense the word was evidently used in this statute, and the word 'contracted' does not mean founded upon a contract, but it was used in its more general sense as equivalent to 'incurred.' " *Smith v. Omans*, 17 Wis. 395.

61. *Nowling v. McIntosh*, 89 Ind. 593.

As to exception where debt is for property obtained by false pretenses, see *infra*, II, B, 5, c, (XIII).

62. *Ala.*—*Penton v. Diamond*, 92 Ala. 610, 9 So. 175, ejectment. *Ind.* *Smith v. Wood*, 83 Ind. 522; *Dorrell v. Hannah*, 80 Ind. 497; *Thomas v. Walmer*, 18 Ind. App. 112, 46 N. E. 695. *Pa.*—*Smith v. Carter*, 17 Phila. 344, action against tenant holding over.

See 7 STANDARD PROC. 982.

[a] A statutory action for use and occupation by an owner of lands against one who occupied them, is in the nature of assumpsit, and the debtor is entitled to an exemption. *St. Louis, I. M. & S. Ry. Co. v. Hart*, 38 Ark. 112.

[b] *Unlawful Detainer.*—*Gaines v. Toles*, 1 Ind. Ter. 543, 37 S. W. 946.

63. *U. S.*—*In re Owens*, 6 Biss. 432, 18 Fed. Cas. No. 10,632, replevin. *Ala.*

*Stuckey v. McKibbin*, 92 Ala. 622, 8 So. 379, detinue. *Ark.*—*Smith v. Ragsdale*, 36 Ark. 297, detinue.

64. *Danner v. Fritz*, 2 North. (Pa.) 67.

65. *Edwards v. Mahon*, 5 Phila. (Pa.) 531.

66. *Kirkpatrick v. White*, 29 Pa. 176.

67. *Miller v. Minturn*, 73 Ark. 183, 83 S. W. 918.

68. *Williams v. Bowden*, 69 Ala. 433; *Keller v. McMahan*, 77 Ind. 62.

69. *Johnson v. Collier*, 161 Ala. 204, 49 So. 761; *Crawford v. Slaton*, 133 Ala. 393, 31 So. 940.

[a] Although *ex contractu*, a judgment in an action of debt to recover a penalty is not one against which a claim of exemption can be asserted as it is not an action for the recovery of a debt within the meaning and intent of the statute. *Johnson v. Collier*, 161 Ala. 204, 49 So. 761; *Crawford v. Slaton*, 133 Ala. 393, 31 So. 940.

70. *Green v. Simon*, 17 Ind. App. 360, 46 N. E. 693 (guardian's bond); *Com. v. Brown*, 17 Pa. Super. 520.

71. *Schuessler v. Dudley*, 80 Ala. 547, 2 So. 526, 60 Am. Rep. 124, holding that a judgment on a tax collector's bond recovered in a summary action for money presumptively converted is a judgment in the nature of one *ex delicto* so far as the principal debtor is concerned. It is a judgment for an official defalcation, not for a debt contracted.

72. *Smith v. Brown*, 28 Miss. 810; *Pierce v. Lewis*, 27 W. N. C. (Pa.) 400 (replevin bond); *Edwards v. Withrow*,

trary.<sup>73</sup> It has been held that an appeal bond is subsidiary to the judgment appealed from, and the right of the appellant to exemption from a judgment on the appeal bond is to be determined by the character of the original action.<sup>74</sup>

(E.) WHERE CONTRACT AND NONCONTRACT ACTIONS ARE JOINED. — If a right of action in contract and one not on contract be united, and a judgment be recovered in such form as to preclude separating one from the other, the judgment will be treated as a judgment rendered on contract so as to entitle the debtor to his exemption.<sup>75</sup> But it is otherwise if the amount recovered in the non-contract right of action may be ascertained. In such case the defendant can pay that amount and claim his exemption as to the remainder.<sup>76</sup>

(III.) Exemption Against Judgment for Costs. — (A.) IN CIVIL ACTIONS. Generally it is held that costs are a mere incident to a suit and a judgment for costs partakes of the nature of the suit in which it is rendered.<sup>77</sup> Hence, generally the execution defendant is entitled to his exemption if the suit was *ex contractu*,<sup>78</sup> but not in case of a tort action,<sup>79</sup> or a special proceeding.<sup>80</sup> The general rule prevails where the

22 W. N. C. (Pa.) 576, recognizance as bail on appeal.

[a] A delivery bond is not a contract within the statute. *Smith v. Brown*, 28 Miss. 810.

[b] A judgment upon a forfeited recognizance given in a criminal case (1) is not a judgment on contract within the meaning of the exemption statute (*Com. v. Savage*, 30 Pa. Super. 364; *Com. v. Dougherty*, 8 Phila. [Pa.] 366), even (2) though assumption is brought to enforce the recognizance. *Com. v. Savage*, 30 Pa. Super. 364.

[c] Judgment Against Plaintiff and Bondsmen. — A judgment in unlawful detainer against the plaintiff and his bondsmen is in tort. The fact that the judgment was rendered against the principal and his surety on the bond does not change the nature of the demand from tort to contract. *Gaines v. Toles*, 1 Ind. Ter. 543, 37 S. W. 946.

73. *State v. Williford*, 36 Ark. 155, 38 Am. Rep. 34; *Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46.

[a] A bail bond is a "debt by contract." *State v. Williford*, 36 Ark. 155, 38 Am. Rep. 34.

[b] Replevin Bail in Bastardy Proceeding. — A judgment on the undertaking of a replevin bail in a bastardy proceeding is a judgment on contract entitling the bail to his exemption. *Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46.

74. *Pennsylvania Life Ins. Co. v. Bruner*, 41 Pa. Super. 358; *Ramsdell v. Seybert*, 14 Pa. Dist. 247.

75. *Ries v. McClatchey*, 128 Ind. 125, 27 N. E. 349; *Thomas v. Walmer*, 18 Ind. App. 112, 46 N. E. 695.

76. *Ries v. McClatchey*, 128 Ind. 125, 27 N. E. 349; *Keller v. McMahan*, 77 Ind. 62; *Thomas v. Walmer*, 18 Ind. App. 112, 46 N. E. 695.

77. See 5 STANDARD PROC. 791.

78. *Clingman v. Kemp*, 57 Ala. 195, explained in *Stuckey v. McKibbin*, 92 Ala. 622, 8 So. 379, as intending to apply to judgments for costs rendered only in actions *ex contractu*.

[a] Under a statute providing that if defendant's realty cannot be divided, the plaintiff may sell the whole and the defendant may demand out of the proceeds so much as he would have received at the appraised value had the land been divided, no deduction for costs can be made until defendant's claim to exemption is paid. *Hain v. Rhoads*, 7 Pa. Co. Ct. 568.

79. *Northern v. Hanners*, 121 Ala. 587, 25 So. 817, 77 Am. St. Rep. 74; *Stuckey v. McKibbin*, 92 Ala. 622, 8 So. 379.

80. *Mengel v. McGee*, 22 Pa. Dist. 671.

[a] Against an execution for costs in a mandamus proceeding, the defendant is not entitled to an exemption. *Mengel v. McGee*, 22 Pa. Dist. 671.

plaintiff is successful in the action,<sup>81</sup> even though the principal judgment is merely for a nominal amount.<sup>82</sup> But it has been held that though the action be upon contract, a judgment for costs against the plaintiff is statutory and not an incident of the contract and is not within the exemption.<sup>83</sup> And an unsuccessful plaintiff in an action in tort,<sup>84</sup> or in an action which is purely statutory,<sup>85</sup> cannot ordinarily claim an exemption against a judgment for costs, though it has been held that a judgment for costs rendered against a plaintiff, even in an action of trover, should be considered as a judgment for debt on contract, and he may claim his exemption.<sup>86</sup>

**Fee Bill.**—Exemptions are allowed to a fee bill debtor the same as to an execution debtor.<sup>87</sup>

(B.) IN CRIMINAL ACTIONS.<sup>88</sup>—A defendant has been allowed his exemption against costs imposed in a criminal proceeding.<sup>89</sup>

(IV.) **Exemption From Order or Judgment for Alimony and Maintenance.** The right to exemption from execution on a decree for alimony is elsewhere discussed.<sup>90</sup>

81. Ark.—*Edwards v. Thayer*, 122 Ark. 579, 184 S. W. 64; *Massie v. Enyart*, 33 Ark. 688. Ind.—*Church v. Hay*, 93 Ind. 323; *Donaldson v. Banta*, 5 Ind. App. 71, 29 N. E. 362. Pa.—*Mengel v. McGee*, 22 Pa. Dist. 671; *Strohecker v. Buffington*, 1 Pearson 124; *Danner v. Fritz*, 2 North. 67 (costs in a suit in ejectment). Compare *Estate of Taylor*, 9 Pa. Co. Ct. 293, 20 Phila. 101, 47 Leg. Int. 25, holding an execution for costs against a guardian in a proceeding to remove him, he not being guilty of any fraudulent conduct is an execution upon his implied contract to pay should he prove unsuccessful. To same effect *Harting v. Grant*, 2 Woodw. (Pa.) 127.

82. *Donaldson v. Banta*, 5 Ind. App. 71, 29 N. E. 362.

83. *Edwards v. Thayer*, 122 Ark. 579, 184 S. W. 64; *Buckley v. Williams*, 84 Ark. 187, 105 S. W. 95, 120 Am. St. Rep. 24, 13 Ann. Cas. 258; *Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; *Donaldson v. Banta*, 5 Ind. App. 71, 29 N. E. 362.

84. *In re Owens*, 6 Biss. 432, 18 Fed. Cas. No. 10,632 in an action of replevin; *Russell v. Cleary*, 105 Ind. 502, 5 N. E. 414.

85. *State ex rel. Wingler v. McIntosh*, 100 Ind. 439.

86. *Bradley v. West Chester St. Ry. Co.*, 160 Pa. 72, 28 Atl. 500, 34 W. N. C. 78; *Pierce's Appeal*, 103 Pa. 27; *Lane v. Baker*, 2 Grant Cas. (Pa.) 424. See *In re Owens*, 6 Biss. 432, 18 Fed. Cas. No. 10,632.

87. *Farris v. Smithpeter*, 180 Mo. App. 466, 166 S. W. 655; *Bradley v. West Chester Ry. Co.*, 160 Pa. 72, 28 Atl. 500, 34 W. N. C. 78; *Pierce's Appeal*, 103 Pa. 27.

[a] See *In re Owens*, 6 Biss. 432, 18 Fed. Cas. No. 10,632, where the court "can see no good reason why the benefit of the statute might not be claimed against a fee bill thus issued [against the successful party for his own costs after a return of nulla bona in an action of tort] as 'final process from a court for a debt growing out of or founded on contract.'"

88. As to right of exemption from fines, see *infra*, II, B, 5, c, (V).

89. *Hollis v. State*, 59 Ark. 211, 27 S. W. 73, 43 Am. St. Rep. 28; *Loomis v. Gerson*, 62 Ill. 11.

[a] Under a provision exempting a homestead from sale on execution except such as may be issued on a judgment for purchase money, for specific liens, laborers' and mechanics' liens for improving the same, or for taxes, or against executors and other named persons for moneys collected by them and other trustees of an express trust for moneys due from them in their fiduciary capacity, the homestead is exempt from seizure and sale on an execution for costs adjudged against a criminal in a criminal prosecution. *Hollis v. State*, 59 Ark. 211, 27 S. W. 73, 43 Am. St. Rep. 28.

90. See 7 STANDARD PROC. 835.

(V.) **Exemption From Judgment for Fines.**—In some states exemption cannot be claimed in cases where a fine is imposed as a punishment for a violation of law.<sup>91</sup> But some statutes of exemptions are broad enough to include fines.<sup>92</sup>

(VI.) **Exemption From Purchase-Money Debt.**—(A.) **IN GENERAL.**—In the absence of limitation, the right of exemption granted by the statute prevails as against a judgment for the purchase money of the property claimed.<sup>93</sup> Most exemption statutes, however, exempt purchase money judgments from their operation.<sup>94</sup> This exception is sometimes ex-

91. **Ill.**—*Loomis v. Gerson*, 62 Ill. 11. **Ind.**—*Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46. **Tenn.**—*Irvin v. State*, 6 Lea 588, under special statute providing no property shall be exempt from fines for particular offenses.

[a] **The reason of the rule in the text** is that the criminal and civil law are carefully kept separate and distinct. *Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46.

[b] **Property of Surety.**—Under a statute providing there shall be no property exempt from execution for fine and costs for a particular offense, the property of a surety is no more exempt than the property of his principal. *Irvin v. State*, 6 Lea (Tenn.) 588.

[c] **Debt.**—A judgment for a fine is not one for a debt, within the meaning of the exemption statute. *Whiteacre v. Rector*, 29 Gratt. (70 Va.) 714, 26 Am. Rep. 420.

92. **Com. v. Cassady**, 159 Ky. 776, 169 S. W. 497, L. R. A. 1915A, 1214; **Com. v. Lay**, 12 Bush (Ky.) 283, 23 Am. Rep. 718; *Betterton v. O'Dwyer*, 124 Mo. App. 306, 101 S. W. 628, reviewing history of statutes.

[a] **In United States Courts.**—By §14 of the act of June 1, 1872, c. 255 relating to poor convicts, it was intended, in cases of fines for criminal offenses against the laws of the United States, that the execution against property for its collection should be subject to the same exemptions as in civil cases. *Fink v. O'Neil*, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. ed. 196.

93. **Kan.**—*Voorhees v. Patterson*, 20 Kan. 555. **N. J.**—*Spear v. Locust Wood Cemetery Co.*, 72 N. J. Eq. 821, 66 Atl. 1068. **Can.**—*Vye v. McNeill*, 3 Brit. Col. 24.

94. **U. S.**—*Mullinix v. Simon*, 196 Fed. 775, 116 C. C. A. 399; *In re Phillips*, 209 Fed. 490; *In re Nunemaker*,

208 Fed. 491; *In re Stern*, 208 Fed. 488; *In re J. E. Maynard & Co.*, 183 Fed. 823; *In re Campbell*, 124 Fed. 417; *In re Tobias*, 103 Fed. 68, 4 Am. Bankr. Rep. 555. **Ark.**—*Kirby's Dig.*, §3903; *Liddell v. Jones*, 76 Ark. 344, 88 S. W. 961, 113 Am. St. Rep. 99; *Friedman v. Sullivan*, 48 Ark. 213, 2 S. W. 785; *Bridgeford & Co. v. Adams*, 45 Ark. 136; *Cason v. Bone*, 43 Ark. 17. **Colo.**—*Weil v. Nevitt*, 18 Colo. 10, 31 Pac. 487; *Behymer v. Cook*, 5 Colo. 395. **Fla.**—*Const.*, §1, art. 10; *Giddens v. Dickenson*, 60 Fla. 320, 53 So. 929; *Cator v. Blount*, 41 Fla. 138, 25 So. 283; *Porter v. Teate*, 17 Fla. 813. **Ga.**—*Shirling v. Kennon*, 119 Ga. 501, 46 S. E. 630; *Watson v. Williams*, 110 Ga. 321, 35 S. E. 344; *Wilcox v. Cowart*, 110 Ga. 320, 35 S. E. 283; *Hawks v. Hawks*, 64 Ga. 239; *Loyless & Griffin v. Collins*, 55 Ga. 370; *Gray Bros. v. Higgs* (Ga. App.), 88 S. E. 709. **Ill.**—*Bush v. Scott*, 76 Ill. 524; *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Kimble v. Esworthy*, 6 Ill. App. 517. **Ia.**—*Mitchell v. Joyce*, 69 Iowa 121, 28 N. W. 473. **Mich.**—*Feenstra v. Tanis*, 145 Mich. 409, 108 N. W. 674; *Gottesman v. Chipman*, 125 Mich. 60, 83 N. W. 1026; *Lillibridge v. Walsh*, 104 Mich. 153, 62 N. W. 172, 97 Mich. 459, 56 N. W. 854. **Minn.**—*Langevin v. Bloom*, 69 Minn. 22, 71 N. W. 697, 65 Am. St. Rep. 546; *Rogers v. Brackett*, 34 Minn. 279, 25 N. W. 601; *Harlev v. Davis*, 16 Minn. 487. **Miss.**—*Buckingham v. Nelson*, 42 Miss. 417. **Mo.**—*Deloach Mill Mfg. Co. v. Latham*, 99 Mo. App. 231, 72 S. W. 1080; *State v. Orahoad*, 27 Mo. App. 496. **N. Y.**—*Snyder v. Davis*, 1 Hun 350, 47 How. Pr. 147; *Smith v. Slade*, 57 Barb. 637; *Hoyt v. Van Alstyne*, 15 Barb. 568. **N. C.**—*Fox v. Brooks*, 88 N. C. 234. **N. D.**—*Northern Shoe Co. v. Cecka*, 22 N. D. 631, 135 N. W. 177; *Wagner v. Olson*, 3 N. D. 69, 54 N. W. 286. **Ohio.**—*Cechvala v. Ma-*

pressly limited by the statute itself,<sup>95</sup> or by construction of the statute<sup>96</sup> to real property; while some statutes except only personal property.<sup>97</sup> An exception to the exception is sometimes made.<sup>98</sup>

(B.) TERMS DEFINED AND APPLIED.—PURCHASE MONEY.—It has been held that the word "purchase-money" within the statute means the money agreed to be paid by the purchaser for property exempt by law from execution.<sup>99</sup> It includes money loaned for and applied to the purchase of the exempt property,<sup>1</sup> but not to money borrowed to pay a pre-existing debt for the purchase price.<sup>2</sup> Where a note is given for the purchase money the judgment recovered thereon is a judgment for

dak, 20 Ohio Cir. Ct. (N. S.) 286. But see *State ex rel. Armstrong v. Lacy*, 18 Ohio Cir. Ct. 379. Pa.—*Wiley's Appeal*, 90 Pa. 173; *Fehley v. Barr*, 66 Pa. 196; *Ulrich's Appeal*, 48 Pa. 489; *Kyle's Appeal*, 45 Pa. 353; *Hawbicker's Est.*, 6 Pa. Co. Ct. 570; *Fox v. Delong*, 1 Woodw. 137; *Scott v. Kerlin*, 1 Del. Co. 345. S. D.—*Mosteller v. Holborn*, 21 S. D. 547, 114 N. W. 693. Wis. *Houlehan v. Rassler*, 73 Wis. 557, 41 N. W. 720.

[a] Where part payment has been made, the purchaser has no right to claim a homestead to that extent or in the proportion which the payment bears to the whole purchase money. The fact that the land has depreciated in value below the unpaid balance does not affect the question. *Cook v. Crocker*, 53 Ga. 66.

[b] Although the judgment embraces other debts besides purchase money, the plaintiff does not lose his purchase money lien. *Fox v. Delong*, 1 Woodw. (Pa.) 137.

[c] In Arkansas, the proviso that no property shall be exempt from debts contracted for the purchase price in §3903 of Kirby's Digest applies to §3904 also. *Friedman v. Sullivan*, 48 Ark. 213, 2 S. W. 785.

95. *Burn's Ann. Ind. Sts.*, 1914, §759.

96. *Shear v. Reynolds*, 90 Ill. 238; *Howard v. Lakin*, 88 Ill. 36; *Wells v. Lilly*, 86 Ill. 317.

97. See the statutes generally and *Mo. Rev. Sts.*, 1909, §2191.

98. *Feenstra v. Tanis*, 145 Mich. 409, 108 N. W. 674; *Maxon v. Perrott*, 17 Mich. 332, 97 Am. Dec. 191. But as to present law in Michigan, see *How. Mich. Sts.*, §13055.

99. *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 568.

Materials furnished to make a crop

as purchase money, see *infra*, II, B, 5, c, (VII).

Lien of attorney in defending homestead as purchase money, see *infra*, II, B, 5, c, (X), (A).

As to landlord's lien, see *infra*, II, B, 5, c, (X), (C).

[a] The amount due a laborer for work done in making farm products is not purchase money. *Watson v. Williams*, 110 Ga. 321, 35 S. E. 344.

[b] Where Part of Consideration Is Payment of Debts.—A partner who purchases the partnership assets, paying therefor some cash and assuming the partnership debts, cannot claim an exemption out of the assets when sued by the retiring partner for failure to pay those debts. *Platt v. Platt*, 50 Fla. 594, 39 So. 536.

[c] The assumption by the purchaser of an indebtedness of the seller to a third person, as part payment for a horse, and the giving of a note to such third person, does not make the note a purchase price debt so as to defeat the purchaser's claim of exemption as to the horse, against a judgment on the note. *Washington v. Cartwright*, 65 Ga. 177. But see *Fox v. Brooks*, 88 N. C. 234, *infra*, note 3.

[d] The assumption by a subsequent purchaser from the vendee, of the latter's original obligation to pay for land, and the giving of a note therefor, prevents an exemption in the land from being claimed against a judgment on the note. *Sparger v. Cumpton*, 54 Ga. 355.

1. *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571; *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Houlehan v. Rassler*, 73 Wis. 557, 41 N. W. 720.

2. *Winslow v. Noble*, 101 Ill. 194; *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571; *Eyster v. Hathaway*, 50 Ill.

purchase money within the statute,<sup>3</sup> and according to some authorities a transferee of the note has the same rights as the original vendor.<sup>4</sup> But where the vendor indorses the note to another, a judgment against him as indorser is not a judgment for purchase money as his indorsement is founded on a new consideration.<sup>5</sup>

The word "obligations" in a statute providing that no property shall be exempt for the payment of obligations contracted for the purchase thereof, means a debt contracted to be paid or a duty to be performed by the purchaser as the consideration of the purchase.<sup>6</sup>

(C.) EXCEPTION APPLIES ONLY TO PROPERTY PURCHASED.—Generally the exception applies only to the property purchased, not to other exempt property.<sup>7</sup> According to some authorities, the proceeds of the property purchased are not exempt,<sup>8</sup> but some statutes have extended the rule so as to make liable to seizure, property or proceeds of an exchange or sale of the property purchased.<sup>9</sup> Where the property purchased is

521, 99 Am. Dec. 537; *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254.

3. **Ga.**—*Faireloth v. St. Johns*, 44 Ga. 603. **Minn.**—*Rogers v. Brackett*, 34 Minn. 279, 25 N. W. 601. **Pa.**—*Fox v. Delong*, 1 Woodw. 137, under a statute excepting "liens of bonds, mortgages or other contracts for the purchase money."

[a] No change in the instrument evidencing the debt or the security will change the debt from one for purchase money to one that is not. *Kimble v. Esworthy*, 6 Ill. App. 517.

4. See *infra*, II, B, 5, c, (VI), (E).

5. *Fairecloth v. St. Johns*, 44 Ga. 603.

6. *Platt v. Platt*, 50 Fla. 594, 39 So. 533; *Porter v. Teate*, 17 Fla. 813; *Fox v. Brooks*, 88 N. C. 234; *Whitaker v. Elliott*, 73 N. C. 186.

[a] It embraces every contract to pay for land, (1) whether by specialty or by parol. *Lawson v. Pringle*, 98 N. C. 450, 4 S. E. 188; *Fox v. Brooks*, 88 N. C. 234. But (2) it must be made with the vendor and the consideration must be the price of the land purchased. *Fox v. Brooks*, 88 N. C. 234.

[b] Where the vendee contracts to pay a note owing by the vendor to a third person, as part consideration for a purchase of land, the land is subject to the payment of the debt as a debt for purchase money. *Fox v. Brooks*, 88 N. C. 234. But see *Washington v. Cartwright*, 65 Ga. 177, *supra*, note 2.

7. **U. S.**—*In re Tobias*, 103 Fed. 63, 4 Am. Bankr. Rep. 555. **Colo.**—*Weil v. Nevit*, 18 Colo. 10, 31 Pac. 487. **Fla.**—*Smith v. Gufford*, 36 Fla. 481, 18 So.

717, 51 Am. St. Rep. 37. **Ga.**—*Loyless & Griffin v. Collins*, 55 Ga. 370. **N. Y.**—*Smith v. Slade*, 57 Barb. 637. See *Hickok v. Fay*, 36 Barb. 9. But see *Snyder v. Davis*, 1 Hun 350, 47 How. Pr. 147; *Craft v. Curtiss*, 25 How. Pr. 163; *Cox v. Stafford*, 14 How. Pr. 519; *Davis v. Peabody*, 10 Barb. 91, and *Cole v. Stevens*, 9 Barb. 676, 6 How. Pr. 424.

8. See *Giddens v. Dickenson*, 60 Fla. 320, 53 So. 929; *Cechvala v. Madak*, 20 Ohio Cir. Ct. (N. S.) 286. Compare *Mullinix v. Simon*, 196 Fed. 775, 116 C. C. A. 399; *Smith v. Gufford*, 36 Fla. 481, 18 So. 717, 51 Am. St. Rep. 37.

[a] Where Material Is Used in Building for Another.—A contractor who purchases material and uses it in the erection of a building for another cannot under this statute have an exemption in the amount due him for erecting the building as against the purchase price of the material so purchased and used. *Giddens v. Dickenson*, 60 Fla. 320, 53 So. 929.

[b] But an exemption in goods, paid for with the proceeds of goods not paid for, may be claimed when honestly acquired in the regular course of business. *In re Tobias*, 103 Fed. 63, 4 Am. Bankr. Rep. 555.

[c] Liability of Crops for Purchase Money of Land.—A statute making a homestead liable for the purchase money does not make the crops raised thereon liable therefor. *Johnson v. Holmes*, 49 Ga. 365.

9. *Cannon v. Dexter Broom & Matress Co.*, 120 Fed. 657, 57 C. C. A. 119 (under the Constitution of South Caro-

mingled with exempted property that has been set apart, such portion only can be subjected to a debt for the purchase money as can be traced and identified.<sup>10</sup> It is not intended that this exception should reach the property of a surety.<sup>11</sup> It has been held obligations incurred in the production of crops are of the same nature as purchase money obligations from which the crops are not exempt.<sup>12</sup> But other authorities are to the contrary,<sup>13</sup> except where furnished by a landlord who has a lien.<sup>14</sup>

(D.) PROPERTY MUST BE IN HANDS OF VENDEE.—The exception as to the purchase price does not create a lien upon the property purchased but relates to the remedy merely;<sup>15</sup> the vendor can therefore subject the property only while it remains in the hands of the vendee,<sup>16</sup> and the

lina); *McGahan v. Anderson*, 113 Fed. 115, 51 C. C. A. 92; *Blackford v. Boak*, 73 Ore. 61, 143 Pac. 1136.

10. *Mitchell v. Simpson Grocery Co.*, 114 Ga. 199, 39 S. E. 935; *Wagner v. Olson*, 3 N. D. 69, 54 N. W. 286, stocks of goods.

[a] *Contra*, *In re Tobias*, 103 Fed. 68, 4 Am. Bankr. Rep. 555, holding in a bankruptcy proceeding that it is the duty of the bankrupt to identify and designate the goods on which, in whole or in part, he still owes the purchase money.

[b] Where a stock of goods is set apart as exempt and the head of the family without an order of court continues to carry on the business, a vendor of goods, sold to him and mingled with the stock, is entitled to subject to the payment of the purchase price only such goods as he can identify. *Mitchell v. Simpson Grocery Co.*, 114 Ga. 199, 39 S. E. 935.

11. *Davis v. Peabody*, 10 Barb. (N. Y.) 91, where the court say the words "purchase-money" should be held to mean the original demand for the property sold as distinguished from the demand on the security given for the payment of the purchase price.

12. *Farmer v. Greer Fertilizer Co.*, 102 S. C. 285, 86 S. E. 639.

As to exception of materials and supplies used in producing crop, see *infra*, II, B, 5, c, (VII).

13. *Wilcox v. Cowart*, 110 Ga. 320, 35 S. E. 283; *Jones v. Spillers*, 9 Ga. App. 473, 71 S. E. 777. But compare, *Stephens v. Smith*, 62 Ga. 177, and *Tift v. Newsom*, 44 Ga. 600, holding that debts for supplies furnished a planter to make his crop are within an exception of materials furnished therefor, or are in the nature of purchase money.

[a] A debt for fertilizer used on land is not within the statute. *Wilcox v. Cowart*, 110 Ga. 320, 35 S. E. 283.

14. See cases in preceding note, and *infra*, II, B, 5, c, (X), (B).

15. U. S.—*In re Boyd*, 120 Fed. 999; *In re Wells*, 105 Fed. 762. Mich.—*Lil- libridge v. Walsh*, 104 Mich. 153, 62 N. W. 172, 97 Mich. 459, 56 N. W. 854. Mo.—*Barton v. Sitlington*, 128 Mo. 164, 177, 30 S. W. 514; *Straus v. Rothan*, 102 Mo. 261, 14 S. W. 940 (reviewing authorities); *Norris v. Brunswick*, 73 Mo. 256; *Barbee & Co. v. Crawford*, 132 Mo. App. 1, 111 S. W. 614; *De Loach Mill Mfg. Co. v. Latham*, 99 Mo. App. 231, 72 S. W. 1080; *Van Frank v. Walther*, 84 Mo. App. 472; *Corning & Co. v. Rinehart Medicine Co.*, 46 Mo. App. 16. N. D.—*Northern Shoe Co. v. Ceeka*, 22 N. D. 631, 135 N. W. 177, explaining *Weil v. Quam*, 21 N. D. 344, 131 N. W. 244.

Exceptions as creating a lien generally, see *supra*, II, B, 5, c, (I).

16. *Weil v. Nevitt*, 18 Colo. 10, 31 Pac. 487, where the court says: "When a vendor sues and recovers judgment for the purchase price of property which he has theretofore sold, the statute gives him the right to have execution against the property so sold while the same remains in the hands of his vendee, notwithstanding such property may be exempt from levy and sale for any other purpose."

[a] Where Purchaser Is Dead. Where the property purchased is real estate and a judgment is recovered against the executor on a note given for the purchase money, the property cannot be taken on the judgment as it had passed to the heirs on the death of the purchaser. *Buckingham v. Nelson*, 42 Miss. 417.

statute sometimes expressly so provides.<sup>17</sup> Other statutes, however, permit the vendor to subject the property in the hands of a subsequent purchaser with notice that the purchase money is unpaid.<sup>18</sup>

(E.) WHETHER EXCEPTION IS PERSONAL TO VENDOR. — Some cases hold the proviso in the exemption statute is a privilege which is personal to the vendor,<sup>19</sup> or those representing him.<sup>20</sup> But others hold that it is immaterial to whom the debt is due, as all that is required is that the vendee owe the purchase money or a part thereof.<sup>21</sup> Accordingly some authorities hold that a transferee of a note given for the purchase price can seize the property as against the debtor's claim of exemption,<sup>22</sup> though others hold that he cannot,<sup>23</sup> unless perhaps he takes a new note.<sup>24</sup>

17. *Mullinix v. Simon*, 196 Fed. 775, 116 C. C. A. 399 (under the Arkansas constitution); *Friedman v. Sullivan*, 48 Ark. 213, 2 S. W. 785.

[a] **Where Property Sold After Filing Petition in Bankruptcy.**—Where property is in the hands of a vendee at the time of filing of a petition in bankruptcy and is afterwards sold by the trustee with a distinct understanding that the bankrupt's right of exemption would apply to the proceeds as to the specific articles, the proceeds are a substitute for the property, which is still in the hands of the vendee. The bankrupt's right to exemption is referable to the condition of things existing at the filing of the petition. *Mullinix v. Simon*, 196 Fed. 775, 116 C. C. A. 399.

18. *Straus v. Rothan*, 102 Mo. 261, 14 S. W. 940 (reviewing authorities); *Parker v. Rodes*, 79 Mo. 88; *Van Frank v. Walther*, 84 Mo. App. 472.

[a] **A mortgagee is not a purchaser within the statute.** *Kane v. Manley*, 63 Mo. App. 43.

[b] **The Michigan statute providing that the property shall not be exempt in the hands of a purchaser if the purchase was after suit commenced and the filing of a specified notice, does not authorize the purchaser to fraudulently transfer the property before such suit or notice, to defeat a levy thereon.** *Lillibridge v. Walsh*, 104 Mich. 153, 62 N. W. 172, 97 Mich. 459, 56 N. W. 854.

19. *In re Boyd*, 120 Fed. 999; *Weil v. Nevitt*, 18 Colo. 10, 31 Pac. 487.

[a] **Similar to Vendor's Lien.**—The privilege of the statute bears a close analogy to a vendor's lien for the purchase of real estate. *Weil v. Nevitt*, 18 Colo. 10, 31 Pac. 487.

[b] **Under the Bankruptcy Law.** Although under the state law a homestead exemption can be claimed in unpaid for property against every one except the vendor, the bankrupt act consolidates the demands of all the creditors and any creditor may except to the allowance of the homestead on the ground the purchase money is unpaid. *In re Campbell*, 124 Fed. 417. Compare *In re Boyd*, 120 Fed. 999; *In re Wells*, 105 Fed. 762, holding unpaid for property claimed as exempt does not vest in the trustee in bankruptcy.

20. *Williams v. Jones*, 100 Ill. 362 (holding assignee of note under the circumstances represented the vendor); *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537, the provision applies only to vendors and vendees, or those representing them.

21. *Lawson v. Pringle*, 98 N. C. 450, 4 S. E. 188.

22. **Ga.**—*Chambliss v. Phelps*, 39 Ga. 286. See *McElmurray v. Blue*, 91 Ga. 509, 18 S. E. 313 (on the authority of *Wofford v. Gaines*, 53 Ga. 485, where the note was renewed and a new note made payable to the holder); *Sparger v. Cumpton*, 54 Ga. 355. **Minn.**—*Langevin v. Bloom*, 69 Minn. 22, 71 N. W. 697, 65 Am. St. Rep. 546, holding that *Harley v. Davis*, 16 Minn. 487, sometimes cited as holding the contrary, is not authority therefor when the facts are considered. **Mo.**—*State v. Orahood*, 27 Mo. App. 496. **N. C.**—*Lawson v. Pringle*, 98 N. C. 450, 4 S. E. 188; *Whitaker v. Elliott*, 73 N. C. 186.

23. **Colo.**—*Weil v. Nevitt*, 18 Colo. 10, 31 Pac. 487. **Ill.**—*Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18. **Mich.** *Shepard v. Cross*, 33 Mich. 96.

24. *Williams v. Jones*, 100 Ill. 362. See *McElmurray v. Blue*, 91 Ga. 509,

(F.) **WAIVER.**—The creditor may waive this exception.<sup>25</sup>

(VII.) **Where Debt Is for Necessaries, Materials Furnished or Labor Done.** An exception to the right of exemption is frequently made in favor of debts contracted in the purchase of necessaries.<sup>26</sup> The necessaries must be those purchased for the debtor himself and family,<sup>27</sup> but they are not limited to articles of food, clothing, shelter, or similar articles.<sup>28</sup> The determination of what articles are necessaries depends upon the circumstances of each particular case.<sup>29</sup>

18 S. E. 313; *Wofford v. Gaines*, 53 Ga. 485.

[a] Where the assignee of a note given for the purchase price by the purchaser and another as security, by an arrangement with the purchaser surrenders the notes to him and takes a note of the purchaser alone and a trust deed to secure payment, the assignee stands in the place of the vendor and he is within the statute. *Williams v. Jones*, 100 Ill. 362.

25. *Cator v. Blount*, 41 Fla. 138, 25 So. 283.

[a] But a creditor by filing with an assignee for creditors his debt against the assignor and accepting from such assignee a pro rata dividend does not waive the right to subject property which is not exempt because the debt was for the purchase price. *Cator v. Blount*, 41 Fla. 138, 25 So. 283.

26. See generally the statutes, and the following: **Ga.**—*Huff v. Bournell*, 48 Ga. 338. **Me.**—*Fisher v. Shea*, 97 Me. 372, 54 Atl. 846, 61 L. R. A. 567. **Mass.**—*Sullivan v. Hadley*, 160 Mass. 22, 35 N. E. 103; *Darling v. Andrews*, 9 Allen 106. **Minn.**—See *Bofferding v. Mengelkoch*, 129 Minn. 184, 152 N. W. 135, holding the statute making this exception is unconstitutional. **Mont.** *Dayton v. Ewant*, 28 Mont. 153, 72 Pac. 420, 98 Am. St. Rep. 549. **Neb.** See *Lehnoff v. Fisher*, 32 Neb. 107, 48 N. W. 821. **N. H.**—*Garside v. Colby*, 72 N. H. 544, 58 Atl. 50. **Pa.**—*Karnes v. Rosena Furnace Co.*, 5 Pa. Dist. 752; *Karnes v. McGuire*, 18 Pa. Co. Ct. 306. **R. I.**—*Palmisciano v. Rapone*, 94 Atl. 832; *Rich v. Tren*, 25 R. I. 208, 55 Atl. 492. **Wash.**—*Creditors Collection Assn. v. Bisbee*, 80 Wash. 358, 141 Pac. 886. **Can.**—*Central Bank v. Ellis*, 20 Ont. App. 364.

[a] A judgment upon a claim for necessaries is a "debt or demand for necessaries" within the meaning of the statute. *Esman v. Roller*, 27 Ohio Cir. Ct. 712.

[b] But a claim for rent is not a "necessary" even though it may be rent of the house in which the defendant lives. *Beard v. Covill*, 102 N. Y. Supp. 204. See *Huff v. Bournell*, 48 Ga. 338, holding the rent of premises disconnected from the homestead in which the debtor lives, he having leased the homestead, is not a "necessary."

[c] **Money Loaned.**—An affidavit for an execution against salary of a debtor which does not state that the judgment was for necessaries but simply for money loaned is insufficient. *In re Hogan*, 64 Misc. 302, 118 N. Y. Supp. 537.

[d] **Exception to Exception.**—The debtor is allowed a certain amount as exempt from a debt for necessaries. *Jumper v. Moore*, 110 Me. 159, 85 Atl. 485. See *Fisher v. Shea*, 97 Me. 372, 54 Atl. 846, 61 L. R. A. 567; *Quimby v. Hewey*, 92 Me. 129, 42 Atl. 344, decided before the amendment of the statute.

**Extent to which wages are exempt from debts for necessaries**, see *supra*, II, B, 5, a, (IV), (F).

27. *Lehnoff v. Fisher*, 32 Neb. 107, 48 N. W. 821.

[a] **Debts for necessaries incurred in carrying on a hotel or boarding-house business** are not within the purview of the statute. *Lehnoff v. Fisher*, 32 Neb. 107, 48 N. W. 821.

28. *Rich v. Tren*, 25 R. I. 208, 55 Atl. 492.

29. *Fisher v. Shea*, 97 Me. 372, 54 Atl. 846, 61 L. R. A. 567; *Provost v. Fische*, 93 Me. 455, 45 Atl. 506.

[a] The word "necessaries" applies only to living persons,—something to sustain or maintain a living person, either food, clothing, medicine, habitation, education or whatever is necessary for such person in his stage in life. Burial expenses of the mother of the debtor are not necessaries. *Watkins v. Schlechter*, 7 Ohio N. P. 42.

[b] A claim for medical attendance

**Materials and Supplies Furnished.**—Debts for materials and supplies furnished are sometimes expressly excepted by statute.<sup>50</sup>

**Labor Done or Performed.**—Statutes sometimes provide that no property shall be exempt<sup>31</sup> from execution for any labor done thereon, or

and medicines furnished (1) is "a demand for necessities." *Darling v. Andrews*, 9 Allen (Mass.) 106. But (2) under a statute excepting wages from the exemption where the judgment is for "necessaries sold" or for work performed in the family as a domestic, "necessaries sold" will not include services of a surgeon to the defendant's wife. *Taylor v. Barker*, 108 App. Div. 21, 95 N. Y. Supp. 474.

[c] **A sewing machine for defendant's own personal use in the manufacture of her own clothing is not shown to be necessary.** *Provost v. Piche*, 93 Me. 455, 45 Atl. 506.

[d] **Groceries furnished an unmarried man to be used by the family where he boards and used by him to pay his board are not necessities furnished a defendant or his family, within the statute.** *McAuley v. Tracy*, 61 Me. 523.

[e] **Legal services (1) rendered in protecting and defending a person arrested may generally be classed as a necessary, but such services in the institution of criminal proceedings would not be. Whether the defense of a contract right where the only result of an adverse decision is a pecuniary loss is a necessary is doubtful.** *Fisher v. Shea*, 97 Me. 372, 54 Atl. 846, 61 L. R. A. 567, on the authority of *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176. Services of an attorney (2) for a minor defendant are necessities. *Rich v. Treu*, 25 R. I. 208, 55 Atl. 492, on the authority of *Crafts v. Carr*, 24 R. I. 397, 53 Atl. 275, 96 Am. St. Rep. 721, 60 L. R. A. 128.

[f] **An execution for damages caused by negligence cannot issue against a debtor's salary under a statute authorizing a seizure of salary on an execution for "necessaries."** *Kelly v. Mulcahy*, 131 App. Div. 639, 116 N. Y. Supp. 61.

[g] **An action on a judgment recovered for "necessaries furnished" is not for necessities furnished within the statute as the claim is merged in the first judgment.** *Brown v. West*, 73 Me. 23.

30. **Fla.**—*Catheart v. Turner*, 18 Fla. 837, under statute allowing a landlord to distrain property for supplies furnished a tenant. **Ga.**—*Stephens v. Smith*, 62 Ga. 177. **La.**—*Hinton v. Roane*, 124 La. 927, 50 So. 798, 134 Am. St. Rep. 526. **Minn.**—*Niekerson v. Crawford*, 74 Minn. 366, 77 N. W. 292, 73 Am. St. Rep. 354.

[a] **Furnished by Partner to Firm.** Funds arising from the sale of goods furnished by one partner to another under a contract of partnership, and invested in improvements on a homestead are not moneys borrowed, labor done or materials furnished. *Kilgo v. Van Dyke*, 44 Ga. 61.

[b] **A claim for rent is an "obligation contracted in the production of the crop."** *Prince v. Nance*, 7 S. C. 351.

[c] **Supplies furnished to make a crop are "materials furnished therefor" within the exception.** *Stephens v. Smith*, 62 Ga. 177; *Tift v. Newsom*, 44 Ga. 600.

[d] **Furnished by landlord to tenant to enable the latter to subsist or raise crop.** *Rudd v. Ford*, 91 Ky. 183, 15 S. W. 179; *Carden v. Dearing*, 14 Ky. L. Rep. 78.

[e] **Supplies to Family as Supplies Furnished Plantation.**—A statute providing that debts due for necessary supplies furnished to a plantation shall be entitled to a privilege on the crop does not embrace supplies for the use of a planter and his family beyond plantation fare, such as cigars, cognac, annisette, and ice. *Hollander v. His Creditors*, 6 La. Ann. 668.

**Liability for debts for purchase price,** see *supra*, II, B, 5, e, (VI).

31. See generally the statutes, and *Dicken v. Thrasher*, 58 Ga. 360; *Mitchener v. Robins*, 73 Miss. 383, 19 So. 103. Compare *Parham v. McMurray*, 32 Ark. 261, holding §3 of the article of exemptions in the constitution of 1868 has no application to personal property but relates solely to labor on the homestead.

[a] **Labor done in cultivation of crops on a homestead is "labor done**

labor performed. This exception does not extend to materials and supplies furnished.<sup>32</sup>

(VIII.) **Where Debt Is for Wages.**—An exception to the exemption laws is frequently provided for when the debt is for the wages of laborers, servants or other named persons.<sup>33</sup> This exception is personal to the laborer or other person named in the statute, and no other class of creditors is entitled to its benefits.<sup>34</sup>

A "laborer" within the meaning of the statute is one who performs manual labor, not requiring special knowledge or skill,<sup>35</sup> and who is

thereon." *Dicken v. Thrasher*, 58 Ga. 360.

[b] **Claims Less Than Specified Sum.**—A provision that the exemption statute shall not extend to "a claim for work and labor less than" \$100 does not privilege all claims for work and labor to the extent of \$100 but only applies to claims which are less than \$100. *Kelly v. Hines*, 6 Ohio Dec. (Reprint) 988, 9 Am. L. Record 404.

**Services of attorney defending homestead**, see II, B, 5, c, (X), (A).

[c] **Where the Creditor Has no Judgment.**—Under a statute providing that no property shall be exempt "when the judgment is for labor performed," the creditor who has performed labor is within the statute although he has no judgment, where the debtor is dead and the creditor has his claim allowed in chancery, there being a statute forbidding any action against the personal representative after the estate is declared insolvent. *Mitchener v. Robins*, 73 Miss. 383, 19 So. 103.

32. *Burlington Mfg. Co. v. Board of Court House, etc. Comrs.*, 67 Minn. 327, 69 N. W. 1091. See *Kilgo v. Van Dyke*, 44 Ga. 61.

33. See generally the statutes and the following: **U. S.**—*In re Phillips*, 209 Fed. 490, under the Washington statute. **Ill.**—*Smith v. Kennett*, 94 Ill. App. 331; *Graves v. Ahlgren*, 87 Ill. App. 668; *Stroup v. Hobbs*, 65 Ill. App. 296; *Bohn v. Weeks*, 50 Ill. App. 236. **Kan.**—*McBride v. Reitz*, 19 Kan. 123; *Reed v. Umbarger*, 11 Kan. 206. **Minn.** See *Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108, holding statute to be unconstitutional. **Neb.**—*Fox v. McClay*, 48 Neb. 820, 67 N. W. 888; *Henderson v. Nott*, 36 Neb. 154, 54 N. W. 87, 38 Am. St. Rep. 720; *Snyder v. Brune*, 22 Neb. 189, 34 N. W. 364. **Pa.**—*Enke v. Stine*, 6 Pa. Co. Ct. 23; *Van Wye v.*

*Harrington*, 1 Pa. Co. Ct. 272; *Meiers v. Umla*, 6 Kulp 332; *Finns v. Banker*, 5 Kulp 33.

[a] **Whether giving a note for wages merges the debt and allows the debtor to claim his exemption**, query. *Reed v. Umbarger*, 11 Kan. 206. As to analogous proposition, where note is given for purchase money, see *supra*, II, B, 5, c, (VI), (B).

[b] **An execution for work and labor** (1) is not an execution for "wages." *Smith v. Kennett*, 94 Ill. App. 331. Nor (2) does a transcript for "work and labor done" show the claim to be "wages for manual labor," *Moskovitz v. Orangers*, 13 Pa. Dist. 153. The (3) words "for labor" do not import that the consideration was "wages" due the payee as a "laborer or servant." *Magers v. Dunlap*, 39 Ill. App. 618.

[c] **Garnishment of Wages for Demand of Wages.**—Where a statute declares generally that no property shall be exempt from execution for laborer's wages, and another enacted subsequently exempts wages from the operation of process, the latter being the legislature's last expression on the subject must be taken to exempt wages from garnishment for wages. *Snyder v. Brune*, 22 Neb. 189, 34 N. W. 364.

[d] In Pennsylvania, money due for wages is exempt even on a judgment based on a claim for wages. *Frutchey v. Lutz*, 167 Pa. 337, 31 Atl. 638. *Contra*, *Finns v. Banker*, 5 Kulp 33; *Enke v. Stine*, 4 Kulp 56.

[e] **Homesteads are not affected by this statute in Nebraska.** *Fox v. McClay*, 48 Neb. 820, 67 N. W. 888.

34. *Bundy v. Harris*, 151 Ill. App. 461; *Grimes v. Sprague*, 86 Mo. App. 245.

35. *Dickinson v. Rahn*, 98 Ill. App. 245; *Epps v. Epps*, 17 Ill. App. 196.

subject to the control and direction of his employer.<sup>36</sup>

A "servant" is one who is employed to perform an inferior and menial service.<sup>37</sup>

(IX.) Where Debt Is for Board. — Statutes sometimes allow the seizure of wages where the debt is for board and lodging.<sup>38</sup>

(X.) Where Creditor Has a Lien. — (A.) IN GENERAL. — The statutes of exemptions relate only to general executions and are not designed to prevent a person from creating a lien upon whatever property he sees fit. If a debtor creates a lien upon particular property,<sup>39</sup> as where he gives a mortgage,<sup>40</sup> he waives his exemption as to the creditor having

Compare *supra*, II, B, 5, a, (IV), (B), (2); II, B, 5, a, (IV), (C); II, B, 5, b, (V).

[a] The word laborer "carries with it the idea of actual physical and manual exertion or toil, and is used to denote that class of persons who literally earn their bread by the sweat of their brows, and who perform with their own hands, at the cost of considerable physical labor, the contracts made with their employers. *Farinholt v. Luckhard*, 90 Va. 936, 21 S. E. 817, 44 Am. St. Rep. 953.

[b] Skilled labor is not within the statute. *Dickinson v. Rahn*, 98 Ill. App. 245.

[c] Traveling salesmen and bookkeepers are not within the statute. *Dickinson v. Rahn*, 98 Ill. App. 245; *Epps v. Epps*, 17 Ill. App. 196.

[d] A mail carrier is a laboring man. *Farinholt v. Luckhard*, 90 Va. 936, 21 S. E. 817, 44 Am. St. Rep. 953.

36. *Fox v. McClay*, 48 Neb. 820, 67 N. W. 888; *Henderson v. Nott*, 36 Neb. 154, 54 N. W. 87, 38 Am. St. Rep. 720.

[a] A contractor is not within the statute. *Henderson v. Nott*, 36 Neb. 154, 54 N. W. 87, 38 Am. St. Rep. 720.

37. *Dickinson v. Rahn*, 98 Ill. App. 245.

38. *Mendola v. Pellerite*, 21 Pa. Dist. 391; *Serena v. Guilfoxy*, 7 Pa. Dist. 141; *Karnes v. Rosaena Furn. Co.*, 5 Pa. Dist. 752; *Smith v. Dingus*, 2 Pa. Dist. 710; *Karnes v. McGuire*, 18 Pa. Co. Ct. 366. See *Smith v. McGinty*, 101 Pa. 402 under an earlier statute. But see *Blythan v. Rescorla*, 1 Kulp (Pa.) 351; *Benner v. Smith*, 21 Pa. Dist. 473 holding statute unconstitutional.

[a] Judgment in Excess of Exemption. — Where statute authorizes a seizure of wages for four weeks' board or less, execution may issue for four weeks' board although the judgment is

in excess thereof. *Karnes v. Rosaena Furn. Co.*, 5 Pa. Dist. 752. But see *Tredennick v. Jones*, 7 Pa. Co. Ct. 548.

39. Ia. — *Swan v. Bournes*, 47 Iowa 501, 29 Am. Rep. 492. Minn. — *Flint v. Luhrs*, 66 Minn. 57, 68 N. W. 514, 61 Am. St. Rep. 391. Miss. — *Halsell v. Turner*, 84 Miss. 432, 36 So. 531. Pa. Building Assn. v. O'Connor, 3 Phila. 453. Tex. — *Baughn v. Allen* (Tex. Civ. App.), 68 S. W. 207.

[a] A clause in a lease making the rent charge a lien on crops and stock whether exempt or not constitutes in effect a mortgage and is enforceable against property otherwise exempt. *Fejavary v. Broesch*, 52 Iowa 88, 2 N. W. 963, 35 Am. Rep. 261.

[b] Where a decree specifically declares certain property to be subject to a lien and where the decree can be effectuated only by a sale of the property, the property cannot be claimed as exempt. *Graves v. Graves*, 106 Ind. 118, 5 N. E. 879.

40. U. S. — *In re Jones*, 2 Dill. 343, 13 Fed. Cas. No. 7,445. Cal. — *Peterson v. Hornblower*, 33 Cal. 266. Fla. — *Patterson v. Taylor*, 15 Fla. 336. Ind. — *Fleming v. Henderson*, 123 Ind. 234, 24 N. E. 236; *Love v. Blair*, 72 Ind. 281. Ia. — *Fejavary v. Broesch*, 52 Iowa 88, 2 N. W. 963, 35 Am. Rep. 261. Kan. — *Dosbaugh Nat. Bank v. Jelf*, 86 Kan. 41, 119 Pac. 538, purchase money mortgage. Mont. — *Cheney v. Caldwell*, 20 Mont. 77, 49 Pac. 397. Pa. — *Gangwere's Appeal*, 36 Pa. 466; *McAuley's Appeal*, 35 Pa. 209; *Pennsylvania Co. v. Bruner*, 41 Pa. Super. 358; *Morgan v. Noud*, 5 Clark 93; *Hufford's Appeal*, 10 W. N. C. 528; *Craig v. Craig*, 1 W. N. C. 613. Tex. — *Baughn v. Allen* (Tex. Civ. App.), 68 S. W. 207 (under statute providing no exemption shall apply to debts secured by liens); *Rose v. Martin* (Tex. Civ. App.), 33 S. W. 284; *Big-*

the lien, but not as to creditors generally however.<sup>41</sup> And where the statute makes certain charges a lien upon the property, the lien will prevail over a claim of exemption in such property,<sup>42</sup> as in the case of innkeepers,<sup>43</sup> boarding house keepers,<sup>44</sup> keepers of livery or boarding stables,<sup>45</sup> attorneys who have a lien on property of a client for fees,<sup>46</sup>

ger v. Jones, 3 Wills. Civ. Cas. §227; Mason v. Bumpass, 1 White & W. Civ. Cas. §§1340, 1341.

[a] Reason.—With quite as much reason, might a vendor or pledgor who had sold or pledged property in payment of a debt, demand its return on the ground it was exempt. The constitution and statute did not mean to restrain the debtor from voluntarily incumbering or transferring his property. Love v. Blair, 72 Ind. 281.

[b] Mortgaged Property Set Apart to Widow.—A widow, to whom personal property of the husband encumbered by a mortgage is set apart, cannot claim it as exempt as against the mortgagee of the deceased. Recker v. Kilgore, 62 Ind. 10, affirmed in Mead v. McFadden, 68 Ind. 340.

[c] If a chattel mortgage cover both exempt and nonexempt property, the mortgagor may require the mortgagee to subject the nonexempt property first. Baughn v. Allen (Tex. Civ. App.), 68 S. W. 207.

[d] Where the judgment is obtained on the bond accompanying the mortgage, instead of on the mortgage itself, no exemption can be claimed. In re McAuley's Appeal, 35 Pa. 209.

41. U. S.—In re Jones, 2 Dill. 343, 13 Fed. Cas. No. 7,445. Ala.—Collier v. Wood Bros., 85 Ala. 91, 4 So. 840. Conn.—Patten v. Smith, 4 Conn. 450, 10 Am. Dec. 166. Ia.—Evans v. St. Paul Harvester Wks., 63 Iowa 204, 18 N. W. 881. Ky.—Collett v. Jones, 2 B. Mon. 19, 36 Am. Dec. 586. Mont. Cheney v. Caldwell, 20 Mont. 77, 49 Pac. 397. Okla.—Irwin v. Walling, 4 Okla. 128, 44 Pac. 219, construing a statute providing "personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of a mortgagor." Tex. Baughn v. Allen (Tex. Civ. App.), 68 S. W. 207. Va.—Williams v. Watkins, 92 Va. 680, 24 S. E. 223.

[a] Subjection of Premises by a Creditor Not the Mortgagee.—Where a

debtor is in possession of a homestead upon which he has given mortgages precluding the allowance of a homestead, a judgment creditor cannot require the property to be sold for the payment of the mortgage and judgment without any allowance of homestead against the wishes of the mortgagees. Bernsee v. Hamilton, 3 Ohio Cir. Dec. 550, 6 Ohio Cir. Ct. 487.

42. Swan v. Bournes, 47 Iowa 501, 29 Am. Rep. 492.

[a] Funeral Expenses.—Where the statute provides that the estate of a decedent when not exceeding a certain amount shall be set off to the widow, and that she shall pay and may be sued for funeral expenses, she cannot claim an exemption in the property against a judgment for such expenses, as there is no contract between her and the creditor and her liability attaches because she has property vested in her charged with such expenses. It is analogous to a mortgage of the property for a debt. Fleming v. Henderson, 123 Ind. 234, 24 N. E. 236.

[b] A judgment on the bond of a tax-collector does not create a lien on his homestead, notwithstanding the existence of a statute making such bond a lien on all his realty. Hume v. Gossett, 43 Ill. 297.

43. Swan v. Bournes, 47 Iowa 501, 29 Am. Rep. 492.

44. Thorn v. Whitbeck, 11 Misc. 171, 32 N. Y. Supp. 1088.

45. Flint v. Luhr, 66 Minn. 57, 68 N. W. 514, 61 Am. St. Rep. 391.

46. Halsell v. Turner, 84 Miss. 432, 36 So. 531.

[a] As Labor Done or Purchase Money.—The lien of an attorney in defending a homestead and obtaining it to be set apart is in the nature of labor done on the homestead and of purchase money thereof. Strohecker v. Irvine, 76 Ga. 639, 2 Am. St. Rep. 62. But see Collier v. Simpson, 74 Ga. 697, as to enforcement of mortgage to secure fees for services in removing incumbrance from homestead.

mechanics' liens,<sup>47</sup> and where animals are impounded.<sup>48</sup> The statute may specifically except claims secured by lien.<sup>49</sup>

Costs incurred in enforcing the lien are included in the lien.<sup>50</sup>

(B.) LANDLORD'S LIEN.—As between landlord and tenant, there can be no claim of exemption in articles on which the landlord has a lien,<sup>51</sup> but it is otherwise as to articles on which he has no lien.<sup>52</sup>

(XI.) Where Debt Is for Rent.<sup>53</sup>—Although some statutes specifically exempt a tenant's property from distress for rent,<sup>54</sup> others provide that

47. Laucks' Appeal, 24 Pa. 426.

48. *Thomason v. Brownwood*, 44 Tex. Civ. App. 623, 98 S. W. 938.

[a] A city ordinance making impounded animal liable for the expenses of impounding them, authorizes execution against them even though the animal is otherwise exempt. *Thomason v. Brownwood*, 44 Tex. Civ. App. 623, 98 S. W. 938.

49. See generally the statutes, and *Ind.*—Burns' Ann. St., 1914, §759. *Ohio.* Bernsee v. Hamilton, 6 Ohio Cir. Ct. 487, 3 Ohio Cir. Dec. 550. *Tex.*—Mason v. Bumpass, 1 White & W. Civ. Cas. §1340.

50. *Slaughter v. Winfrey*, 85 N. C. 159.

As to exceptions against judgments for costs, see *supra*, II, B, c, (III).

51. *Colo.*—Noxon v. Glaze, 11 Colo. App. 503, 53 Pac. 827. *Fla.*—Hodges v. Cooksey, 33 Fla. 715, 15 So. 549, 24 L. R. A. 812; Cathcart v. Turner, 18 Fla. 837. *N. C.*—Hamer v. McCall, 121 N. C. 196, 28 S. E. 297; *Slaughter v. Winfrey*, 85 N. C. 159; *Durham v. Speeke*, 82 N. C. 87. *Tenn.*—Hill v. George, 1 Head 394.

*Contra*, *Abraham v. Davenport*, 73 Iowa 111, 34 N. W. 767, 5 Am. St. Rep. 665.

[a] Right Is Personal.—The right of a landlord to seize property otherwise exempt is personal to himself. *Duperron v. Communy*, 6 La. Ann. 789.

[b] A landlord having a judgment against a tenant cannot justify a seizure of exempt property by setting up unadjudicated liens on the property. *McGaughy v. Meek*, 1 White & W. Civ. Cas. (Tex.), §1196.

[c] In Louisiana, the exemption in Code of Practice, art. 644, does not apply to lessees. *Stewart v. Lacoume*, 30 La. Ann. 157; *Duperron v. Communy*, 6 La. Ann. 789.

[d] In Texas, (1) it is provided, in a statute giving a landlord a lien on all property on the premises, that this statute shall not be construed as repealing or affecting any act exempting property from forced sale. *Vern. Sayles' Tex. Civ. St.*, 1914, art. 5490; *York v. Carlisle*, 19 Tex. Civ. App. 269, 46 S. W. 257. Compare, *Vern. Sayles' Tex. Civ. St.*, 1914, art. 3793. (2) If the tenant fails to claim the exemption, the landlord may seize otherwise exempt property. *York v. Carlisle*, 19 Tex. Civ. App. 269, 46 S. W. 257; *Hammer v. Woods*, 6 Tex. Civ. App. 179, 24 S. W. 942. See generally the title "Homesteads and Exemptions."

Exemption against debt for rent, see *infra*, II, B, 5, c, (XI).

[e] In Georgia (1) the landlords' special lien upon crops for rent of the premises is considered to be for a debt in the nature of purchase money and as such is superior to a claim of exemption. *Shirling v. Kennon*, 119 Ga. 501, 46 S. E. 630; *Watson v. Williams*, 110 Ga. 321, 35 S. E. 344; *Harrell v. Fagan*, 43 Ga. 339; *Taliaferro v. Pry*, 41 Ga. 622 (where the debtor waived the statute also); *Davis v. Meyers*, 41 Ga. 95. (2) Neither the crop nor the money for which it was sold can be claimed by the tenant as exempt against the landlord. *Davis v. Meyers*, 41 Ga. 95.

52. *Schofield v. Liody*, 35 Fla. 1, 16 So. 780; *Hodges v. Cooksey*, 33 Fla. 715, 15 So. 549, 24 L. R. A. 812; *Cathcart v. Turner*, 18 Fla. 837.

53. Rent as a debt contracted, see *supra*, II, B, 5, c, (II).

Rent as a necessary, see *supra*, II, B, 5, c, (VII).

54. See generally the statutes and *Noxon v. Glaze*, 11 Colo. App. 503, 53 Pac. 827; *Kenyon v. Gould*, 61 Pac. 292.

exemptions shall not prevail against an execution for rent.<sup>55</sup>

(XII.) Where Execution Is For Money Received as Attorney or Agent. Statutes sometimes provide that no property shall be exempt from execution issued on a judgment against an attorney or agent for money or property received for his client or principal.<sup>56</sup>

(XIII.) Where Debt Is for Property Obtained by False Pretenses. — An exception to the exemption statute is sometimes made where the debt was incurred for property obtained by false pretenses.<sup>57</sup>

(XIV.) Where State or Nation Is Plaintiff.<sup>58</sup>— Generally in the absence of an express provision of statute the debtor may claim his exemption against a judgment in favor of the state as well as against one in favor of an individual creditor.<sup>59</sup> And under a federal statute adopting the statutes of the state relating to executions, final process of the United

[a] In Kentucky the statute provides that property exempt from execution shall be also exempt from distress for rent, except for money or property furnished to enable the tenant to raise his crop. *Rudd v. Ford*, 91 Ky. 183, 15 S. W. 179; *Carden v. Dearing*, 14 Ky. L. Rep. 78.

55. See generally the statutes, and *Miss.*—*Ransom v. Duff*, 60 Miss. 901. N. J.—*Guest v. Opdyke*, 31 N. J. L. 552. Pa.—See *Pepper's Estate*, 1 Phila. 562, holding the heirs cannot claim property as against a charge for rent to which it was subject when it came to them. W. Va.—See *Donaldson v. Voltz*, 19 W. Va. 156, holding the statute unconstitutional.

[a] Exemption of Garnishee of Tenant.—The rights of a landlord against his tenant do not attach as against the debtor of the tenant against whom the landlord has recovered judgment in a proceeding by garnishment so as to deprive him of his exemption. *Swope v. Ross*, 29 Ark. 370.

[b] As Affected by Character of Process.—This statute applies whether the process is technically appropriate for the collection of rent, to-wit, an attachment or distress for rent, or whether it is a fieri facias upon a judgment in personam for rent due and unpaid. *Ransom v. Duff*, 60 Miss. 901.

Exemption against lien of landlord, see *supra*, II, B, 5, c, (X), (B).

56. *Shreck v. Gilbert*, 52 Neb. 813, 73 N. W. 276; *Ervay v. Hill*, 46 Wash. 457, 90 Pac. 590.

[a] Power of Attorney.—A cause of action against a spiritualist medium for fraud in that the medium induced the plaintiff to give him a power of attor-

ney by means of which the defendant obtained moneys belonging to the plaintiff and that he failed to account for such money is not within the statute. *Ervay v. Hill*, 46 Wash. 457, 90 Pac. 590.

[b] Application to Homesteads.—The statute of Washington has no reference to homestead exemptions. *Ervay v. Hill*, 46 Wash. 457, 90 Pac. 590.

57. *Sundback v. Griffith*, 7 S. D. 109, 63 N. W. 544; *Hall v. Harris*, 1 S. D. 279, 46 N. W. 931, 36 Am. St. Rep. 730.

58. As to exception from exemption in criminal case, see *supra*, II, B, 5, c, (V); judgment for costs in criminal cases, see *supra*, II, B, 5, c, (III).

59. U. S.—See *Fink v. O'Neil*, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. ed. 196, not deciding the point. Ark.—*State v. Williford*, 36 Ark. 155, 38 Am. Rep. 34. Ga.—*Colquitt v. Brown*, 63 Ga. 440; *Doe ex dem. Gladney v. Deavors*, 11 Ga. 79, distinguished in *Brooks v. State*, 54 Ga. 36, which was a claim against a defaulting public officer for withholding public revenues. Ind.—*Maloney v. Newton*, 85 Ind. 565, 44 Am. Rep. 46. Ky.—*Com. v. Lay*, 12 Bush 283, 23 Am. Rep. 718, execution for fine and costs. Compare, *Com. v. Cook*, 8 Bush 220, 8 Am. Rep. 456. Mo.—*State v. Pitts*, 51 Mo. 133; *Betterton v. O'Dwyer*, 124 Mo. App. 306, 101 S. W. 628. N. Y.—*In re Strohm*, 51 Misc. 481, 101 N. Y. Supp. 688 (a judgment for support of an insane person); *St. Lawrence State Hospital v. Fowler*, 15 Misc. 159, 37 N. Y. Supp. 12. Va.—See *Whiteacre v. Rector*, 29 Gratt. (70 Va.) 714, 26 Am. Rep. 420, holding the state is not within the pur-

States upon judgments in civil actions are subject to the same exemptions as apply to private persons by the law of the state in which the property is found.<sup>60</sup>

d. *Amount*.—The exemption which a debtor may claim is generally limited as to amount by the statute granting it,<sup>61</sup> although many specific articles are exempted without reference to their value.<sup>62</sup> If the debtor has less property than the law allows him, he is entitled to the whole.<sup>63</sup> Any claim made in excess of the statutory limit is improper and will not be allowed.<sup>64</sup> The statute is a continual mandate to the officer to leave that amount of the debtor's estate untouched.<sup>65</sup> If an article claimed is indivisible and worth in excess of the statutory exemption, the debtor cannot claim it as exempt,<sup>66</sup> even if he pays the officer in money the excess of value.<sup>67</sup> And where the exemption is of specific number of a given class of chattels, a debtor who owns but an

view of a constitutional provision concerning homestead exemptions because not named therein. *Can.*—Talcott v. Sickelsteel, 21 U. C. Q. B. 43.

[a] Against a liability to the state for misappropriation of state's money there is no exemption under a statute creating an exemption on an execution against debts contracted. *Vincent v. State*, 74 Ala. 274.

As to exemption against fines, see *infra*, II, B, 5, c, (V).

60. *Fink v. O'Neil*, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. ed. 196. But see *United States v. Howell*, 9 Fed. 674, holding a state exemption is intended to apply only to debts between individuals and not to debts owing to the state or United States.

61. See generally the statutes, and the following: *U. S.*—*In re McCutchen*, 100 Fed. 779, construing §2132 of Rev. Sts. of South Carolina. *Ind.*—*Hart v. O'Rourke*, 151 Ind. 205, 51 N. E. 330; *Citizens' State Bank v. Harris*, 149 Ind. 208, 48 N. E. 856. *Minn.*—*In re How*, 59 Minn. 415, 61 N. W. 456; *Cogel v. Mickow*, 11 Minn. 475. *N. C.*—*Campbell v. White*, 95 N. C. 344; *Citizens' Nat. Bank v. Green*, 78 N. C. 247; *Dean v. King*, 35 N. C. 20. *N. D.*—*Woods v. Teeson*, 31 N. D. 610, 154 N. W. 797. *Wis.*—*Humphrey v. Taylor*, 45 Wis. 251, 30 Am. Rep. 738.

Amount of insurance, see *supra*, II, B, 5, a, (III), (D), (2), (b).

As to amount of farming utensils exempted, see *supra*, II, B, 5, a, (IX), (C), (2), (c).

Amount of wages exempt, see *supra*, II, B, 5, a, (IV), (F).

Exemption of work animals as lim-

ited by value, see *supra*, II, B, 5, a, (XI), (A), (8).

62. See generally the statutes, and the discussion *supra*, II, B, 5, a.

63. *McCluskey v. McNeely*, 8 Ill. 578; *Gadman v. Smith*, 17 Ind. 152. See *Sandberg v. Borstadt*, 48 Colo. 96, 109 Pac. 419.

[a] If no more than the statutory amount of exemption in wages is due, the debtor can claim that amount. *Wohlford v. Wabash Coal Co.*, 164 Ill. App. 185.

[b] The costs of the execution cannot be taken out of a fund realized on the sale of defendant's property where the fund does not exceed the statutory exemption. *McFarland v. Short*, 1 Chest. Co. Rep. (Pa.) 410.

64. *U. S.*—*In re Zimmerman*, 202 Fed. 812. *Ala.*—*Pinkus v. Bamberger*, 99 Ala. 266, 13 So. 578. *Ill.*—*Waldo v. Gray*, 14 Ill. 184. *Ohio.*—*Munson v. Gashorn*, 1 Ohio Dec. (Reprint) 404.

65. *Campbell v. White*, 95 N. C. 344.

[a] When the amount allotted has been diminished by use, loss, or other cause, the debtor has a right to have exempted any other personal property which he may have up to the prescribed limit. *Campbell v. White*, 95 N. C. 344.

66. *Ill.*—*Waldo v. Gray*, 14 Ill. 184; *Cook v. Scott*, 6 Ill. 333. *Me.*—*Everett v. Herrin*, 46 Me. 357, 74 Am. Dec. 455; *Hughes v. Farrar*, 45 Me. 72. *Mo.*—*State v. Jungling*, 116 Mo. 162, 22 S. W. 688. *Can.*—*McMartin v. Hurlburt*, 2 Ont. App. 146.

See *supra*, II, B, 5, a, (XI), (A), (8).

67. *Waldo v. Gray*, 14 Ill. 184. See

undivided half interest in such chattels cannot on that account double the number allowed, as this would change the exemption to one of value.<sup>68</sup> The value of other property in the debtor's possession and not inventoried should be deducted from the statutory amount of exemption when setting aside the exemption from inventoried property.<sup>69</sup> Where a bankrupt, after the filing of the petition and before the election of a trustee, applies to his own use personalty of the estate, its value should be deducted from the amount of the exemption subsequently allowed him.<sup>70</sup>

**Claiming Under Several Sections.**—A debtor may claim his exemption under several subdivisions of the statute if he is included within them,<sup>71</sup> but where the exemptions allowed under different sections are such that a claim under one section would be inconsistent with and necessarily exclude a claim under another section the debtor cannot claim under both.<sup>72</sup>

**Construing the statutes as to the amount of exemption,** the courts give the statutes a liberal construction.<sup>73</sup>

Everett v. Herrin, 46 Me. 357, 74 Am. Dec. 455.

68. White v. Capron, 52 Vt. 634.

69. Pinkus v. Bamberger, 99 Ala. 266, 13 So. 578. Compare, Trager v. Feebleman, 95 Ala. 60, 10 So. 213.

70. In re McUlla, 189 Fed. 250.

71. U. S.—In re Strauch, 208 Fed. 842 (where the referee attempted to defeat the homestead exemption by improperly deducting therefrom the personal property exemption); In re Zimmerman, 202 Fed. 812. Colo.—Sandberg v. Borstadt, 48 Colo. 96, 109 Pac. 419. Ill.—Good v. Fogg, 61 Ill. 449, 14 Am. Rep. 71.

[a] A debtor who is the head of a family and a keeper of a boarding house is entitled to exemptions allowed to a head of a family and to an exemption of property used in carrying on the business of keeping a boarding house, up to the statutory limit. Sandberg v. Borstadt, 48 Colo. 96, 109 Pac. 419. To same effect, see also Rolla State Bank v. Borgfield, 93 Mo. App. 62.

[b] In Georgia a debtor may claim under either §3414 or §3416 of the Code of 1910, but not under both. McFarlin v. Reeves, 10 Ga. App. 581, 73 S. E. 862.

72. Van Lue v. Warlich-Cornett Co., 12 Cal. App. 749, 108 Pac. 717.

[a] **Sections Relating to Different Occupations.**—A debtor cannot claim exemption under a statute relating exclusively to farmers and under a stat-

ute relating exclusively to teamsters. Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 749, 108 Pac. 717.

73. Kan.—Donmeyer v. Donmeyer, 43 Kan. 444, 23 Pac. 627. Mo.—State v. Farmer, 21 Mo. 160. Wyo.—Lafferty v. Sistalla, 11 Wyo. 360, 72 Pac. 192.

[a] **Statute Construed.**—Where a statute exempts certain animals, provisions and fuel and allows in lieu of such animals other property to a certain value, the debtor is entitled to other property to the prescribed limit and in addition thereto provisions and fuel. In re Buelow, 98 Fed. 86.

[b] In Nebraska the code section exempting \$500 in personal property to heads of families without homesteads is intended as an exemption in addition to the exemption of specific articles given by another code section. Johnson v. Bartek, 56 Neb. 422, 76 N. W. 878; Williams v. Golden, 10 Neb. 432, 6 N. W. 766.

[c] **Exemption of Beds and Furniture of Given Value.**—Where the statute exempts one bed and bedding to each householder and an additional bed and bedding for each member of the family and other household goods, utensils and furniture to the value of \$500.00, the debtor cannot claim as exempt more than the statutory number of beds but must make his selection from other furniture. In re Robison, 215 Fed. 662.

c. *Claim and Enforcement of Exemption.*—This subject is fully treated elsewhere in this work.<sup>74</sup>

6. **Rights of Third Persons in Property Levied on.**—a. *By Motion.*—A summary proceeding by motion to compel the sheriff to deliver to claimant property seized under an execution as the property of the execution defendant is not a proper remedy.<sup>40</sup> Nor can the claimant move to quash the execution,<sup>41</sup> though he may move to dismiss the levy, where it is apparent on the face of the record that the judgment or execution is wholly void.<sup>42</sup>

b. *Replevin, Trover, etc.*—One whose property has been levied on as the property of another may generally avail himself of any appropriate remedy such as replevin,<sup>43</sup> trover,<sup>44</sup> or their statutory substitutes, notwithstanding the existence of a special remedy by way of claim.<sup>45</sup>

c. *Interpleader by Sheriff.*—In some jurisdictions, interpleader by the sheriff is the proper remedy whereby conflicting titles between third party claimants and the execution creditor to property held under a writ of execution is determined.<sup>46</sup>

d. *By Affidavit or Claim.*—(I.) **Right To File.**—(A.) **GENERALLY.** Statutes frequently provide for the filing of a claim of some sort by third persons who contend that their property has been levied upon as the property of the execution debtor.<sup>47</sup> This remedy is purely statutory, being unknown to the common law,<sup>48</sup> and in the absence of such

74. See 11 STANDARD PROC. 469, et seq.

40. *Lawson v. Johnson*, 5 Ark. 168.

41. *Morrison v. Anderson*, 111 Ga. 847, 36 S. E. 462.

[a] **Motion To Quash Not Proper in Claim Suit.**—A claimant of property levied upon has no right to make a motion to quash the attachment or judgment upon which the execution is based, or the execution itself. His only concern being that the process shall not be enforced by a seizure and sale of his property, his remedy, in a case where such a motion would be good if presented by the proper party is to move to dismiss the levy. *Morrison v. Anderson*, 111 Ga. 847, 36 S. E. 462; *Pulaski v. Thompson*, 83 Ga. 270, 9 S. E. 1065; *Davidson v. Rogers*, 80 Ga. 287, 7 S. E. 264; *Morton, Bliss & Co. v. Gahona*, 70 Ga. 569; *Bosworth v. Clark*, 62 Ga. 286. But see *Ansley Co. v. O'Byrne*, 120 Ga. 618, 48 S. E. 228; *Bick v. Carter*, 123 Mo. App. 311, 100 S. W. 531; and *infra*, II, B, 6, d, (XII), (C), (4), (b).

42. *Osborne v. Rice*, 107 Ga. 281, 33 S. E. 54; *Moody v. Millen*, 103 Ga. 452, 30 S. E. 258. See *Hilton & Dodge Lumb. Co. v. Clements*, 108 Ga. 791,

33 S. E. 951; and *infra*, II, B, 6, d, (XII), (C), (4), (b).

43. See *infra*, II, B, 6, d, (III); and the title "**Replevin.**"

[a] **Execution From Supreme Court.** Replevin, and not the interposition of a claim, is the proper remedy where the execution issues from the supreme court which has no original jurisdiction in matters of fact. *State v. Booker*, 61 Miss. 16.

44. See the title "**Trover and Conversion,**" and *infra*, II, B, 6, d, (III).

45. See *infra*, II, B, 6, d, (III).

[a] **Though an indemnifying bond for the benefit of the claimant and the sheriff is given by the execution creditor pursuant to statute, the claimant is not compelled to rely thereon unless the statute so provides, but may proceed in trover or replevin against the sheriff.** *State v. McBride*, 81 Mo. 349; *Belkin v. Hill*, 53 Mo. 492; *Stevens v. Springer*, 23 Mo. App. 375.

46. See 14 STANDARD PROC. 229, et seq.

47. See the statutes and the discussion following.

48. *Ala.*—*Munter v. Leinkauff & Strauss*, 78 Ala. 546. *Ga.*—*Lingo v. Harris*, 73 Ga. 28; *Moses v. Eagle &*

a statute the claimant has no standing in the action in which the execution was issued.<sup>49</sup> A claim may be interposed only in those cases covered by the terms of the statute.<sup>50</sup>

(B.) AS AFFECTED BY CHARACTER OF PROPERTY.—The statute sometimes limits the right to make third party claims to cases in which personal property has been levied upon.<sup>51</sup> But in some jurisdictions, the right is extended to cover real property.<sup>52</sup>

(II.) Nature and Purpose of Proceeding.—A third party claim suit is a civil suit.<sup>53</sup> It is not, however, an independent suit, but is consequential or collateral to the main suit against the execution defendant.<sup>54</sup> It has been said that it partakes of the nature of an equitable proceeding, though in the law side of the court,<sup>55</sup> and where the claimant files a petition for equitable relief in aid of his claim, it becomes a purely equitable proceeding.<sup>56</sup> Generally the claim laws are intended to prevent unnecessary suits and expense, by determining in advance of the

Phenix Mfg. Co., 68 Ga. 241. Ill. Wende v. Zimmer, 189 Ill. App. 490. Miss.—Shattuck v. Miller, 50 Miss. 386.

[a] No claim could be interposed to property levied on by execution issued upon judgments at law prior to Feb. 16, 1799, but the same was sold, leaving the parties interested to their actions for redress. Lingo v. Harris, 73 Ga. 28.

49. Price v. Sanchez, 8 Fla. 136; Ball v. Cedar Valley Creamery Co., 98 Iowa 184, 67 N. W. 232, overruling Edwards v. Cosgro, 71 Iowa 296, 32 N. W. 350, in so far as it stated that a third person could interpose a claim.

50. Leffel v. Miller (Miss.), 7 So. 324.

51. Ala.—Code, 1907, §6039; Howard v. Deens, 143 Ala. 423, 39 So. 346; Lassiter v. State, 106 Ala. 292, 17 So. 725. Ark.—Kirby's Dig., 1904, §3267. Ill.—Hurds' St., 1916, ch. 140a, §1. Ky.—Carroll's Code, 1906, §645. Miss. Code, 1906, §4990. Mo.—Rev. St., 1909, §2204; Potter v. Everett, 40 Mo. App. 152. Mont.—Rev. Code, 1907, §6823. Neb.—Rev. St., 1913, §8062. N. J.—2 Comp. St., 1910, p. 2255, §32; Weller v. Lanning, 41 N. J. L. 477. N. Y. Code Civ. Proc., §1418. Ohio.—Jones v. Carr & Co., 16 Ohio St. 420; Patty v. Mansfield, 8 Ohio 369. Ore.—Sommer v. Oliver, 39 Ore. 453, 65 Pac. 600; Vulcan Iron Wks. v. Edwards, 27 Ore. 563, 36 Pac. 22, 39 Pac. 403. Tex. Jones v. Bull, 90 Tex. 187, 37 S. W. 1054; Whitman v. Willis, 51 Tex. 421.

[a] Real property cannot be claimed

under such statutes. Leffel v. Miller (Miss.), 7 So. 324; Potter v. Everett, 40 Mo. App. 152, growing trees.

[b] The character of the property at the time of the interposition of the claim determines whether the court has jurisdiction to administer the remedies which the claim statute gives. Jones v. Bull, 90 Tex. 187, 37 S. W. 1054.

52. Fla. Gen. St., 1906, §1626; Ga. Code, 1911, §5167.

53. Lassiter v. State, 106 Ala. 292, 17 So. 725; Planters' & Merchants' Bank v. Borland, 5 Ala. 531.

As to jurisdiction of criminal court to try claim action, see *infra*, II, B, 6, d, (XII), (A).

54. Catching v. Bowden, 89 Ala. 604, 8 So. 58; Munter v. Leinkauff, 78 Ala. 546.

[a] "A claim is really an intervention authorized by statute in a proceeding to which the claimant is not a party." Ford v. Holloway, 112 Ga. 851, 38 S. E. 373.

55. Hollinshead v. Woodard, 128 Ga. 7, 57 S. E. 79; Ford v. Holloway, 112 Ga. 851, 38 S. E. 373; Dawson v. Equitable Mtg. Co., 109 Ga. 389, 34 S. E. 668; Howell v. Elsberry, 79 Ga. 475, 479, 5 S. E. 96; Colquitt v. Thomas, 8 Ga. 258; Smith v. Knowles, 16 Ga. App. 669, 85 S. E. 986.

56. Austin v. Southern Home B. & L. Assn., 122 Ga. 439, 50 S. E. 382; Timmons v. Mathis, 9 Ga. App. 713, 72 S. E. 279.

As to right to jury in such case, see *infra*, II, B, 6, d, (XII), (C), (2).

execution sale the issue of title between the plaintiff and the claimant,<sup>57</sup> though in some jurisdictions they are intended solely for the protection of the officer making the levy.<sup>58</sup>

(III.) **A Cumulative Remedy.**—The proceeding by claim is a cumulative remedy;<sup>59</sup> the claimant is therefore, not bound to follow such proceeding, but may resort to other appropriate remedies.<sup>60</sup> If the remedy afforded by claim proceeding is inadequate and incomplete, he may

57. **Fla.**—Baars *v.* Creary, 23 Fla. 311, 2 So. 662. **Ga.**—Central Bank *v.* Georgia Groc. Co., 120 Ga. 883, 48 S. E. 325; Anderson *v.* Banks, 92 Ga. 121, 18 S. E. 364. **Ill.**—Lansing *v.* Bates, 11 Ill. 550. **Ky.**—Hoskins *v.* Robinson, 101 Ky. 667, 42 S. W. 113. **Miss.** Shattuck *v.* Miller, 50 Miss. 386. **N. J.** Harris *v.* Krause, 60 N. J. L. 72, 37 Atl. 439.

[a] “The object of the statute is to furnish third parties—strangers to the writ—a speedy remedy in case their property is seized for the debt of another, or is taken as the property of another.” Pitts *v.* Burgess, 2 Wills. Civ. Cas. (Tex.), §700.

58. **Cal.**—Dubois *v.* Spinks, 114 Cal. 289, 46 Pac. 95. **Minn.**—Northwest Thresher Co. *v.* Dietlein, 105 Minn. 518, 117 N. W. 231. **Neb.**—State *v.* Gillespie, 9 Neb. 505, 4 N. W. 239. **Ohio.**—Jones *v.* Carr & Co., 16 Ohio St. 420; Abbey *v.* Searls, 4 Ohio St. 598; Patty *v.* Mansfield, 8 Ohio 369. **Ore.** Vulcan Iron Wks. *v.* Edwards, 27 Ore. 563, 36 Pac. 22, 39 Pac. 403.

59. **Ala.**—Lassiter *v.* State, 106 Ala. 292, 17 So. 725; Columbus Iron Wks. Co. *v.* Renfro Bros., 71 Ala. 577. **Fla.** Toomer *v.* Fourth Nat. Bank, 68 Fla. 555, 67 So. 225. **Ga.**—McLennan *v.* Graham, 106 Ga. 211, 32 S. E. 118; Sears *v.* Bagwell, 69 Ga. 429; Raiford *v.* Hyde, 36 Ga. 93; Phillips *v.* State, 15 Ga. 518; Whittington *v.* Doe *ex dem.* Wright, 9 Ga. 23. **Ill.**—Pike *v.* Colvin, 67 Ill. 227. **Ohio.**—Jones *v.* Carr & Co., 16 Ohio St. 420.

60. **Ala.**—McAdams *v.* Beard, 34 Ala. 478. **Fla.**—Toomer *v.* Fourth Nat. Bank, 68 Fla. 555, 67 So. 225. **Ga.** Lawless *v.* Orr, 122 Ga. 276, 50 S. E. 85; McLennan *v.* Graham, 106 Ga. 211, 32 S. E. 118; Sears *v.* Bagwell, 69 Ga. 429; Raiford *v.* Hyde, 36 Ga. 93; Whittington *v.* Doe *ex dem.* Wright, 9 Ga. 23. **Ill.**—Pike *v.* Colvin, 67 Ill. 227. **Ky.**—Hoskins *v.* Robinson, 101 Ky. 667, 42 S. W. 113. **Mo.**—St. Louis, Alton & C. R. Co. *v.* Castello, 28 Mo. 379; Brad-

ley *v.* Holloway, 28 Mo. 150; Hawk *v.* Applegate, 37 Mo. App. 32; Houx *v.* Shaw, 18 Mo. App. 45. See also State *v.* McBride, 81 Mo. 349. **N. J.** Harris *v.* Krause, 60 N. J. L. 72, 37 Atl. 439. **Ohio.**—Jones *v.* Carr & Co., 16 Ohio St. 420; Ralston *v.* Oursler, 12 Ohio St. 105; Patty *v.* Mansfield, 8 Ohio 369; Moses *v.* Brashears, 2 Handy 36, 12 Ohio Dec. 317. **Ore.**—Vulcan Iron Wks. *v.* Edwards, 27 Ore. 563, 36 Pac. 22, 39 Pac. 403; Coos Bay R., etc. Co. *v.* Wieder, 26 Ore. 453, 456, 38 Pac. 338; Capital Lumbering Co. *v.* Hall, 9 Ore. 93. **Tex.**—Lang *v.* Dougherty, 74 Tex. 226, 12 S. W. 29; Hardy *v.* Broadus, 35 Tex. 668; Moore *v.* Gammel, 13 Tex. 120; McKay *v.* Treadwell, 8 Tex. 176; Vickery *v.* Ward, 2 Tex. 212; Schley *v.* Hale, 1 White & W. Civ. Cas. §930.

[a] The language of the court in Price *v.* Sanchez, 8 Fla. 136, stating that the claim proceeding “is a substitute for the action of trespass or trover at common law,” is characterized, in Toomer *v.* Fourth Nat. Bank, 68 Fla. 555, 67 So. 225, as being unfortunate, but not authority for holding that the proceeding is exclusive. But see Bernheimer & Sons *v.* Martin, 66 Miss. 486, 6 So. 326, holding that replevin cannot be brought where a claim could have been interposed. Clark *v.* Clinton, 61 Miss. 337; Griffin *v.* Lancaster, 59 Miss. 340.

[b] **Failure To Interpose Claim Does Not Operate as Estoppel.**—The failure to file a claim to property which has been levied on will not estop the true owner from asserting his title by an action of trover against the purchaser at the sale under the execution, such owner having done nothing that had a tendency to mislead the purchaser as to the owner's relation to the property and the title. Lawless *v.* Orr, 122 Ga. 276, 50 S. E. 85; McLennan *v.* Graham, 106 Ga. 211, 32 S. E. 118.

See *supra*, II, B, 6, b, and the titles

resort to equity.<sup>61</sup> But when the claimant has availed himself of his remedy by claim to vindicate his rights, he is thereby barred from resorting to other remedies.<sup>62</sup> He is not, however, obliged to proceed on an indemnifying bond given by the execution creditor for his benefit, unless the statute requires him to do so, but may sue the sheriff.<sup>63</sup>

(IV.) **Where Made.**—The claim or affidavit must be made to the sheriff or constable who levied the writ.<sup>64</sup>

(V.) **By Whom Made.**—(A.) **IN GENERAL.**—It is a general rule that these claims can be interposed only by a person not a party to the writ of execution.<sup>65</sup> The execution defendant cannot interpose a third party claim in his own behalf to the property levied on under the writ against him.<sup>66</sup> But one against whom the execution runs in a representative

“**Replevin;**” “**Trover and Conversion.**”

61. **Ill.**—Wende v. Zimmer, 189 Ill. App. 490. **Miss.**—Shaw v. Thompson, Smed. & M. Ch. 628. **Tex.**—Sumner v. Crawford (Tex. Civ. App.), 41 S. W. 825.

[a] Where the taking into possession of goods under a writ of execution was not warranted by law and was therefore not a valid levy, but was a mere trespass, the proper remedy was by injunction, for the trial of the right of property would have been an inadequate and incomplete remedy for the plaintiff, for, if it had been resorted to, he would have waived all damages that were incurred by reason of the alleged seizure. Sumner v. Crawford (Tex. Civ. App.), 41 S. W. 825.

[b] **The interests of a mortgagee,** not in possession, should be protected in equity. Floyd v. Morrow, 26 Ala. 353; Gammage v. Silliman, 2 Wills. Civ. Cas. (Tex.), §14.

62. **Ala.**—Munter v. Leinkauff, 78 Ala. 546. **Mo.**—Houx v. Shaw, 18 Mo. App. 45. **Neb.**—Storms v. Eaton, 5 Neb. 453. **Ohio.**—Ralston v. Oursler, 12 Ohio St. 105; Moses v. Brashears, 2 Handy 36, 12 Ohio Dec. 317. **Ore.**—Vulcan Iron Wks. v. Edwards, 27 Ore. 563, 36 Pac. 22, 39 Pac. 403; Capital Lumbering Co. v. Hall, 9 Ore. 93. **Tex.**—Lang v. Dougherty, 74 Tex. 226, 12 S. W. 29; Howeth v. Mills, 19 Tex. 295; Moore v. Gammel, 13 Tex. 120.

**As to election of remedies generally,** see the title “**Choice and Election of Remedies.**”

[a] **But a claim interposed in one case does not prevent independent suit for conversion of property levied on in**

another case though the executions were issued in different actions by the same plaintiff against the same defendant and levied simultaneously. Carson v. McCormick Harvesting Mach. Co., 18 Tex. Civ. App. 225, 44 S. W. 406.

63. **State v. McBride**, 81 Mo. 349; Belkin v. Hill, 53 Mo. 492.

64. See the statutes.

**As to the court in which the question is tried,** see *infra*, II, B, 6, d, (XII), (A).

65. **Ala.**—Howard v. Deens, 143 Ala. 423, 39 So. 346; Eldridge v. Grice, 132 Ala. 667, 32 So. 683; Floyd v. Morrow, 26 Ala. 353. **Ark.**—Kirby's Dig., 1904, §3267. **Cal.**—Code Civ. Proc., §689; Paden v. Goldbaum, 4 Cal. Unrep. Cas. 767, 37 Pac. 759. **Ga.**—Wynn v. Irvine's Georgia Music House, 109 Ga. 287, 34 S. E. 582; Zimmerman v. Tucker, 64 Ga. 432; De Loach & Wilcoxson v. Myrick, 6 Ga. 410. **Ill.**—Hurd's St., 1916, ch. 140a, §1. **La.**—Hefferman v. Brenham, 1 La. Ann. 146; Brown v. Cougot, 8 Rob. 14; Oger v. Daunoy, 7 Mart. (N. S.) 656. **Miss.**—Sears v. Gunter, 39 Miss. 338. **Mont.**—Rev. Code, 1907, §6823. **Tex.**—Jones v. Bull, 90 Tex. 187, 37 S. W. 1054; Pitts v. Burgess & Neal, 2 Wills. Civ. Cas., §700.

**As to who may prepare the claim or affidavit,** see *infra*, this section.

66. **Ark.**—Kirby's Dig. 1904, §3267. **Fla.**—Gen. St., 1906, §1626. **Ga.**—Code, 1910, §5157; Wynn v. Irvine's Georgia Music House, 109 Ga. 287, 34 S. E. 582. **Ill.**—Hurd's St., 1916, ch. 140a, §1. **Ky.**—Carroll's Code, 1906, §645; Borches v. Bellis, 110 Ky. 620, 62 S. W. 486. **Mo.**—McGregor v. Hampton, 70 Mo. App. 98; Stevens v. Springer, 23 Mo. App. 375. **Neb.**—Rev. St., 1913,

capacity may claim the property in his individual capacity.<sup>67</sup> The claim may be made either by the claimant himself,<sup>68</sup> or by his agent,<sup>69</sup> or attorney.<sup>70</sup> One who is agent for another may make a claim for the latter to property taken on execution against himself.<sup>71</sup> But the sheriff has no authority, without the consent of the claimant, to institute a proceeding to try the right of property.<sup>72</sup>

(B.) PERSON ESTOPPED.—One who by his conduct or representations has induced the officer to believe that the property belongs to the execution defendant is estopped from claiming the property as his own.<sup>73</sup>

(C.) AS AFFECTED BY TITLE OR INTEREST.—(1.) *In General*.—Under some statutes the title or interest of the claimant must have existed at the

§8062. **N. J.**—Weller *v.* Lanning, 41 N. J. L. 477. **Ohio**.—Jones *v.* Carr & Co., 16 Ohio St. 420; Patty *v.* Mansfield, 8 Ohio 369. **Ore.**—Vulcan Iron Wks. *v.* Edwards, 27 Ore. 563, 36 Pac. 22, 39 Pac. 403. **Tex.**—Pitts *v.* Burgess, 2 Wills. Civ. Cas. (Tex.), §700.

[a] **The wife of the execution defendant** is a competent party to make a claim. Houx *v.* Shaw, 18 Mo. App. 45; Atwood *v.* Meredith, 37 Miss. 635.

67. Padgett *v.* Waters, 4 Ga. App. 306, 61 S. E. 293. See Hardman *v.* Cooper, 107 Ga. 251, 33 S. E. 73.

[a] **Execution Against One as Agent.** An execution against "S. J. W. as agent for" is an execution against him; the words "as agent for" being merely descriptio personae, and therefore he cannot interpose a claim to the property levied upon under such an execution. Wynn *v.* Irvine's Georgia Music House, 109 Ga. 287, 34 S. E. 582.

68. **Ala.**—Code, 1907, §6039. **Cal.** Code Civ. Proc., §689; Paden *v.* Goldbaum, 4 Cal. Unrep. Cas. 767, 37 Pac. 759. **Fla.**—Gen. St., 1906, §1626. **Ga.** Blackwell *v.* Pennington & Sons, 66 Ga. 240. **Ia.**—Chicago, B. & Q. R. Co. *v.* Pierce, 138 Iowa 508, 116 N. W. 594. **Tex.**—Vernon's Sayles' Civ. St., 1914, §7769.

[a] **Signing.**—An affidavit made by a claimant is sufficient although not subscribed or signed, if it clearly appears that he made it and swore to it. Albritton *v.* Williams, 132 Ala. 647, 32 So. 636.

[b] **By Partnership.**—The affidavit must be the sworn declaration of an individual and one signed in the name of a partnership is not sufficient. Flint, Chamberlain & Graham *v.* McCarty, 1 White & W. Civ. Cas. (Tex.), §1018.

69. **Ala.**—Code, 1907, §6039. **Cal.**

Code Civ. Proc., §689. **Fla.**—Gen. St., 1906, §1626. **Ga.**—Blackwell *v.* Pennington & Sons, 66 Ga. 240. **Ill.**—Webber *v.* Brown, 38 Ill. 87. **Ia.**—Chicago, Burlington & Q. R. Co. *v.* Pierce, 138 Iowa 508, 116 N. W. 594. **Tex.**—Vernon's Sayles' Civ. St., 1914, §7769; Walmsley *v.* Hubbard, 24 Tex. 612.

[a] **Agent Must Interpose Claim in Name of Principal.**—That factors who have made advances may file a claim, where property held by or consigned to them has been levied on under a fieri facias does not authorize an agent, having no interest in the property, to interpose in his own name a claim thereto for the protection of his principal, where it has been levied on as the property of a third person. Rowland *v.* Gregg & Son, 122 Ga. 819, 50 S. E. 949.

70. **Ala.**—Code, 1907, §6039. **Fla.** Gen. St., 1906, §1626. **Ga.**—Blackwell *v.* Pennington & Sons, 66 Ga. 240. **Ia.** Chicago, B. & Q. R. Co. *v.* Pierce, 138 Iowa 508, 116 N. W. 594. **Tex.**—Vernon's Sayles' Civ. St., 1914, §7769.

71. Walmsley *v.* Hubbard, 24 Tex. 612.

72. Storms *v.* Eaton, 5 Neb. 453; Jones *v.* Carr & Co., 16 Ohio St. 420; Moses *v.* Brashears, 2 Handy 36, 12 Ohio Dec. 317.

73. **Idaho.**—Lick *v.* Munro, 8 Idaho 510, 69 Pac. 285. **Ill.**—Beaver *v.* Danville Shirt Co., 69 Ill. App. 320. **Ia.** Amonett *v.* Young, 14 La. Ann. 175. **N. Y.**—Whedon *v.* Champlin, 59 Barb. 61. **S. D.**—Plunkett *v.* Hanschka, 14 S. D. 454, 85 N. W. 1004.

[a] **Recital in forthcoming bond** that property belongs to execution defendant creates an estoppel against a third party, executing such bond. Sparks *v.* Shropshire, 4 Bush (Ky.) 550.

[b] **A mortgagee in possession of**

time of the levy,<sup>74</sup> while under others, it must exist at the time of the interposition of the claim.<sup>75</sup> The statutes frequently specify the nature of the title or interest which the third party must have before he can interpose a claim;<sup>76</sup> thus, it is sometimes provided that a claim may be made by the owner of the legal title,<sup>77</sup> or of an equitable right or title to property levied upon.<sup>78</sup> The title or interest must be of such a nature as to render the property not subject to the writ and be inconsistent with the execution plaintiff's right to proceed under the writ.<sup>79</sup>

the goods levied upon is not estopped from setting up his claim to it by delivering to the sheriff a receipt for the property conditioned that on default in redelivery he would pay the amount of the execution, where the sheriff and the judgment creditor has full knowledge of the existence of the mortgage. *Plunkett v. Hanschka*, 14 S. D. 454, 85 N. W. 1004.

74. *State v. Jenkins*, 170 Mo. 16, 70 S. W. 152.

[a] **Effect of Rescission of Executory Contract of Sale.**—Under such a statute the owner of goods who has entered into an executory contract of sale which is mutually rescinded after the levy made upon such goods, is remitted to his original rights and is a proper claimant under the statute. *State v. Jenkins*, 170 Mo. 16, 70 S. W. 152.

75. *Burt v. Rubley*, 113 Ga. 1144, 39 S. E. 409; *Oatts v. Wilkins*, 110 Ga. 319, 35 S. E. 345; *Ruker v. Womack*, 55 Ga. 399; *Deariso & Co. v. Lawrence*, 3 Ga. App. 580, 60 S. E. 330; *Casentini v. Ullman*, 21 Tex. Civ. App. 582, 54 S. W. 420.

[a] **Title at time of levy only not sufficient.** *Oatts v. Wilkins*, 110 Ga. 319, 35 S. E. 345; *Ruker v. Womack*, 55 Ga. 399; *Deariso & Co. v. Lawrence*, 3 Ga. App. 580, 60 S. E. 330.

76. See generally the statutes.

77. Ala.—*Howard v. Deens*, 143 Ala. 423, 39 So. 346; *Patapasco Guano Co. v. Ballard*, 107 Ala. 710, 19 So. 777, 54 Am. St. Rep. 131. Ga.—*Lanier v. Bailey*, 120 Ga. 878, 48 S. E. 324; *MacIntyre v. Ferst*, 101 Ga. 682, 28 S. E. 989; *Bailey v. Brockett*, 20 Ga. 148. La.—*Boubede v. Aymes*, 29 La. Ann. 274; *Livaudais v. Livaudais*, 3 La. Ann. 454; *Brown v. Cougot*, 8 Rob. 14; *Oger v. Daunoy*, 7 Mart. (N. S.) 656. Miss. Code, 1906, §4990.

78. Ala.—*Strickland & Co. v. Lesesne*, 160 Ala. 213, 49 So. 233; *How-*

*ard v. Deens*, 143 Ala. 423, 39 So. 346; *Eldridge v. Grice*, 132 Ala. 667, 32 So. 683; *Patapasco Guano Co. v. Ballard*, 107 Ala. 710, 19 So. 777, 54 Am. St. Rep. 131; *Ballard v. Mayfield*, *Pitman & Co.*, 107 Ala. 396, 18 So. 29. Miss. *Goyer Cold Storage Co. v. Wikdberger*, 71 Miss. 438, 15 So. 235. Mo.—*State v. McKellop*, 40 Mo. 184.

[a] **Beneficiary in trust deed may interpose claim under a statute allowing any person having "any interest" in the property to claim the same.** *State v. McKellop*, 40 Mo. 184.

[b] **An assignee of a landlord's claim for rent has such an equitable title to the crops raised upon the rented premises as will entitle him to maintain a claim suit, under the statute, for the trial of the right of property.** *Strickland & Co. v. Lesesne & Ladd*, 160 Ala. 213, 49 So. 233; *Wells v. Cody*, 112 Ala. 278, 20 So. 381.

[c] **A mortgagee of an unplanted crop has such an equitable title in the mortgaged crop, so soon as it comes into existence, as makes available to him the right to institute a claim suit.** *Ballard v. Mayfield*, *Pitman & Co.*, 107 Ala. 396, 18 So. 29; *Patapasco Guano Co. v. Ballard*, 107 Ala. 710, 19 So. 777, *overruling* *Columbus Iron Wks. Co. v. Renfro Bros.*, 71 Ala. 577, 45 Ala. Reprint 292.

[d] **Trustee.**—One who holds the legal title in trust for a wife may file a claim where such property is levied upon as the separate property of the husband. *Rogers v. Bostain*, 11 Ky. L. Rep. 764.

[e] **In Alabama, prior to Feb. 28, 1887, an equitable title was not sufficient as a basis of a statutory claim suit.** *Bush v. Henry*, 85 Ala. 605, 5 So. 321; *Wetzler v. Kelly*, 83 Ala. 440, 3 So. 747; *Columbus Iron Wks. Co. v. Renfro*, 71 Ala. 577; *King & Co. v. Hill*, 20 Ala. 133.

79. *Hurley v. Epps*, 69 Ga. 611; *Al-*

(2.) *Paramount Lien*.—The claimant may be one having a lien upon the property which is paramount to the right, title or interest of the defendant in the writ;<sup>80</sup> but it is generally held that only a lienholder in possession has sufficient interest to interpose a claim to property levied on,<sup>81</sup> though there is authority to the contrary.<sup>82</sup>

A mortgagee or lienholder, not in possession of the property, cannot interpose a claim to determine the right of the property.<sup>83</sup> A mort-

len *v. Russell*, 19 Tex. 87; *Gillian v. Henderson*, 12 Tex. 47; *Schley v. Hale*, 1 White & W. Civ. Cas. (Tex.), §930.

[a] *Vendee in Possession Under Conditional Sale*.—Where personal property has been sold on a credit, with title retained by the vendor as security until payment, the vendee in possession, who has paid a portion of the purchase money, has such an interest as will authorize the interposition of a claim, if the property is levied on by virtue of an execution against a defendant other than the vendor. *Our Bank v. Corry*, 145 Ga. 385, 89 S. E. 365.

[b] *Necessity of Unity of Ownership and Possession*.—(1) In order to entitle a person to make an affidavit of ownership his claim must be one of title or of possession. It is not necessary that both ownership and possession should unite in the claimant. *White v. Jacobs*, 66 Tex. 462, 1 S. W. 344. (2) One who has the legal title to property at the time of the levy may claim the property though the levy is made by giving notice and without taking actual possession. *Marsh v. Thomason*, 6 Tex. Civ. App. 379, 25 S. W. 43.

80. *Ala.*—*Howard v. Deens*, 143 Ala. 423, 39 So. 346; *Eldridge v. Grice*, 132 Ala. 667, 32 So. 683; *Patapsco Guano Co. v. Ballard*, 107 Ala. 710, 19 So. 777, 54 Am. St. Rep. 131. *Ga.*—*Hurley v. Epps*, 69 Ga. 611. *Miss.*—*Thomas v. Shell*, 76 Miss. 556, 24 So. 876; *Trice v. Walker*, 71 Miss. 968, 15 So. 787.

[a] *In Louisiana* the claimant must be either the owner of the thing seized or have a privilege on the proceeds of the sale. *Boubede v. Aymes*, 29 La. Ann. 274; *Hickman v. Thompson*, 26 La. Ann. 260; *Livaudais v. Livaudais*, 3 La. Ann. 454; *Brown v. Cougot*, 8 Rob. 14.

81. *Hurley & Smith v. Epps*, 69 Ga. 611; *White v. Jacobs*, 66 Tex. 462, 1 S. W. 344; *Blanton v. Langston & Co.*, 80 Tex. 149; *Belt v. Raguet*, 27 Tex.

471; *National Bank v. Citizens Nat. Bank*, 41 Tex. Civ. App. 535, 93 S. W. 209.

[a] *A mechanic's lien on personal property for repairs done thereon*, is sufficient basis for making a claim to the property when levied on. *Hurley v. Epps*, 69 Ga. 611.

[b] *A landlord who has distrained the goods of his tenant for rent due* may interpose a claim thereto if the goods are levied upon. *Grimsley v. Klein*, 2 Ill. 343; *Durham v. Flannagan*, 2 Wills. Civ. Cas. (Tex.), §22, where goods delivered to landlord to secure payment of the rent.

[c] *A pledgee* may interpose a claim provided the officer in making the levy takes possession of the property to the exclusion of the pledgee. But he cannot do so where the levy is made by giving the possessor of the property notice as required by the statute without taking possession of the property. *National Bank v. Citizens' Nat. Bank*, 41 Tex. Civ. App. 535, 93 S. W. 209; *Durham v. Flannagan*, 2 Wills. Civ. Cas. (Tex.), §22.

[d] *A lessor, who under a statute has a right of pledge on the movable effects of the lessee, which are found on the property leased, may interpose a third party claim where the property is seized upon by the lessee's creditor and claim the proceeds under a distribution made according to law.* *Case v. Kloppenburg*, 27 La. Ann. 482; *McCarthy v. Baze*, 26 La. Ann. 382.

82. *Thomas v. Shell*, 76 Miss. 556, 24 So. 876; *Trice v. Walker*, 71 Miss. 968, 15 So. 787.

83. *Wilber v. Kray & Co.*, 73 Tex. 533, 11 S. W. 540; *Garrity v. Thompson*, 64 Tex. 597; *Sparks v. Pace*, 60 Tex. 298; *Wootton v. Wheeler*, 22 Tex. 338; *Gillian v. Henderson*, 12 Tex. 47; *Wright v. Henderson*, 12 Tex. 43 (trustee in deed of trust); *National Bank v. Citizens' Nat. Bank*, 41 Tex. Civ. App. 535, 93 S. W. 209; *Brown & Co. v. Grinnan*, 2 Wills. Civ. Cas. (Tex.),

gagee cannot, however, interpose a claim before a breach of the mortgage terms.<sup>84</sup>

(3.) *Remainder and Reversionary Interest.*—In accordance with the rule that the claimants' right or title must be inconsistent with the execution plaintiff's right to proceed under the writ,<sup>85</sup> a mere remainderman cannot claim the property where the execution is levied upon the particular prior estate,<sup>86</sup> and the same is true as to the holder of a reversionary interest.<sup>87</sup>

(4.) *Joint Ownership.*—(a.) *Generally.*—If the claimant owns the property jointly with another third person, he has sufficient title to interpose a claim,<sup>88</sup> and he may interpose a claim for all of the owners.<sup>89</sup>

(b.) *With Defendant.*—But joint ownership with the defendant in the execution is not ordinarily such an interest as will support a claim,<sup>90</sup>

§§413, 414; *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022.

[a] "The principle (1) is that, if the defendant has an interest in the property subject to execution, it may be levied on and sold, notwithstanding a third party may hold a lien with which it will be incumbered in the hands of a purchaser at the sheriff's sale" (*Garrity v. Thompson*, 64 Tex. 597; *Erwin v. Blanks*, 60 Tex. 583; *Sparks v. Pace*, 60 Tex. 298; *Wootton v. Wheeler*, 22 Tex. 338; *George v. Dyer*, 1 White & W. Civ. Cas. [Tex.], §§780, 782), (2) but a claim may be interposed by a mortgagee in possession. *Craig v. Martin-Bennett Co.* (Tex. Civ. App.), 102 S. W. 1172.

84. *Ga.*—*MacIntyre & Co. v. Ferst*, 101 Ga. 682, 28 S. E. 989; *Cabot v. Armstrong*, 100 Ga. 438, 28 S. E. 123. *Ind.*—*Philbrick v. Goodwin*, 7 Blackf. 18; *Hamilton v. Mitchell*, 6 Blackf. 131. *Mo.*—*F. O. Sawyer Paper Co. v. Mangano*, 60 Mo. App. 76.

*Contra.*—*Ballard v. Mayfield, Pitman & Co.*, 107 Ala. 396, 18 So. 29; *Patapsco Guano Co. v. Ballard*, 107 Ala. 710, 19 So. 777, 54 Am. St. Rep. 131.

[a] *Unforeclosed Mortgage.*—In a claim case, the claimant cannot rely upon an unforeclosed mortgage, though it be prior in date to the judgment under which the property is levied upon. *MacIntyre & Co. v. Ferst*, 101 Ga. 682, 28 S. E. 989; *Cabot v. Armstrong*, 100 Ga. 438, 28 S. E. 123; *Goodrich v. Bowe*, 1 City Ct. (N. Y.) 338.

[b] Where the condition allowing the mortgagor to retain possession was broken by the levy of the execution, the legal right of the mortgagees to

take possession immediately accrued and gave them the right to interpose a claim. *Gaar, Scott & Co. v. First Nat. Bank*, 20 Ill. App. 611.

[c] *Claim by Trustee Before Condition Broken.*—(1) On the trial of a claimant's issue, it is proper for the court to sustain the claim of a trustee in a deed of trust, the conditions of which at the interposition of such claim were unbroken, if, at the time of trial, the conditions have been broken. *Dodds v. Pratt*, 64 Miss. 123, 8 So. 167. (2) Compare with *Butler v. Lee*, 54 Miss. 476, wherein the court says: "If the condition of the deed of trust had been broken when the claim of the trustee . . . was interposed, the issue should have been determined in favor of the claimant; otherwise, not."

85. See *supra*, II, B, 6, d, (V), (C), (1).

86. *North Georgia Fertilizer Co. v. Leming*, 138 Ga. 775, 76 S. E. 95; *American Mtg. Co. v. Hill*, 92 Ga. 297, 18 S. E. 425; *Allen v. Russell*, 19 Tex. 87.

87. *Allen v. Russell*, 19 Tex. 87.

88. *Cotten v. Thompson*, 21 Ala. 574; *McGrew v. Hart*, 1 Port. (Ala.) 175.

89. *Hawkins v. May*, 12 Ala. 673; *Blackwell v. Pennington & Sons*, 66 Ga. 240.

90. *Willis v. Loeb*, 59 Miss. 169; *Schley v. Hale*, 1 White & W. Civ. Cas. (Tex.), §930.

[a] If a joint owner's rights "require protection in the matter he must resort to other remedies afforded by the law." *Schley v. Hale*, 1 White & W. Civ. Cas. (Tex.), §930.

and this is true in case of a partnership,<sup>91</sup> unless it is denied by the claimant that the defendant is a member of the firm.<sup>92</sup>

(VI.) **When Made.**—The claim must be interposed before the property seized or the proceeds thereof have passed from the possession of the officer.<sup>93</sup>

(VII.) **How Made.**—(A.) **IN GENERAL.**<sup>94</sup>—The statutes prescribe how a claim to property levied upon shall be made,<sup>95</sup> and the claimant must act in substantial accordance with the statute.<sup>96</sup> Generally it is required that the claimant file with or serve upon the officer an affidavit<sup>97</sup> or notice<sup>98</sup> of his claim. The making of the affidavit is a jurisdictional prerequisite,<sup>99</sup> proceedings in the trial of the right of property not being considered as commenced until the claim is made<sup>1</sup> to the

91. *Brown & Co. v. Young*, 1 White & W. Civ. Cas. (Tex.), §1240; *Schley v. Hale*, 1 White & W. Civ. Cas. (Tex.), §930.

92. *White v. Jacobs*, 66 Tex. 462, 1 S. W. 344.

93. N. Y. Code Civ. Proc., §1418; *Lackey v. Campbell* (Tex. Civ. App.), 54 S. W. 46.

94. **By whom claim may be made**, see *supra*, II, B, 6, d, (V).

95. See the statutes.

96. Ala.—*Munter v. Leinkauff*, 78 Ala. 546; *Mobile Life Ins. Co. v. Teague*, 78 Ala. 147. Fla.—*Moody v. R. Hoe & Co.*, 22 Fla. 309. La.—*Gravely v. Southern Ice Mach. Co.*, 46 La. Ann. 549, 17 So. 166. Miss.—*Shattuck v. Miller*, 50 Miss. 386. Tex.—*Carter v. Carter*, 36 Tex. 693.

97. See the statutes.

[a] **Claim and affidavit made out of the state** should be properly authenticated before presenting the same to the officer. *Charles v. Foster*, 56 Ga. 612.

**As to signing or subscribing the affidavit by claimant**, see *supra*, II, B, 6, d, (V), (A).

98. See generally the statutes and the following: Ark.—*Lawson v. Johnson*, 5 Ark. 163. Ill.—*Dunlap v. Berry*, 5 Ill. 327, 39 Am. Dec. 413. Ia.—*Chicago, B. & Q. R. Co. v. Pierce*, 138 Iowa 508, 116 N. W. 594; *Shaw v. Tyrell*, 129 Iowa 556, 105 N. W. 1006. N. J.—*Goltra v. Tice* (N. J. L.), 60 Atl. 757.

[a] **Service of claim on deputy sheriff** is sufficient. Ia.—*Rust v. Morgan*, 114 Iowa 101, 86 N. W. 209; *Peterman v. Jones*, 94 Iowa 591, 63 N. W. 338. Ky.—*Mann v. Martin*, 14

*Bush* 763. Minn.—*Williams v. McGrade*, 13 Minn. 174.

[b] **Property Levied Upon by Deputy—Service on Sheriff.**—So also service of the claim is properly made on the sheriff although the property was levied on by a deputy. *Headington v. Langland*, 65 Iowa 276, 21 N. W. 650.

99. *Mobile Life Ins. Co. v. Teague*, 78 Ala. 147; *McAdams v. Beard*, 34 Ala. 478; *Flint, Chamberlain & Graham v. McCarty*, 1 White & W. Civ. Cas. (Tex.), §1018.

[a] **Unsworn Intervention in Original Suit Insufficient.**—A claimant of property which had been levied on as the property of another cannot assert his title to the property by a simple unsworn proceeding without bond, denominated by him an intervention in the original suit. He must proceed according to the statute, by making oath in writing to his claim of the property, and by executing bond as prescribed in the act. *Carter v. Carter*, 36 Tex. 693.

[b] **The sheriff is not bound to notice bare assertions and declarations of individuals**, as to their claim to property found in the possession of an execution defendant, he is required to notice only legal claims fairly exhibited. *Dunlap v. Berry*, 5 Ill. 327, 39 Am. Dec. 413.

1. *Blackwell v. Pennington & Sons*, 66 Ga. 240; *Zurcher v. Krohne, Feiss & Co.*, 63 Tex. 118.

[a] **“The affidavit is the starting point of the proceeding—the active principle that brings into action the jurisdiction of the court. It is the initiatory step, and is essential to the exercise of the special jurisdiction conferred by the statute.”** *Flint, Cham-*

officer, and the bond is given in accordance with the statute.<sup>2</sup>

(B.) **CONTENTS OF CLAIM.**—The affidavit or claim must follow the statute as to its contents.<sup>3</sup> Generally it must set out that the third party holds title to,<sup>4</sup> or has the right to the possession of,<sup>5</sup> or a lien upon,<sup>6</sup> the property which has been seized under the writ. Statutes sometimes require that the notice of the claim state the nature of the claimant's interest in the property,<sup>7</sup> how and from whom<sup>8</sup> he acquired

*berlain & Graham v. McCarty*, 1 White & W. Civ. Cas. (Tex.), §1018.

[b] A mere tender of the claim affidavits is not sufficient. *Jolley v. Hardeman*, 111 Ga. 749, 36 S. E. 952.

2. See *infra*, II, B, 6, d, (VIII).

3. *Kesse v. Wilson*, 139 Mo. App. 1, 119 S. W. 508.

[a] A claim which states the nature of the demand, its amount and identifies the property claimed is sufficient. *Goode v. Nelson*, 29 La. Ann. 143.

[b] **Good Faith.**—The affidavit or claim must state that the claim is made in good faith. *Vernon's Sayles'* Tex. Civ. St., 1914, §7769; *Wright v. Henderson*, 10 Tex. 204.

[c] **Form of Claim.**—(Title and venue.) J. K., being duly sworn, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, L. M., sheriff of \_\_\_\_\_ county, under and by virtue of a writ of execution issued in said action, levied upon and seized as the property of the above-named defendant, personal property described as follows: (insert description); that at the time of said levy the said property was not the property of said defendant but was and is the property of affiant, who acquired title to said property in the following manner (state manner of acquiring title); that the value of said property is \_\_\_\_\_ dollars, and this affidavit is made for the purpose of obtaining the possession of said property. (Signature and Jurat.)

To L. M., sheriff of \_\_\_\_\_ county: I hereby claim the property described in the above affidavit and demand possession of the same.

4. Ala.—*Lassiter v. State*, 106 Ala. 292, 17 So. 725; *Catching v. Bowden*, 89 Ala. 604, 8 So. 58; *McKeithen v. Pratt & Co.*, 53 Ala. 116. Fla.—*Price v. Sanchez*, 8 Fla. 136. Miss.—Code, 1906, §4990. Mo.—*McGregor v. Hampton*, 70 Mo. App. 98. Mont.—Rev. Code, 1907, §§6823, 6673. N. Y.—Code Civ. Proc., §1418.

[a] **Sufficient Statement of Title.**

A verified claim setting out that the claimant is the owner of the property seized, and had delivered it to the execution defendant for purposes of sale, and that he was so holding it when seized by the officer, is a sufficient compliance with a statute directing the claimant to set out his title and state the grounds of such title. *Vermont Marble Co. v. Brow*, 109 Cal. 236, 41 Pac. 1031, 50 Am. St. Rep. 37. 5. *Paden v. Goldbaum*, 4 Cal. Unrep. Cas. 767, 37 Pac. 759.

[a] A claim stating that the claimant is entitled to possession under a bill of sale of the property levied upon is sufficiently explicit. *Henderson v. Hart*, 122 Cal. 332, 54 Pac. 1110; *Dubois v. Spinks*, 114 Cal. 289, 46 Pac. 95.

6. Ala. Code, 1907, §6039.

[a] If the claim is based on a mortgage or lien, the affidavit must state the nature of the right which is claimed. *Bennett v. McKee*, 144 Ala. 601, 38 So. 129; *Ivey v. Coston*, 134 Ala. 259, 32 So. 664.

[b] **Effect of Failure To State Nature of Title.**—When in the interposition of a claim, the claimants do not state in their affidavit that their claim to the property is based upon a mortgage, they are not entitled to recover in such suit as mortgagees. *Ivey v. Coston*, 134 Ala. 259, 32 So. 664.

7. *Gray v. Carroll*, 144 Iowa 68, 120 N. W. 1035.

[a] A specific description of the property is not required by the statute. *Murray v. Thiessen*, 114 Iowa 657, 87 N. W. 672.

8. *Gray v. Carroll*, 144 Iowa 68, 120 N. W. 1035.

[a] **Sufficient Statement.**—Under such a statute a notice stating that the cattle levied on were purchased in a certain state from different parties, whose names could not be given but who resided in a certain vicinity, and that \$1,500 was paid for the thirty-three head of cattle, is sufficient. *Mur-*

the same, and the consideration paid therefor.<sup>9</sup>

(C.) CONCLUSIVENESS OF ALLEGATIONS.—A claimant is bound by any admissions he may make in the affidavit.<sup>10</sup> If he asserts that he has an absolute title to the property he is estopped from attempting to hold it under a mere lien.<sup>11</sup>

(D.) OBJECTIONS TO.—In some states the plaintiff in the execution may demur to the sufficiency of the claimant's affidavit of claim,<sup>12</sup> but no objections or exceptions can be taken to the affidavit after issue joined,<sup>13</sup> or after the execution creditor has given a bond.<sup>14</sup>

(E.) AMENDMENT.—It has been said that the claim affidavit may not be amended, in the absence of a statutory provision allowing it,<sup>15</sup> but it seems that under some circumstances amendment may be permitted.<sup>16</sup>

(VIII.) Bonds.<sup>17</sup>—(A.) BY EXECUTION PLAINTIFF.—In some jurisdictions, the sheriff may release the property or deliver it to the claimant unless the execution plaintiff gives him a bond to indemnify him against loss or damage by reason of retaining such property.<sup>18</sup> If the

ray v. Thiessen, 114 Iowa 657, 87 N. W. 672.

9. Gray v. Carroll, 144 Iowa 68, 120 N. W. 1035; Melver v. Davenport, 110 Iowa 740, 81 N. W. 585.

10. Asher v. Fredenstein, 19 La. Ann. 256.

11. Garrity v. Thompson, 64 Tex. 597.

12. Dixon v. Zadek, 59 Tex. 529.

As to demurrer generally see the title "Demurrer."

[a] A claim affidavit may be demurred to if it fails to state which half of certain premises is claimed by the third person. Janes v. Cleveland, 62 Ga. 237.

[b] Effect of Judgment on Demurrer.—Where claimant fails to amend his claim after a demurrer is sustained thereto, the judgment against the claimant on the demurrer becomes as conclusive a determination of the merits of the cause and of all such issues as might have been litigated between the parties to that action, as though the cause had been determined under formal issues, the hearing of evidence, and a judgment rendered thereon. Dixon v. Zadek, 59 Tex. 529. As to effect of a judgment on demurrer as res adjudicata, see the title "Judgments."

13. Sharp v. Hicks, 94 Ga. 624, 21 S. E. 208; Larey v. Baker, 85 Ga. 687, 11 S. E. 800.

14. State v. Johnson, 1 Mo. App. 219.

15. Blackwell v. Pennington & Sons, 66 Ga. 240.

[a] Amendment to Change Claimant.—An affidavit made by one in his individual name cannot be amended so as to make a partnership the claimant. Blackwell v. Pennington & Sons, 66 Ga. 240.

As to change in statement after appeal from justice court, see the title "Justices of the Peace."

16. See Norris v. Detar, 5 Blackf. (Ind.) 31, where it was held that if the affidavit was defective, the court might permit the claimant to amend.

[a] Amendment Unnecessary.—Where all the pertinent facts on behalf of the claimant are admissible in evidence in a claim case and actually admitted, the refusal of the court to allow an amendment to the claim affidavit setting out these facts in detail, is of no consequence. Hadden v. Larned, 87 Ga. 634, 13 S. E. 806.

17. As to forthcoming bond given by the judgment debtor for purpose of retaining possession of property levied on, see the article "Forthcoming Bonds."

18. Cal.—Code Civ. Proc., §689. Ia. Code, 1897, §3992; Chicago, B. & Q. R. Co. v. Pierce, 138 Iowa 508, 116 N. W. 594. Kan.—Gen. St., 1909, §6042. Mo.—State v. McBride, 81 Mo. 349; Bradley v. Holloway, 28 Mo. 150; McGregor v. Hampton, 70 Mo. App. 98. Mont.—Gallick v. Bordeaux, 31 Mont. 328, 78 Pac. 583. N. J.—2 Comp. St.,

plaintiff gives the bond the officer must proceed and apply the property to the satisfaction of the judgment,<sup>19</sup> at least if the claimant has not filed the bond required of him.<sup>20</sup>

(B.) BY CLAIMANT.—(1.) *Generally*.—In some states the claimant must, at the time of interposing his affidavit or claim,<sup>21</sup> also execute and deliver a statutory bond, with sufficient sureties.<sup>22</sup> It is not necessary for the claimant to tender another forthcoming bond when he renews a claim which he had previously withdrawn.<sup>23</sup> A claimant unable to give the bond must resort to some other remedy for the vindication of his rights,<sup>24</sup> unless the statute dispenses with a bond in case of a pauper claimant.<sup>25</sup>

(2.) *To Whom Payable*.—Some statutes require that the forthcoming bond be made payable to the execution plaintiff,<sup>26</sup> and others to the

1910, p. 2255, §33 (sheriff must proceed to sell property if plaintiff indemnifies him); *Harris v. Krause*, 60 N. J. L. 72, 37 Atl. 439; *Adams v. Diss-ton*, 44 N. J. L. 662; *Weller v. Lanning*, 41 N. J. L. 477; *Harrison v. Allen*, 40 N. J. L. 556, bond without surety sufficient. **Okl.**—Rev. Laws, 1910, §5157.

19. *Harris v. Krause*, 60 N. J. L. 72, 37 Atl. 439, claimant is forced to resort to his common-law remedies for redress.

[a] **Effect of indemnity bond after judgment for claimant in proceedings tried before a justice of the peace**, see *Storms v. Eaton*, 5 Neb. 453; *Jones v. Carr & Co.*, 16 Ohio St. 420; *Ralston v. Oursler*, 12 Ohio St. 105; *Abbey v. Searls*, 4 Ohio St. 598; *Moses v. Brashers*, 2 Handy 36, 12 Ohio Dec. 317.

20. *Williamson v. Wylie*, 69 Mo. App. 368. Compare, *McGregor v. Hampton*, 70 Mo. App. 98, and *infra*, II, B, 6, d, (VIII), (B).

21. *Hand v. Hall Merchandise Co.*, 91 Ga. 130, 16 S. E. 644.

[a] **A bond cannot be given after a motion to dismiss the claim for want of a bond has been duly made**. *Hand v. Hall Merchandise Co.*, 91 Ga. 130, 16 S. E. 644.

22. **Ala.**—*Lassiter v. State*, 106 Ala. 292, 17 So. 725; *Catching v. Bowden*, 89 Ala. 604, 8 So. 58. **Ark.**—*Kirby's Dig.*, 1904, §3267. **Fla.**—Gen. St., 1906, §1626. **Ga.**—Code, 1910, §5158. **Ky.** *Watson v. Gabby*, 18 B. Mon. 658. **Miss.** *Gayden v. Marshall*, 8 Smed. & M. 489. **Mo.**—Rev. St., 1909, §2204 (if claimant desires possession of goods); *State v. McBride*, 81 Mo. 349; *McGregor v.*

*Hampton*, 70 Mo. App. 98. **Tex.**—*Carter v. Carter*, 36 Tex. 693. **Va.**—*Fields-Watkins Co. v. Hensley*, 117 Va. 661, 86 S. E. 113.

[a] **A forthcoming bond and a damage bond must be given where the property is given into the custody of the claimant**. *Smith v. Hightower*, 80 Ga. 669, 7 S. E. 165; *Raiford v. Taylor*, 43 Ga. 250.

[b] **Jurisdictional Prerequisite**.—(1) The execution of the bond in the manner provided by the statute is a jurisdictional prerequisite. *Mobile Life Ins. Co. v. Teague*, 78 Ala. 147; *McAdams v. Beard*, 34 Ala. 478; *Carter v. Carter*, 36 Tex. 693; *Zadek v. Dixon* (Tex.), 3 S. W. 247. (2) And where no bond has been executed, the court can derive no jurisdiction from the mere consent of the parties litigant. *Mobile Life Ins. Co. v. Teague*, 78 Ala. 147.

[c] **The officer taking a forthcoming bond has no power to change or qualify the conditions prescribed by the statute**. *King v. Castlen*, 91 Ga. 488, 18 S. E. 313.

[d] **For forms of forthcoming bond**, see III.—*Foltz v. Stevens*, 54 Ill. 180. **Ky.**—*Carroll's Code*, 1906, p. 653. **Miss.** Code, 1906, §5001. **Tex.**—*Vernon's Sayles' Civ. St.*, 1914, §7774.

23. *Houser v. Williams*, 84 Ga. 601, 11 S. E. 129.

24. *Moore v. Gammel*, 13 Tex. 120. See *Williamson v. Wylie*, 69 Mo. App. 368.

25. **Ga.** Code, 1911, §5164.

26. **Ala.**—Code, 1907, §6039. **Ark.** *Kirby's Dig.*, 1904, §3267. **Fla.**—Gen. St., 1906, §1626. **Ky.**—*Carroll's Code*, 1906, §645; *Watson v. Gabby*, 18 B. Mon. 658. **Miss.**—Code, 1906, §4990.

state.<sup>27</sup> In some jurisdictions, if the bond is a forthcoming bond it is made payable to the sheriff,<sup>28</sup> while if merely a bond to cover damages it is made payable to the execution plaintiff.<sup>29</sup>

(3.) *Amount of.*—(a.) *In General.*—The statutes fix the amount of the bond, the customary provision being in double the value of the property claimed,<sup>30</sup> but in no case to be more than double the amount of the writ levied.<sup>31</sup>

(b.) *Appraisement To Determine.*—Where the amount of the bonds is based upon the value of the property claimed, the statutes provide that the property shall be first appraised,<sup>32</sup> either by the levying officer,<sup>33</sup> or by disinterested persons selected by him.<sup>34</sup>

(4.) *Conditions of.*—The conditions of the bond vary with the statutes.<sup>35</sup> In those jurisdictions where the claimant is given the possession,<sup>36</sup> the bond must be conditioned to have the property forthcoming for the satisfaction of the judgment or claim of the plaintiff, if the issue is determined in favor of the plaintiff,<sup>37</sup> and also for the payment of such costs and damages as may be awarded against him.<sup>38</sup> The bond

**Tex.**—Vernon's Sayles' Civ. St., 1914, §7770.

[a] A bond should not be executed to an assignee of the judgment creditor under a statute directing it to be made to the plaintiff in the execution. *Watson v. Gabby*, 18 B. Mon. (Ky.) 658.

[b] Where several writs have been levied upon the property, the bond may be made payable to all the plaintiffs in the several writs. *Vernon's Sayles' Civ. St. (Tex.)*, 1914, §7770.

27. Mo. Rev. St., 1909, §2204.

28. *Houser v. Williams*, 84 Ga. 601, 11 S. E. 129.

29. Ga. Code, 1910, §5161.

30. See generally the statutes, and the following: **Ala.**—Code, 1907, §6039.

**Ark.**—Kirby's Dig., 1904, §3267. **Fla.**—Gen. St., 1906, §1626. **Ga.**—Code, 1911, §5158. **Ky.**—Carroll's Code, 1906, §645. **Miss.**—Code, 1906, §4990. **Tex.**—Vernon's Sayles' Civ. St., 1914, §7770.

31. **Ala.**—Code, 1907, §6039. **Ga.**—Code, 1911, §5158. **Miss.**—Code, 1906, §4990.

32. See generally the statutes, and compare *infra*, II, B, 7, d, (V).

33. **Fla.**—Gen. St., 1906, §1626. **Ga.**—Code, 1911, §5158. **Miss.**—Code, 1906, §4990. **Tex.**—Vernon's Sayles' Civ. St., 1914, §7770.

[a] *Conclusiveness of Sheriff's Appraisement.*—Where no issue has been made as to the value of the property, and the claimant has not shown that the valuation of the property by the

sheriff was incorrect, it is not error for the court to adopt the valuation of the sheriff, though it would be better, in all cases, to require the jury to find the value of the property, so that the court will be able to make such a decree as will insure regularity in any proceedings that may become necessary after judgment. *Ratchiff v. Hicks*, 23 Tex. 173; *Wright v. Henderson*, 12 Tex. 43; *York v. Le Gierse & Co.*, 1 White & W. Civ. Cas. (Tex.), §1327; *Aiken v. Kennedy*, 1 White & W. Civ. Cas. (Tex.), §1321.

34. **Carroll's Code (Ky.)**, 1906, §646.

35. See the statutes.

36. See *infra*, II, B, 6, d, (IX), (A).

37. **Ala.**—Code, 1907, §6039; *Catching v. Bowden*, 89 Ala. 604, 8 So. 58.

**Ark.**—Kirby's Dig., 1904, §3267. **Fla.**—Gen. St., 1906, §1626. **Ga.**—Code, 1911, §5160; *Reese v. Worsham & Co.*, 110 Ga. 449, 35 S. E. 680, 78 Am. St. Rep. 109; *Houser v. Williams*, 84 Ga. 601, 11 S. E. 129. **Miss.**—Code, 1906, §4990. **Mo.**—*Sechler Carriage Co. v. Hymes*, 87 Mo. App. 193. **Tex.**—*Willis v. Chowning*, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842; *Parlin & Orendorff Co. v. Coffey*, 25 Tex. Civ. App. 218, 61 S. W. 512.

38. **Ala.**—Code, 1907, §6039. **Fla.**—Gen. St., 1906, §1626. **Miss.**—Code, 1906, §4990. **Mo.**—Rev. St., 1909, §2204. **Tex.**—*Parlin & Orendorff Co. v. Coffey*, 25 Tex. Civ. App. 218, 61 S. W. 512.

should contain a recital of the appraised value of each article of the property levied upon.<sup>39</sup>

(5.) *Objections to*.—The plaintiff in execution may object to the sufficiency of the bond,<sup>40</sup> but no objections can be taken after issue joined.<sup>41</sup>

(6.) *Amendment and Substitution*.—If a claim bond does not conform to the statute, it may be amended,<sup>42</sup> or a new and sufficient one may be executed in such time as the court may fix, with the same effect as if originally so executed.<sup>43</sup>

*Effect of Failure To Amend*.—Failure to amend an insufficient bond will effect a dismissal of the claim.<sup>44</sup>

(7.) *Recovery Upon*.—(a.) *Summary Remedy*.—In some jurisdictions a summary remedy upon the claimant's bond, by way of execution against the sureties, is provided by statute.<sup>45</sup>

(b.) *By Action*.—aa. *Who May Maintain*.—The person to whom the bond is made payable may maintain an action upon a breach thereof.<sup>46</sup> A person, not a party to the bond can maintain no action for its breach,<sup>47</sup> except where the bond was made to the officer or the state for his benefit.<sup>48</sup>

bb. *Defenses*.—No defense can be interposed which would involve

39. Kirby's Dig. (Ark.), 1904, §3268; Carroll's Code (Ky.), 1906, §646.

40. Walker v. McDowell, 4 Smed. & M. (Miss.) 118, 43 Am. Dec. 476.

41. Fulghum v. Connor, 99 Ga. 237, 25 S. E. 406.

42. Lee v. Mills, 69 Ga. 740; Veal v. Perkerson, 47 Ga. 92; Sweeney v. Jarvis, 6 Tex. 36.

43. Carroll's Code (Ky.), 1906, §682; Sweeney v. Jarvis, 6 Tex. 36.

44. Lee v. Mills, 69 Ga. 740.

45. Catching v. Bowden, 89 Ala. 604, 8 So. 58; Cooper & Co. v. Davis, 88 Ala. 569, 7 So. 145; Moody v. R. Hoe & Co., 22 Fla. 314.

[a] The claim bond must be returned forfeited (1) before execution may issue against the sureties. Foust v. Greene, 90 Ala. 539, 8 So. 59; Catching v. Bowden, 89 Ala. 604, 8 So. 58. (2) A delivery to the sheriff, to avoid a forfeiture, must be entire. A delivery of less than all is not a performance of the condition of the bond, and the sheriff has no discretion in the matter but must return the fact of forfeiture. Munter v. Leinkauff, 78 Ala. 546.

[b] An execution (1) upon a forfeited bond cannot be issued in favor of only a part of the execution plaintiffs. Moody v. Hoe & Co., 22 Fla. 314. (2) It may issue only against the obligors, where the statute so provides. Moody v. Hoe & Co., 22 Fla. 314.

As to summary remedies generally, see the title "Summary Proceedings;" for enforcement of forthcoming bond given by judgment debtor, see 10 STANDARD PROC. 24.

46. Heard v. Duke, 98 Ga. 134, 26 S. E. 485.

As to joinder of causes of action arising upon the breach of two forthcoming bonds given upon two executions, see 14 STANDARD PROC. 689, 691, note.

47. Heard v. Duke, 98 Ga. 134, 26 S. E. 485.

[a] Execution defendant has no legal title or equitable interest in the enforcement of an action upon a breach of the bond. Heard v. Duke, 98 Ga. 134, 26 S. E. 485.

48. See cases following, and generally the title "Parties."

[a] Where the bond is made payable to the sheriff, (1) he may, upon a breach thereof, recover upon it for the use of the plaintiffs in execution (Heard v. Duke, 98 Ga. 134, 26 S. E. 485), (2) or the plaintiff in execution may bring suit in his own name. Hart v. Thomas & Co., 75 Ga. 529.

[b] Where the bond is made payable to the state, any person injured may, in the name of the state, sue thereon. Mo. Rev. St., 1909, §2204; State v. True, 25 Mo. App. 451; Stevens v. Springer, 23 Mo. App. 375.

the very issue tried in the claim case.<sup>49</sup> Nor can it be contended that the property is a fixture and therefore part of the realty and not within the jurisdiction of court trying the claim case.<sup>50</sup>

**Motion To Quash Bond.**—The claimant cannot, after a judgment adverse to his claim, and a breach of the condition of his bond, move to quash such bond.<sup>51</sup>

*cc. Judgment.*—A judgment upon the bond should ascertain the specific amount due the execution plaintiff.<sup>52</sup> It does not, however, merge the original judgment,<sup>53</sup> although in so far as it represents the same indebtedness, but one satisfaction will be allowed.<sup>54</sup>

(IX.) **Effect of Interposing Claim.**—(A.) **GENERALLY.**—In some jurisdictions, the claimant, after having made affidavit and executed a sufficient bond is entitled to the actual possession of the claimed property.<sup>55</sup> But the sheriff is not thereby relieved of liability to the claimant,<sup>56</sup>

49. *Anderson v. Banks*, 92 Ga. 121, 18 S. E. 364. See *infra*, II, B, 6, d, (XII), (C), (4) and (10).

[a] **The sureties on a forthcoming bond** cannot assert that the property levied upon really belonged to their principal, when he, or the representative of his estate, abandoned the claim, and thereby failed to establish his right thereto. *Zurcher v. Krohne, Feiss & Co.*, 63 Tex. 118.

50. *Jones v. Bull*, 90 Tex. 187, 37 S. W. 1054, the principal and sureties are estopped to deny that the property is personalty, after obtaining possession of it as such by giving the bond.

51. *Wheeler v. Wooten*, 27 Tex. 257.

52. *Smith v. Well's Admx.*, 4 Bush (Ky.) 92.

53. *Lewis v. Taylor*, 17 Tex. 57. See *Seymour v. House*, 103 Ga. 676, 30 S. E. 655.

[a] **Such bond is designed as a cumulative security** to the plaintiff, for the payment of the debt claimed in the execution with interest thereon, and for the damages on the failure to sustain the claim of title to the property. *Lewis v. Taylor*, 17 Tex. 57.

54. *Lewis v. Taylor*, 17 Tex. 57.

55. **Ala.**—Code, 1907, §6039; *Catching v. Bowden*, 89 Ala. 604, 8 So. 58; *Munter v. Leinkauff*, 78 Ala. 546; *Jackson v. Gewin*, 9 Ala. 114; *Rives & Owen v. Wilborne*, 6 Ala. 45. **Ariz.**—*Lawler v. Bashford-Burmister Co.*, 5 Ariz. 94, 46 Pac. 72. **Fla.**—Gen. St., 1906, §1626. **Ga.**—Code, 1911, §5162; *Houser v. Williams*, 84 Ga. 601, 11 S. E. 129. **Miss.**—Code, 1906, §4991; *Sears v. Gunter*, 39 Miss. 338. **Mo.**—Rev. St., 1909, §2204; *McGregor v. Hampton*, 70 Mo.

App. 98; *Houx v. Shaw*, 18 Mo. App. 45. **Tex.**—*Vernons' Sayles' Civ. St.*, 1914, §§7770, 7772.

[a] **Sheriff need not surrender possession** of property to claimant, where claim is not made or forthcoming bond given until the very day of sale under the levy of such property. *Phillips v. State*, 15 Ga. 518.

[b] **Nature of Claimant's Custody.** The provision allowing the claimant, after having complied with the statute, to become the bailee or custodian of the property pending the litigation, is highly conservative, as tending to cut down the expenses of the suit. But he takes possession provisionally, and not as owner. The property is in the law's keeping, and he must preserve it for the law's final arbitrament. Preservation and inexpensive safe custody are the limit of his authority and duty. *Munter v. Leinkauff*, 78 Ala. 546.

[c] **The sheriff, (1) after accepting a forthcoming bond and surrendering possession** of the property, has no right, either upon his own motion or upon the plaintiff's order, to again seize the property before the day of sale. *Houser v. Williams*, 84 Ga. 601, 11 S. E. 129. (2) If he accepts the return of the property in full satisfaction of the obligation, the expense of its keeping from the day of acceptance to the date of its sale falls upon him. *Webb v. Rehberg* (Ga. App.), 90 S. E. 100.

56. *Lenoir's Admr. v. Wilson*, 36 Ala. 600. See also *supra*, II, B, 6, b; II, B, 6, d, (III).

[a] **Interposing a claim** will not suspend the running of the statute of limitations against a claimant's right of

unless the statute so provides;<sup>57</sup> and the levy of the execution upon the property claimed is not discharged thereby,<sup>58</sup> nor is the lien created by the levy impaired,<sup>59</sup> and the property may, after a determination of the claim adverse to the claimant, be sold in satisfaction of the original judgment.<sup>60</sup> But generally the interposition of a claim in the manner provided by statute does suspend the right of sale under the writ pending the determination of the claim,<sup>61</sup> though the claimant is not thereby deprived of the right to sell the property.<sup>62</sup>

(B.) AS ADMISSION. — The fact of the making of the levy is admitted by the interposition of a claim;<sup>63</sup> but generally the legality of the

action. *Baker v. Boozer*, 58 Ga. 195.

57. Ala.—Code, 1907, §6049; *Lassiter v. State*, 106 Ala. 292, 17 So. 725. Tex.—*Vernons' Sayles' Civ. St.*, 1914, §7794; *Howeth v. Mills*, 19 Tex. 295; *Davis v. Jones*, 32 Tex. Civ. App. 424, 75 S. W. 63; *Rose v. Riddle*, 3 Wills. Civ. Cas. §298.

58. Kirby's Dig. (Ark.) 1904, §3272; *Carroll's Code* (Ky.) 1906, §650; *Southern Bank v. White*, 1 Duv. (Ky.) 290.

59. Ala.—*Street v. Duncan*, 117 Ala. 571, 23 So. 523; *Branch Bank v. Broughton*, 15 Ala. 127; *Jackson v. Gewin*, 9 Ala. 114; *Doremus, Suydam & Co. v. Walker*, 8 Ala. 194, 42 Am. Dec. 634; *Mills v. Williams*, 2 Stew. & P. 390. Ga.—*Chesapeake Guano Co. v. Wilder*, 85 Ga. 550, 11 S. E. 618. Ky.—*Carroll's Code*, 1906, §650.

[a] The forfeiture of the forthcoming bond does not impair the lien acquired. *The Chesapeake Guano Co. v. Wilder*, 85 Ga. 550, 11 S. E. 618.

60. *Seymour v. House*, 103 Ga. 676, 30 S. E. 655; *The Chesapeake Guano Co. v. Wilder*, 85 Ga. 550, 11 S. E. 618.

61. Ala.—*Street v. Duncan*, 117 Ala. 571, 23 So. 523; *Lenoir's Admr. v. Wilson*, 36 Ala. 600; *Foster v. Smith*, 16 Ala. 192; *Jackson v. Gewin*, 9 Ala. 114. Fla.—*Gen. St.*, 1906, §1627. Ga.—*Code*, 1911, §5159. Ky.—*Carroll's Code*, 1906, §645; *Vicory v. Strausbaugh*, 78 Ky. 425. Miss.—*Code*, 1906, §4991. Mo. *Houx v. Shaw*, 18 Mo. App. 45.

[a] Where a person (1) who has a privilege or lien on the property seized interposes a claim [see *supra* II, B, 6, d, (V), (C), (2)] the right of sale is not suspended as the property is sold subject to the payment of the claimant's privilege. *Case v. Kloppenburg*,

27 La. Ann. 482; *Hickman v. Thompson*, 26 La. Ann. 260; *Marot v. Ferrier*, 18 La. Ann. 665. (2) Injunction must be obtained by the third person to arrest the sale. *Succession of Logan*, 4 La. Ann. 279.

[b] Pledged Property.—Where the property levied upon is a pledge and is claimed by the pledgee, the property will be sold, and the proceeds of the sale distributed among the lienholders according to the priority of their respective liens. *People's Nat. Bank v. Wheedon*, 115 Ga. 782, 42 S. E. 91.

[c] Sale Under Another Execution. The pending of a claim suit does not prevent the sale of the property so claimed under another *fi. fa.* issued upon a judgment of other creditors against the defendant. *Walker v. Zorn*, 50 Ga. 370; *Brown v. McCrary*, 30 Ga. 878.

62. *Jackson v. Gewin*, 9 Ala. 114; *Thomas & Co. v. Parker*, 69 Ga. 283.

Effect of sale by claimant on claim proceedings, see *infra*, II, B, 6, d, (XII), (C), (3), (c).

63. Ala.—*Bradford & Sons v. Bassett*, 151 Ala. 520, 44 So. 59. Ga. *Stinson v. Hirsch*, 125 Ga. 149, 53 S. E. 1011; *Osborne v. Rice*, 107 Ga. 281, 33 S. E. 54; *Cohen v. Broughton*, 54 Ga. 296. Tex.—*Latham v. Selkirk*, 11 Tex. 314; *Portis v. Parker*, 8 Tex. 23, 58 Am. Dec. 95; *Davis v. Jones*, 32 Tex. Civ. App. 424, 75 S. W. 63.

[a] Irregularity of Levy Waived. As a third party claim cannot properly be filed until a legal levy has been made, a claimant by filing such claim admits the seizure of the property under the levy and thereby also waives any irregularity or informality in the execution of the process, and is estopped from questioning the sufficiency of the entry of levy made by the offi-

process under which it is made is not admitted thereby,<sup>64</sup> though it has been held to the contrary.<sup>65</sup>

(C.) ON RIGHT TO LEVY ON OTHER PROPERTY.—The interposition of a third party claim does not prevent the plaintiff from levying on other property of the execution defendant, pending the proceeding.<sup>66</sup>

(D.) CLAIMANT'S LIABILITY TO PAY EXECUTION DEBT.—The claimant does not, by interposing a claim, render himself liable to pay the judgment debt for the collection of which the writ was issued.<sup>67</sup>

(X.) Withdrawal or Discontinuance of.—(A.) IN GENERAL.—Statutes sometimes provide that the claimant may withdraw or discontinue his claim,<sup>68</sup> but that he may not do so beyond a limited number of times

cer. *Stinson v. Hirsch*, 125 Ga. 149, 53 S. E. 1011; *Davis v. Jones*, 32 Tex. Civ. App. 424, 75 S. W. 63.

64. *Bradford & Sons v. Bassett*, 151 Ala. 520, 44 So. 59 (if void on its face); *Stinson v. Hirsch*, 125 Ga. 149, 53 S. E. 1011; *Osborne v. Rice*, 107 Ga. 281, 33 S. E. 54; *Hudspeth v. Scarborough*, 69 Ga. 777.

[a] Where the levy does not describe the property (1) levied upon and does not state to which of several defendants it belongs, the claimant is not estopped by the interposition of his affidavit and claim from excepting to the levy on that ground. *Hudspeth v. Scarborough*, 69 Ga. 777. (2) *Compare Drawdy v. Littlefield*, 75 Ga. 215, wherein it was said, "Though the levy itself does not say that it is made on property as property of T. P. L., the claimant so recognized it in her affidavit of claim, and this solemn admission in judicio, under oath, too, estops her from denying that it was levied on as his property."

As to scope of inquiry into irregularity and invalidity of writ or judgment, see *infra*, II, B, 6, d, (XII), (C), (4), (b).

65. *Merricks v. Davis*, 65 Ill. 319.

[a] "The claimant, by his act of giving notice to try the right of property, admits the validity of the execution" (*Thompson v. Wilhite*, 81 Ill. 356; *Harrison v. Singleton*, 3 Ill. 21), and the regularity and existence of the proceedings against the defendant. *Dexter v. Perkins*, 22 Ill. 143; *Ledford v. Weber*, 7 Ill. App. 87.

66. Ala.—Code, 1907, §6048; *Doremus, Suydam & Co. v. Walker*, 8 Ala. 194, 42 Am. Dec. 634. Ark.—*Kirby's Dig.*, 1904, §3272. Fla.—Gen. St., 1906, §1627, where plaintiff dismisses first levy. Ga.—*Wyatt v. Chapman*, 66 Ga.

727; *Lynch v. Pressley*, 8 Ga. 327. Ky. *Carroll's Code*, 1906, §650; *Southern Bank v. White*, 1 Duv. 290. Miss. Code, 1906, §4991 (plaintiff may dismiss the levy, and have execution as if it were never made); *Walker v. McDowell*, 4 Smed. & M. 118, 43 Am. Dec. 476. And see *Davis v. Netterville*, 68 Miss. 429, 10 So. 32, wherein it is stated that a subsequent levy will not operate as an abandonment of the original levy. Tex.—*Vernons' Sayles' Civ. St.*, 1914, §7795; *Garrity v. Thompson*, 67 Tex. 1, 2 S. W. 750.

[a] There is no necessity for order of court permitting the withdrawal of a fi. fa. where the claim papers have not been returned to the court having jurisdiction. *Wyatt v. Chapman*, 69 Ga. 727.

67. *Wall v. Harvey*, 107 Ga. 404, 33 S. E. 421; *Southern Mining Co. v. Brown*, 107 Ga. 264, 33 S. E. 73; *Bryan v. Simpson*, 92 Ga. 307, 18 S. E. 547; *Timmons v. Mathis*, 9 Ga. App. 713, 72 S. E. 279.

68. *Adams v. Carnes*, 111 Ga. 505, 26 S. E. 597; *National Exchange Bank v. Walker*, 80 Ga. 281, 4 S. E. 763; *Hart v. Thomas & Co.*, 61 Ga. 470; *Ruker v. Womack*, 55 Ga. 399; *Hodges v. Holiday*, 29 Ga. 696; *Lynch v. Bond*, 19 Ga. 314; *American Inv. Co. v. Cable Co.*, 4 Ga. App. 106, 60 S. E. 1037.

[a] Where claimant has stipulated not to withdraw his claim, the court may deny a subsequent motion made by the claimant to dismiss the claim, there being no mode of dismissing a claim at the claimant's instance otherwise than by withdrawing it. *Royce v. Small*, 94 Ga. 677, 20 S. E. 12.

[b] Plaintiff cannot secure a dismissal against the will of the claimant where he has himself previously prevented a withdrawal by the claimant

without the consent of the execution plaintiff.<sup>69</sup> The right to voluntarily withdraw the claim must be exercised within a reasonable time.<sup>70</sup> And a claimant who has gained possession of the property claimed cannot voluntarily withdraw his claim without first restoring the property to the sheriff.<sup>71</sup>

(B.) EFFECT OF.—While the withdrawal or discontinuance of the claim terminates the claimsuit,<sup>72</sup> it does not, under some statutes, prohibit the execution plaintiff from having a case made up and submitted to the jury, charging that the claim was filed for the purpose of delay;<sup>73</sup> nor does the withdrawal prohibit the claimant, if he retains the title, from claiming again.<sup>74</sup>

by refusing to consent thereto. *Bethune v. Barker*, 14 Ga. 694.

69. *Thomas & Co. v. Parker*, 69 Ga. 283; *Brady v. Brady*, 68 Ga. 831; *Hart v. Thomas & Co.*, 61 Ga. 470; *Ruker v. Womack*, 55 Ga. 399; *Lynch v. Bond*, 19 Ga. 314; *American Inv. Co. v. Cable Co.*, 4 Ga. App. 106, 60 S. E. 1037. See *Mercer v. Baldwin*, 85 Ga. 651, 11 S. E. 846.

[a] A dismissal on motion of the execution plaintiff when the claimant fails to appear operates merely as a consent to a dismissal by the claimant and does not estop the latter from making another claim. *American Inv. Co. v. Cable Co.*, 4 Ga. App. 106, 60 S. E. 1037.

70. See cases following.

[a] After the jury has left the box to make up its verdict, it is too late. *Houser v. Brown*, 60 Ga. 366; *Mize v. Ells*, 22 Ga. 565.

[b] Too Late After Judgment or Verdict Against Claimant.—*Adams v. Carnes*, 111 Ga. 505, 36 S. E. 597; *Hiley v. Bridges*, 60 Ga. 375; *Renneker & Glover v. McMichael*, 33 Ga. 94; *Mize v. Ells*, 22 Ga. 565; *Bethune v. Barker*, 14 Ga. 694; *Attaway v. Dyer*, 8 Ga. 184.

[c] After an appeal taken from a judgment in favor of the execution plaintiff, claimant cannot dismiss his claim without the consent of the plaintiff. *Bethune v. Barker*, 14 Ga. 694; *Attaway v. Dyer*, 8 Ga. 184.

71. *Mosely v. Gainer*, 10 Tex. 578.

72. *Ray v. Atlanta Trust & Bank Co.*, 111 Ga. 853, 36 S. E. 769; *Malpass v. Georgia Loan & Tr. Co.*, 108 Ga. 303, 33 S. E. 967; *Anderson v. Banks*, 92 Ga. 121, 18 S. E. 364; *Ruker v. Womack*, 55 Ga. 399; *McRea v. Nolan*, 33 Ga. 205; *Brown v. Burrus*, 8 Mo. 26.

[a] No appeal can be taken upon

any decision of the court made prior to a voluntary withdrawal of the claim. *McRea v. Nolan*, 33 Ga. 205.

73. *Shelnett v. Whitesburg Banking Co.*, 141 Ga. 678, 81 S. E. 1106; *Ray v. Atlanta Trust & B. Co.*, 111 Ga. 853, 36 S. E. 769; *Mercer v. Baldwin*, 85 Ga. 651, 11 S. E. 846; *National Exchange Bank v. Walker*, 80 Ga. 281, 4 S. E. 763; *Brady v. Brady*, 68 Ga. 831; *Houser v. Brown*, 60 Ga. 366; *Whitaker v. David*, 49 Ga. 559.

[a] The case (1) for damages for delay is separate and distinct from the claim suit. *Ray v. Atlanta Trust & B. Co.*, 111 Ga. 853, 36 S. E. 769. (2) Matters, which would have supported the claimant's title in the claim case cannot be set up as a defense. *Ray v. Atlanta Trust & B. Co.*, 111 Ga. 853, 36 S. E. 769. (3) Nor may the claimant, on a motion for a new trial of the issue asking damages for delay make any objections to rulings made in the trial of the claim case before his withdrawal of the claim. *Ray v. Atlanta Trust & B. Co.*, 111 Ga. 853, 36 S. E. 769.

74. *Ruker v. Womack*, 55 Ga. 399; *American Inv. Co. v. Cable Co.*, 4 Ga. App. 106, 60 S. E. 1037.

[a] Withdrawing a claim to property levied on, and permitting the sale to take place under the process by which the property was seized, does not estop the claimant from afterwards asserting his right to seize the property under an execution superior to the process under which the property was sold. *Denton Bros. v. Hannah*, 12 Ga. App. 494, 77 S. E. 672.

For necessity of giving new bond where claim renewed after a withdrawal, see *infra*, II, B, 6, d, (VIII), (B), (1).

(XI.) **Consolidation of Claims.**—One claim cannot be interposed to the levy of several executions upon the same property in favor of different plaintiffs against the same defendant,<sup>75</sup> the remedy of the claimant in such case, if he wishes to consolidate the cases into one, is to go into equity and ask that the claim cases be consolidated to avoid a multiplicity of suits.<sup>76</sup>

(XII.) **Hearing and Determination of Claim.**—(A.) **BY WHAT COURT.** The statutes designate the court which has jurisdiction to try the title of property levied upon and claimed by a third person.<sup>77</sup> Generally it is the court from which the writ issued,<sup>78</sup> the writ, affidavit and bond being returned by the levying officer to such court at the next term.<sup>79</sup>

**Court of County of Levy.**—Some statutes provide that the court of the county in which the levy is made has jurisdiction;<sup>80</sup> at least where

75. *Fla.*—Moody *v. R. Hoe & Co.*, 22 Fla. 309. *Ga.*—Miller & Co. *v. Mattox*, 118 Ga. 269, 45 S. E. 237. *Miss.*—McAnulty *v. Bingham*, 6 How. 382.

76. Miller & Co. *v. Mattox*, 118 Ga. 269, 45 S. E. 237; Smith *v. Dobbins*, 87 Ga. 303, 15 S. E. 496. Compare Clegg *v. Varnell*, 18 Tex. 294, (1) wherein the claimant was allowed to enjoin in one suit all executions issued upon judgments in favor of different plaintiffs and levied upon the property claimed, and have the right of property determined. (2) But see Green *v. Banks*, 24 Tex. 508, wherein the court refused to sanction the right of the claimant to consolidate in one proceeding and trial the causes of different plaintiffs in execution, whose executions happened to be levied on the same property, upon the ground that the court would have no power to render a joint judgment in favor of the different execution plaintiffs as one of them has no interest in the debt or damages of any of the others.

77. See generally the statutes.

78. *Ala.*—McAdams *v. Beard*, 34 Ala. 478; Doremus, Suydam & Co. *v. Walker*, 8 Ala. 194, 42 Am. Dec. 634. *Ark.*—Kirby's Dig., 1904, §3269. *Fla.* Gen. St., 1906, §1627. *Ga.*—Code 1910, §5167 (if property levied on is personal property); Brannon *v. Cheek*, 103 Ga. 353, 29 S. E. 937; Ridling *v. Stewart*, 77 Ga. 539, 541; Akin *v. Peck*, 64 Ga. 643; Cox *v. Cox*, 48 Ga. 619. *La.* Brown *v. Washington*, 51 La. Ann. 483, 24 So. 976; Staples *v. Boulogny*, 10 Rob. 424. *Miss.*—Clark *v. Clinton*, 61 Miss. 337. *Mo.*—McGregor *v. Hampton*, 70 Mo. App. 98.

[a] Where the claimant is prevented by the amount of his claim from going into the court from which the execution issued, he can compel the execution plaintiff to come into the court having jurisdiction. Brown *v. Washington*, 51 La. Ann. 483, 24 So. 976.

79. *Ala.*—Code, 1907, §6040. *Ark.* Kirby's Dig., 1904, §3269. *Fla.*—Gen. St., 1906, §1627. *Ga.*—Code, 1910, §5167; Brannon *v. Barnes*, 111 Ga. 850, 36 S. E. 689.

[a] **Subsequent Term.**—The court has no jurisdiction of a trial of right of property until a term subsequent to that in which the affidavit and bond was filed with the sheriff. Johnson *v. Johnson*, 108 Ala. 124, 19 So. 306.

[b] Where the sheriff fails to return the claim papers to the proper court, the remedy of either party is to move a rule against him and compel a proper return of the claim. Brannon *v. Cheek*, 103 Ga. 353, 29 S. E. 937; Cottle *v. Dodson*, 25 Ga. 633.

80. Carroll's Code (Ky.) 1906, §648; Vernon's Sayles' Civ. St. (Tex.) 1914, §7776 (which court of such county has jurisdiction is determined by the value of the property claimed); Cullers *v. Gray* (Tex.), 57 S. W. 305; Carney *v. Marsalis*, 77 Tex. 62, 13 S. W. 636; Zucher *v. Krohne, Feiss & Co.*, 63 Tex. 118 (justice's court where value below \$200); Erwin *v. Blanks*, 60 Tex. 583 (district court where value \$500 or over); Chrisman *v. Graham*, 51 Tex. 454, (county court where value exceeds \$200 and not exceeding \$500); Chrisman *v. Grayham*, 49 Tex. 491.

[a] **Even Though Execution Plain-**

real property is levied upon,<sup>81</sup> all the claim papers being returned to such court.<sup>82</sup>

**Justice of Peace.** — In some jurisdictions the trial of the right of property levied upon by virtue of a writ of execution issued from a court of record, is had before a justice of the peace and a jury.<sup>83</sup>

**Criminal Court.** — A proceeding to try the right of property between an execution plaintiff and a claimant, being essentially a civil suit,<sup>84</sup> cannot be tried by a court which has jurisdiction of criminal cases exclusively.<sup>85</sup>

(B.) **MAKING AND JOINDER OF ISSUE.**<sup>86</sup> — The making and joinder of issues is a matter governed entirely by the statutes<sup>87</sup> which sometimes provide that the court shall direct the issues to be made up.<sup>88</sup> Sometimes the only pleading necessary on the part of the claimant is his claim or affidavit.<sup>89</sup> In some jurisdictions no formal pleadings need

**tiff Resides Elsewhere.** — *Coleman v. Brown*, 16 La. Ann. 110.

[b] **Venue Changed.** — If the claimant is not a resident of the county in which the execution is issued, and the property is levied on in the county of his residence, the venue for the trial of the issue may be changed, on his application, to the circuit court of the county of his residence. Such change of venue is a matter of right. *Croom v. Williams*, 110 Miss. 605, 70 So. 704.

81. *Thomason v. Thompson*, 129 Ga. 440, 59 S. E. 236, 26 L. R. A. (N. S.) 536; *Cox v. Cox*, 48 Ga. 619.

[a] **Equitable Jurisdiction.** — (1) Such court has no jurisdiction to hear the equitable petition of the execution defendant who seeks relief against the claimant, where the residence of such claimant is in another county, under a statute providing that petitions for equitable relief shall be filed in the county of the residence of the person against whom relief is prayed. *Keith v. Hughey*, 138 Ga. 769, 76 S. E. 91. (2) But the court has jurisdiction to hear the equitable petition of the execution plaintiff, without regard to the residence of the claimant, where the relief sought is germane to and involved in the claim action, for the claimant by voluntarily interposing a claim, waives jurisdiction as between the parties. *Thomason v. Thompson*, 129 Ga. 440, 59 S. E. 236, 26 L. R. A. (N. S.) 536; *Dawson v. Equitable Mortg. Co.*, 109 Ga. 389, 34 S. E. 668.

[b] **Where both real and personal property are levied on and a claim**

made for both in the county of the levy, the court should dismiss the claim as to personalty, having no jurisdiction over it. *Brannan v. Cheek*, 103 Ga. 353, 29 S. E. 937; *Cox v. Cox*, 48 Ga. 619.

82. Ga. Code, 1911, §5167; *Carroll's Code* (Ky.) 1906, §647.

83. **Kan.** — *Sponenbarger v. Lemert*, 23 Kan. 55. **Neb.** — *Rev. St.*, 1913, §8062. **Ohio.** — *Page & Adams Gen. Code*, §11741; *Jones v. Carr & Co.*, 16 Ohio St. 420; *Patty v. Mansfield*, 8 Ohio 369. **Wyo.** — *Comp. St.*, 1910, §4766.

84. See *supra*, II, B, 6, d, (II).

85. *Lassiter v. State*, 106 Ala. 292, 17 So. 725.

86. **As to the scope of the inquiry at the trial**, see *infra* II, B, 6, d, (XII), (C), (4).

87. See the statutes.

88. **Ariz.** — *Lawler v. Bashford-Burmister Co.*, 5 Ariz. 94, 46 Pac. 72. **Ky.** — *Borches v. Bellis*, 110 Ky. 620, 62 S. W. 486; *Harbor v. Harris' Admr.*, 8 Ky. L. Rep. 965; *Combs v. Wallace*, 3 Ky. L. Rep. 384. **Tex.** — *Scarborough v. Alcorn*, 74 Tex. 358, 12 S. W. 72; *Linn v. Wright*, 18 Tex. 317, 70 Am. Dec. 282; *Wright v. Henderson*, 10 Tex. 204.

[a] **It will be assumed on appeal that the trial court prescribed the proper issues.** *Harbor v. Harris' Admr.*, 8 Ky. L. Rep. 965.

89. **Ga.** — *Hadden v. Larned*, 87 Ga. 634, 13 S. E. 806. **Mo.** — *State v. McBride*, 81 Mo. 349. **Wash.** — *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022; *Chapin v. Bokee*, 4 Wash. 1, 29 Pac. 936.

be made,<sup>90</sup> unless one of the parties insists that the issue be made up in writing.<sup>91</sup> In other states, however, formal pleadings are required consisting of either statements by the execution plaintiff and the claimant,<sup>92</sup> or of an answer or demurrer by the execution plaintiff to the

Compare *Lawler v. Bashford-Burmister Co.*, 5 Ariz. 94, 46 Pac. 72.

[a] **A complaint filed by the claimant** is properly stricken from the files where the case is tried upon the allegations of the claim affidavit. *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022.

[b] **Under an affidavit alleging ownership and right to immediate possession** in claimant, the claimant is entitled to prove that he was in possession of the property and was holding it as security for an indebtedness due him from the execution defendant, and is not confined to proof of absolute ownership. *First Nat. Bank of Seattle v. Hagan*, 16 Wash. 45, 47 Pac. 223.

**As to the form and sufficiency of the affidavit or claim**, see *supra*, II, B, 6, d, (VII).

90. **Ala.**—*Millitello v. Roden Groc. Co.*, 190 Ala. 675, 67 So. 420; *Lehman, Durr & Co. v. Warren*, 53 Ala. 535. **Fla.** *Moody v. R. Hoe & Co.*, 22 Fla. 309; *Price v. Sanchez*, 8 Fla. 136. **Ill.** *Hurd's Rev. St.*, 1916, ch. 140a, §7; *Smeeth-Harwood Co. v. Hutchison*, 175 Ill. App. 602. **Ky.**—*Watson v. Gabby*, 18 B. Mon. 658; *Martin's Admr. v. Donaldson*, 5 Ky. L. Rep. 253; *Howard v. Onan*, 4 Ky. L. Rep. 445. **Wash.**—*Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022; *Chapin v. Bokee*, 4 Wash. 1, 29 Pac. 936.

[a] **Discretionary With Court.** Whether the pleadings shall be in writing or not is a question addressed to the discretion of the court in a motion for judgment on the bond. *Borches v. Bellis*, 110 Ky. 620, 62 S. W. 486; *Couchman's Admr. v. Maupin*, 78 Ky. 33; *Sargent v. Farrar's Assignee*, 2 Ky. L. Rep. 212.

[b] **When No Necessity for Special Pleading Estoppel.**—In *Wright v. McCord*, 113 Ga. 881, 39 S. E. 510, the court said: "It is in cases where for some equitable cause a verdict is to be molded in a claim case that there must be pleadings sufficient to indicate the character of the finding sought, and supported, perhaps, by a proper prayer.

But where the naked question is whether the land levied on is subject to the legal process which has seized it, and this issue is raised upon an ordinary claim proceeding, we know of no reason why there should be separate pleadings alleging that the land is subject because the claimant is estopped from asserting his title." See also *Millitello v. Roden Groc. Co.*, 190 Ala. 675, 67 So. 420. Compare *Scarborough v. Alcorn*, 74 Tex. 358, 12 S. W. 72.

91. *Windham v. Clarke*, 16 Ala. 659; *Dent v. Smith*, 15 Ala. 286.

[a] **The fact that the issue was not made up in writing** cannot be assigned for error when no objection was made in the lower court. *Windham v. Clarke*, 16 Ala. 659; *Dent v. Smith*, 15 Ala. 286; *Phillips v. Cooper*, 50 Miss. 722.

[b] **Presumption of Issue.**—A recital in the record that the jury came and were empanelled to try the issue joined is sufficient to raise the presumption that the formal issue in the trial of the right of property was joined. *Gray v. Raiborn*, 53 Ala. 40; *Phillips v. Cooper*, 50 Miss. 722.

92. See *Lawler v. Bashford-Burmister Co.*, 5 Ariz. 94, 46 Pac. 72; *Scarborough v. Alcorn*, 74 Tex. 358, 12 S. W. 72; *State v. Bender*, 68 Tex. 676, 5 S. W. 674.

[a] **The claimant's affidavit alone** (1) is not sufficient to make up the issue. *Scarborough v. Alcorn*, 74 Tex. 358, 12 S. W. 72. (2) Such affidavit is not to be considered as a pleading, and the source or character of title set up therein is not binding upon the affiant or claimant, but the claim to the property must be tried upon the pleadings tendering issues. *Hargadine-McKittrick Dry Goods Co. v. First Nat. Bank*, 14 Tex. Civ. App. 416, 37 S. W. 622. (3) But where the court and the parties treat the claimant's affidavit as a statement of his defense it is sufficient to prevent a default until an order to prevent some other issue and a failure to comply therewith. *Lawler v. Bashford-Burmister Co.*, 5 Ariz. 94, 46 Pac. 72.

[b] **Estoppel Specially Plead.** Under such a statute, where the claim-

claim affidavit,<sup>93</sup> to which answer the claimant may reply<sup>94</sup> or demur.<sup>95</sup> Where formal pleadings are made, they are generally governed by the rules applicable to other pleadings.<sup>96</sup>

**Counterclaim.** — The execution plaintiff cannot, in a trial of the issue of title, interpose a counterclaim.<sup>97</sup>

**Equitable Petition.** — The statute sometimes permits the filing by either the plaintiff or the claimant of an equitable petition by way of amendment, alleging facts showing any equitable matter germane to the issue.<sup>98</sup>

**Effect of Failure To Tender Issue.** — A failure to tender issue within a specified time may be made ground for dismissal,<sup>99</sup> or it may release

ant relies upon a claim of ownership by virtue of an estoppel he has not complied with the requirement of the statute that he state the nature of his claim unless he sets up the estoppel and the facts constituting it. *Scarborough v. Alcorn*, 74 Tex. 358, 12 S. W. 72. *Compare Wright v. McCord*, 113 Ga. 881, 39 S. E. 510.

93. *State v. McBride*, 81 Mo. 349; *McGregor v. Hampton*, 70 Mo. App. 98; *Martin v. Fox*, 40 Mo. App. 664; *Stevens v. Springer*, 23 Mo. App. 375.

[a] **Claim as Petition.** — The claim takes the place and serves the purpose of a petition. *State v. McBride*, 81 Mo. 349; *McGregor v. Hampton*, 70 Mo. App. 98; *Stevens v. Springer*, 23 Mo. App. 375.

[b] **Failure to demur or answer** within time allowed will effect a release of the property levied upon. *Williamson v. Bank of Curryville*, 69 Mo. App. 368.

94. *Martin v. Fox*, 40 Mo. App. 664.

95. See *Albert v. Freas*, 103 Md. 383, 64 Atl. 282.

96. See the statutes.

[a] **Pleas.** — To a claim of ownership of property seized under execution issued against a third party, the plaintiff in the execution filed a plea upon equitable grounds setting forth certain facts which it was alleged operated as an equitable estoppel to the claimant to assert a claim to the property. Held, that a demurrer to this plea was properly sustained since this defense could have been offered in evidence under the pleas at law. *Albert v. Freas*, 103 Md. 383, 64 Atl. 282.

97. *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33.

98. *Austin v. Southern Home, B. & L. Assn.*, 122 Ga. 439, 50 S. E. 382; *Ford v. Holloway*, 112 Ga. 851, 38 S.

E. 373; *Dawson v. Equitable Mortgage Co.*, 109 Ga. 389, 393, 34 S. E. 668; *Southern Mining Co. v. Brown*, 107 Ga. 264, 33 S. E. 73; *Roberts v. Roberts*, 101 Ga. 765, 29 S. E. 271; *Cabot v. Armstrong*, 100 Ga. 438, 28 S. E. 123; *Blandford & Thornton v. McGehee*, 67 Ga. 84; *Zimmerman v. Tucker*, 64 Ga. 432.

[a] **Petition Cannot Enlarge Issue.** (1) *Blanford v. McGehee*, 67 Ga. 84; *Cox v. Cox*, 48 Ga. 619. (2) A plaintiff "who seeks in a claim case to subject certain property to a judgment which he holds against one individually, cannot, when it is shown that the individual has no title to the property which he seeks to subject, set up, by way of amendment to the issue thus raised, an equity to have such land subjected to the payment of a part of the debt represented by the judgment as the property of a testator whose representative is not bound in his representative character by such judgment." *Handman v. Cooper*, 107 Ga. 251, 33 S. E. 73.

[b] **Petition to foreclose a mortgage on the property claimed**, is not allowable, since the mortgage could be foreclosed after the sale on execution with equal effect. *Cabot v. Armstrong*, 100 Ga. 438, 28 S. E. 123.

99. Ga. Code, 1910, §6273; *McCall v. Lewis*, 129 Ga. 613, 59 S. E. 302; *Hopper v. Wilson*, 128 Ga. 776, 58 S. E. 359; *Sirmans v. Bush*, 61 Ga. 136.

[a] **Issue Tendered Before Call.** Where plaintiff tendered issue before the case was called by writing on the claimant's affidavit that he traversed and denied the truth of such affidavit, the levy should not be dismissed for a failure to tender an issue after the announcement of ready. *Sirmans v. Bush*, 61 Ga. 136.

[b] **Plaintiff has the option of pro-**

the property from the execution and discharge the claimant's bond.<sup>1</sup> Some statutes provide that if the claimant fails to join issue when tendered, the court, at the instance of the execution plaintiff, will order a writ of inquiry as to the value of the property and to determine whether or not the claim was made for the purposes of delay.<sup>2</sup>

(C.) THE TRIAL.—(1.) *In General*.<sup>3</sup>—Proceedings to determine third party claims are governed in general by rules applicable to trials generally.<sup>4</sup> The trial of the right of property is sometimes heard upon a motion either for a judgment upon the bond,<sup>5</sup> or to discharge the bond and release the levy<sup>6</sup> upon notice to the adverse party.<sup>7</sup>

(2.) *By Judge or Jury*.—Under some statutes the issues in an action to try the right to property should be determined by a jury,<sup>8</sup> in which case the claimant cannot adopt a form of proceeding which would deprive the parties of the right of trial by jury.<sup>9</sup> Where one of the parties files an equitable petition in aid of his claim, he thereby converts the proceeding into one in equity,<sup>10</sup> and is no longer entitled to a jury trial as a matter of right.<sup>11</sup>

ceeding with trial or dismissing where the claimant refuses to join issue. *Royce v. Small*, 94 Ga. 677, 20 S. E. 12.

[c] Rule in Georgia changed. *Collier v. Blake*, 16 Ga. App. 382, 85 S. E. 254.

[d] Where the court has failed to direct the issues to be made up, it is error for it to dismiss the case. *Wright v. Henderson*, 10 Tex. 204.

1. *Sears v. Gunter*, 39 Miss. 338; *Martin v. Lofland*, 10 Smed. & M. (Miss.) 317.

2. *Bedford, French & Goodwin Co. v. Adams Machine Co.*, 93 Miss. 537, 47 So. 429; *Sears v. Gunter*, 39 Miss. 338.

3. As to trial by sheriff's jury, see *infra*, II, B, 6, d, (XII), (D).

4. See generally the article "Trial."

[a] Continuances may be allowed in claim cases as in other actions, for good cause shown. *Ga.*—National Exchange Bank *v. Walker*, 80 Ga. 281, 4 S. E. 763, absence of claimant. *Miss.*—Code, 1906, §4992. *Mo.*—Rev. St., 1909, §2205. See generally the title "Continuances."

5. *Carroll's Code* (Ky.) 1906, §648; *Borches v. Bellis*, 110 Ky. 620, 62 S. W. 486; *Vicory v. Strausbaugh*, 78 Ky. 425; *Williams v. Smith*, 4 Bush (Ky.) 540; *Smith v. Wells' Admx.*, 4 Bush (Ky.) 92.

[a] A claimant's bond taken after the death of the defendant cannot be

enforced by motion. *Howe v. Lane*, 8 Ky. L. Rep. 783.

6. *Carroll's Code* (Ky.) 1906, §650.

7. *Carroll's Code* (Ky.) 1906, §§648, 650; *Smith v. Well's Admx.*, 4 Bush (Ky.) 92.

[a] Such notice may be amended in the discretion of the court. *Combs v. Wallace*, 3 Ky. L. Rep. 384.

8. *Ala.*—*Langdon & Co. v. Brumby*, 7 Ala. 53. *Ark.*—*Lawson v. Johnson*, 5 Ark. 168. *Fla.*—Gen. St., 1906, §1628. *Ga.*—*Hodges v. Holiday*, 29 Ga. 696; *De Loach v. Myrick*, 6 Ga. 410. *Ky.* *Carroll's Code*, 1906, §648. *Neb.*—Rev. St., 1913, §8062, jury in justice's court. *N. J.*—2 Comp. St., 1910, p. 2255, §32. *Tex.*—*De Forest, Armstrong & Co. v. Miller*, 42 Tex. 34.

As to trial by sheriff's jury, see *infra*, II, B, 6, d, (XII), (D).

9. *Lawson v. Johnson*, 5 Ark. 168.

[a] In Illinois (1) jury trial is not necessary unless demanded. *Hurd's Rev. St.*, 1916, ch. 140a, §7. (2) Under an earlier statute in Illinois, a sheriff's jury determined the right of property. *Rowe v. Bowen*, 28 Ill. 116; *Mason v. State Bank*, 1 Ill. 183. See *infra*, II, B, 6, d, (XII), (D).

10. See *supra*, II, B, 6, d, (II).

11. *Austin v. Southern Home B. & L. Assn.*, 122 Ga. 439, 50 S. E. 382.

Right to trial by jury in equity case, see generally the title "Juries and Jurors."

**Oath.**<sup>12</sup> — The jury should be sworn "to try the right of property" between the plaintiff in execution and the claimant,<sup>13</sup> and, under some statutes, to give damages if the claim was interposed for delay.<sup>14</sup>

(3.) *Parties.* — (a.) *In General.*<sup>15</sup> — The judgment debtor or defendant in execution is not a party to a claim case, the issue being joined between the plaintiff in execution and the claimant.<sup>16</sup> Nor is the sheriff a proper party thereto.<sup>17</sup> The sureties on the claim bond are not parties to the trial,<sup>18</sup> unless judgment may go against them.<sup>19</sup>

(b.) *Effect of Death of.* — If the plaintiff or one of several joint plaintiffs in execution dies pending a trial of the right of property, the proceeding may be revived in the name of his personal representative.<sup>20</sup>

If the claimant dies pending the claim, his representative may be made

12. As to oath of jury generally, see the title "Juries and Jurors."

13. Fla.—Volusia County Bank v. Bigelow, 45 Fla. 638, 33 So. 704; Baars v. Creary, 23 Fla. 311, 2 So. 662; Moody v. R. Hoe & Co., 22 Fla. 309; Price v. Sanchez, 8 Fla. 136. Neb. Rev. St., 1913, §8063. Ohio.—Jones v. Carr & Co., 16 Ohio St. 420.

As to scope of inquiry, see *infra*, II, B, 6, d, (XII), (C), (4).

14. Moody v. R. Hoe & Co., 22 Fla. 309.

15. See generally the title "Parties."

Amendment as to parties, see *supra*, II, B, 6, d, (VII), (E).

[a] Objections for failure to join interested parties as claimants must be made in trial court. Hawkins v. May, 12 Ala. 673.

16. Fla.—Moody v. R. Hoe & Co., 22 Fla. 314. Ga.—Keith v. Hughey, 138 Ga. 769, 76 S. E. 91; Central Bank v. Georgia Groc. Co., 120 Ga. 883, 48 S. E. 325; Cabot v. Armstrong, 100 Ga. 438, 28 S. E. 123; Woodruff v. Wilkinson, 73 Ga. 115; Bosworth v. Clark, 62 Ga. 286; Anderson v. Wilson, 45 Ga. 25. Tex.—Anderson v. Anderson, 23 Tex. 639.

[a] The execution plaintiff cannot join the judgment debtor with the claimant in a proceeding to try the right of property, as such joinder would change the character of the suit, and the attitude which the claimant is entitled to occupy. Anderson v. Anderson, 23 Tex. 639.

17. Ga.—DeLoach v. Myrick, 6 Ga. 410. Ill.—Hibbard v. Thrasher, 65 Ill.

479. La.—Staples v. Bouigny, 10 Rob. 424. Ohio.—Jones v. Carr & Co., 16 Ohio St. 420.

18. Kibble v. Butler, 14 Smed. & M. (Miss.) 207.

19. Hodde v. Susan, 58 Tex. 389; Muenster v. Tremont Nat. Bank (Tex. Civ. App.), 46 S. W. 277.

[a] Therefore a judge related to the surety in a claim bond, is disqualified from trying an action to try the right of property. Hodde v. Susan, 58 Tex. 389.

20. Gayle v. Bancroft's Admr., 22 Ala. 316; Neal v. Heard, 125 Ga. 441, 54 S. E. 99; Ray v. Anderson, 114 Ga. 975, 980, 41 S. E. 60; Fulghum v. Connor, 99 Ga. 237, 25 S. E. 406; Rogers v. Truett, 73 Ga. 386. See generally the titles "Revivor," "Survival."

[a] Where the levy is made after the death of the execution plaintiff, the representative of the deceased should be made a party to the claim case. This might be accomplished merely by a tender of an issue by the representative and a proper response by the claimant. Ray v. Anderson, 114 Ga. 975, 980, 41 S. E. 60.

[b] An heir at law who is without authority to represent the estate of a deceased plaintiff cannot be made a party to the claim case. Neal v. Heard, 125 Ga. 441, 54 S. E. 99.

[c] Death of the execution plaintiff after the verdict finding the property subject to the writ, but before rendition of the decree, does not entitle the claimant to have the verdict set aside. Rountree v. Lathrop & Co., 69 Ga. 539.

a party<sup>21</sup> and if there be no representative judgment is entered against the sureties on his bond.<sup>22</sup>

(c.) *Effect of Sale by Claimant.*—The sale of the property by the claimant during the pendency of the proceedings does not defeat his right to continue them.<sup>23</sup>

(4.) *Scope of Inquiry.*—(a.) *Title to Property.*—The scope of the inquiry depends of course, upon the issues which have been made up,<sup>24</sup> and the statutes regulating the matter.<sup>25</sup> Generally the true issue made between the claimant and the execution plaintiff is whether or not the property levied upon is liable to the satisfaction of the judgment against the execution defendant,<sup>26</sup> thus thereby trying the respective merits of the claimant's and execution defendant's title.<sup>27</sup> Gen-

21. Ga. Code, 1911, §6272.

22. Miss. Code, 1906, §4996.

[a] A *nunc pro tunc* judgment rendered against a deceased claimant, is not void but merely voidable, and consequently binding upon his sureties until set aside in a direct proceeding *Ramsey v. Zapp* (Tex. Civ. App.), 57 S. W. 82. And see *Muenster v. Tremont Nat. Bank* (Tex. Civ. App.), 46 S. W. 277.

23. *Thomas & Co. v. Parker*, 69 Ga. 283, he may continue the proceedings to protect his purchaser. Compare *supra*, II, B, 6, d, (IX), (A).

24. As to the making and joinder of issues see *supra*, II, B, 6, d, (XII), (B).

25. See generally the statutes.

[a] In Illinois the issue is whether the right of property is in the claimant. *Marshall v. Cunningham*, 13 Ill. 20; *Cassell v. Williams*, 12 Ill. 387.

[b] In Mississippi, whether or not the claimant has title or a paramount lien which entitles him to hold the property is not a proper issue. *Trice v. Walker*, 71 Miss. 968, 15 So. 787.

26. Ala.—*Millitello v. Roden Groc. Co.*, 190 Ala. 675, 67 So. 420; *Bradford & Sons v. Basset*, 151 Ala. 520, 44 So. 59; *Johnson v. Citizens' Bank*, 145 Ala. 654, 39 So. 577; *Ramey v. W. O. Peoples Groc. Co.*, 108 Ala. 476, 18 So. 805; *Crosby v. Hutchinson*, 53 Ala. 5; *Langdon & Co. v. Brumby*, 7 Ala. 53. Fla.—*Baars v. Creary*, 23 Fla. 311, 2 So. 662; *Moody v. Hoe*, 22 Fla. 309; *Price v. Sanchez*, 8 Fla. 136. Ga.—*Thomason v. Thompson*, 129 Ga. 440, 59 S. E. 236, 26 L. R. A. (N. S.) 536; *Widincamp v. James*, 129 Ga. 279, 58 S. E. 836; *McLendon v. Shumate*, 123 Ga. 526, 57 S. E. 886; *Hollinshead v.*

*Woodard*, 128 Ga. 7, 57 S. E. 79; *Stinson v. Hirsch*, 125 Ga. 149, 53 S. E. 1011; *Ansley v. O'Byrne*, 120 Ga. 618, 48 S. E. 228; *Ray v. Atlanta Bank Co.*, 110 Ga. 305, 35 S. E. 117; *Deloach & Wilcoxson v. Myrick*, 6 Ga. 410. Ill.—*Marshall v. Cunningham*, 13 Ill. 20. Miss.—*Trice v. Walker*, 71 Miss. 968, 15 So. 787; *Phillips v. Cooper*, 50 Miss. 722; *Shattuck v. Miller*, 50 Miss. 386; *Sears v. Gunter*, 39 Miss. 338; *Atwood v. Meredith*, 37 Miss. 635; *Thomas v. Estes*, 2 Smed. & M. 439. Wash.—*Chapin v. Bokee*, 4 Wash. 1, 29 Pac. 936.

[a] *Estoppel May Be Shown Under Such Issue.*—*Millitello v. Roden Groc. Co.*, 190 Ala. 675, 67 So. 420; *Wright v. McCord*, 113 Ga. 881, 39 S. E. 881. But see *Scarborough v. Alcorn*, 74 Tex. 358, 12 S. W. 72.

[b] The fact that the execution defendant had other property which should have been first levied on, cannot be put in issue by the claimant. *Mosely v. Gainer*, 10 Tex. 578.

[c] No question can be raised as to the liability of the claimant to pay the debt on which the execution was founded. *Southern Min. Co. v. Brown*, 107 Ga. 264, 33 S. E. 73.

27. *Bradford & Sons v. Basset*, 151 Ala. 520, 44 So. 59; *Johnson v. Citizens' Bank* (Ala.), 39 So. 577; *Petree v. Wilson*, 104 Ala. 157, 16 So. 143; *Crosby v. Hutchinson*, 53 Ala. 5; *Hollinshead v. Woodard*, 128 Ga. 7, 57 S. E. 79.

[a] *Feigned Issue.*—"Nothing is, in truth, put in issue by the record, in a claim case, but the liability of the property to the plaintiff's judgment. The title of the claimant is tried, but no issue is made on the record about

erally a title paramount to that of execution defendant held by a third person, a stranger to the trial of the right of title, and with whom claimant has no privity, cannot be shown by the claimant to defeat the plaintiff's execution.<sup>28</sup>

(b.) *Irregularity and Invalidity of Writ or Judgment.*—As the defendant in execution, in a direct proceeding for that purpose, is the only person who can raise the question of the regularity of a writ,<sup>29</sup> and as the claim statutes were not intended to give a remedy against irregular executions, the rule is that the claimant cannot, in the collateral proceeding of a trial of the right of property, force an issue as to the regularity of the writ,<sup>30</sup> or of the judgment upon which the writ issued,<sup>31</sup> or that the initial process was served by one without authority

that. It is a feigned issue—feigned albeit it involves title to lands. That the sole legal issue is the liability of the property to the judgment is proven by the verdict." Hollinshead v. Woodard, 128 Ga. 7, 57 S. E. 79, quoting from Coiquitt v. Thomas, 8 Ga. 265.

[b] The "right of property" or issue to be tried under the claim statute is an issue of superiority as between the right of the plaintiff in execution to subject the chattel to the satisfaction of his writ, and the claimant's title, as against such right, or, in other words, an issue of the liability of the property to the plaintiff's execution as against the claimant's title, if he has any. It is not a mere question as to whom the legal title and possession of the chattel were in at the time of the levy of the execution. Baars v. Creary, 23 Fla. 311, 2 So. 662.

[c] "Where the claimant's right depends alone upon an interest as joint owner or partner in the property, the judgment of the court will not undertake to regulate the equities of the other joint owners or partners, but will determine only the plain issue of whether or not the property is subject to the execution and levy, and if the claimant fails to show that it is not thus subject, the judgment will be against him and the sureties upon his claim bond as directed by the statute." Schley v. Hale, 1 White & W. Civ. Cas. (Tex.) §§930, 932.

28. Eldridge v. Grice, 132 Ala. 667, 32 So. 683; Jones v. Franklin, 81 Ala. 161, 1 So. 199; Cotten v. Thompson, 21 Ala. 574; Foster v. Smith, 16 Ala. 192; Frow & Ferguson v. Downman, 11 Ala. 880; Branch Bank v. Parker, 5 Ala. 731; Rowland v. Gregg & Son, 122 Ga. 819, 50 S. E. 949; Burt v. Rubley, 113

Ga. 1144, 39 S. E. 409; Parker v. Matthews, 106 Ga. 49, 31 S. E. 784; Stirks v. Johnson, 99 Ga. 298, 25 S. E. 648; Pierce v. De Graffenried, 43 Ga. 392; Black v. Lewis, 30 Ga. 958; Beers v. Dawson, 8 Ga. 556.

29. See *infra*, IV, A, 2, c.

30. Ala.—Millitello v. Roden Groc. Co., 190 Ala. 675, 67 So. 420; Johnson v. Whitfield, 124 Ala. 508, 27 So. 406, 82 Am. St. Rep. 196; Christian & Craft Groc. Co. v. Michael, 121 Ala. 84, 25 So. 571, 77 Am. St. Rep. 30; Sandlin v. Anderson, Green & Co., 76 Ala. 403; Crosby v. Hutchinson, 53 Ala. 5; Brown, Toler & Phillips v. Hurt & Bros., 31 Ala. 146; Stone v. Stone, 1 Ala. 582; Perkins v. Mayfield, 5 Port. 182. Fla.—Baars v. Creary, 23 Fla. 311, 2 So. 662; Price v. Sanchez, 8 Fla. 136. Ill.—Thompson v. Wilhite, 81 Ill. 356. Miss.—Atwood v. Meredith, 37 Miss. 635. Neb.—Miller v. Willis, 15 Neb. 13, 16 N. W. 840. Tex.—The Meader Co. v. Armigdale, 58 Tex. 447; Hodde v. Susan, 58 Tex. 389; Portis v. Parker, 22 Tex. 699; Earle v. Thomas, 14 Tex. 583; Bennett v. Gamble, 1 Tex. 124; Courtney Shoe Co. v. Polley (Tex. Civ. App.), 95 S. W. 7.

31. Millitello v. Roden Groc. Co., 190 Ala. 675, 67 So. 420; Dent v. Smith, 15 Ala. 286; Taylor v. Branch Bank, 14 Ala. 633; Huff v. Cox, 2 Ala. 310; Stone v. Stone, 1 Ala. 582; Hooper v. Pair, 3 Port. (Ala.) 401, 29 Am. Dec. 258; Baars v. Creary, 23 Fla. 311, 2 So. 662; Price v. Sanchez, 8 Fla. 136.

[a] "In the case of a *fi. fa.* a defendant who has had his day in court cannot go behind the judgment for the purpose of showing that it ought never to have been rendered, nor will a claimant be allowed any such right." Horne v. Powell, 88 Ga. 637, 15 S. E. 688.

to make service.<sup>32</sup> But if the execution,<sup>33</sup> or the judgment upon which it is based<sup>34</sup> is void for any cause apparent upon the face of the record or has been set aside for irregularity,<sup>35</sup> or if originally valid, and it has been paid off or otherwise discharged,<sup>36</sup> he may avail himself of that fact to defeat the plaintiff on the trial of the right of property. And it is sometimes permitted, on the trial of a claim case, for the

[b] **Judgment Fraudulently Obtained.**—That judgment upon which the writ was issued was obtained by fraud cannot be shown in claim suit. *Millitello v. Roden Groc. Co.*, 190 Ala. 675, 67 So. 420.

32. *Young v. Germania Sav. Bank*, 134 Ga. 602, 68 S. E. 321.

33. **Ala.**—*Millitello v. Roden Groc. Co.*, 190 Ala. 675, 67 So. 420; *Bradford & Sons v. Haris*, 151 Ala. 669, 44 So. 60; *Bradford & Sons v. Bassett*, 151 Ala. 520, 44 So. 59; *Sandlin v. Anderson, Green & Co.*, 76 Ala. 403; *Brown, Toler & Phillips v. Hurt & Bro.*, 31 Ala. 146. **Ga.**—*Smith v. Lockett*, 73 Ga. 104; *Bradford v. Water Lot Co.*, 58 Ga. 280; *Robinson v. Schly*, 6 Ga. 515; *Slaughter v. Manning*, 11 Ga. App. 650, 75 S. E. 1059. **Tex.**—*The Meader Co. v. Aringdale*, 58 Tex. 447; *Webb v. Mallard*, 27 Tex. 80; *Portis v. Parker*, 22 Tex. 699; *Clegg v. Varnell*, 18 Tex. 294; *Earle v. Thomas*, 14 Tex. 583; *Bennett v. Gamble*, 1 Tex. 124.

[a] See *Biek v. Carter*, 123 Mo. App. 311, 100 S. W. 531, wherein, upon the motion of a claimant to quash an execution, the court did so, upon it appearing that the execution defendant was dead at the time of the issuance of the writ, the court, however, said, "Whether or not Mrs. Vaughn [the claimant] had a right to interfere by motion, it is certain the court had control of its own process, and it ought not to be put in the wrong for quashing a void execution." *Contra*, *Thompson v. Wilhite*, 81 Ill. 356; *Merrieks v. Davis*, 65 Ill. 319; *Harrison v. Singleton*, 3 Ill. 21.

[b] **The claimant (1) may attack an execution or the judgment upon which it issues for any reason which the defendant in execution could urge against it at the time of the trial of the claim case.** *Hollinshead v. Woodard*, 128 Ga. 7, 57 S. E. 79; *Ansley Co. v. O'Byrne*, 120 Ga. 618, 48 S. E. 228; *Osborne v. Rice*, 107 Ga. 281, 33 S. E.

54; *New England Mortgage Sec. Co. v. Watson*, 99 Ga. 733, 27 S. E. 160; *Suydam v. Palmer*, 63 Ga. 546; *Horne v. Powell*, 88 Ga. 637, 15 S. E. 688; *Bradford v. Water Lot Co.*, 58 Ga. 280. (2) But he cannot move to quash the judgment or execution, his remedy being by motion to dismiss the levy. *Morrison v. Anderson*, 111 Ga. 847, 36 S. E. 462. See *supra*, II, B, 6, a.

[c] **"A judgment which is void as to third persons, for the want of jurisdiction, is not such a judgment as can prevail;"** and this appearing from the record itself, the levy is properly dismissed. *Suydam v. Palmer*, 63 Ga. 546.

[d] **It is too late to raise the objection that the execution is void, for the first time in the appellate court.** *Latham v. Selkirk*, 11 Tex. 314.

34. *Hollinshead v. Woodard*, 128 Ga. 7, 57 S. E. 79; *New England Mtg. Sec. Co. v. Watson*, 99 Ga. 733, 27 S. E. 160; *Henderson v. Hill*, 64 Ga. 292; *Phillips v. Hyde*, 45 Ga. 220; *Latham v. Selkirk*, 11 Tex. 314.

[a] **Not a Collateral Attack Upon Judgment.**—*Krutina v. Culpepper*, 75 Ga. 602.

[b] **Death of Sole Plaintiff Before Judgment in Main Suit.**—Claimant may show that the judgment upon which the execution was based was void by reason of the death of the sole plaintiff before the trial and judgment of the case. *Irwin v. Shuford*, 144 Ga. 532, 87 S. E. 674.

35. *Brown v. Hurt & Bro.*, 31 Ala. 146.

36. *Hollinshead v. Woodard*, 128 Ga. 7, 57 S. E. 79; *Ansley v. O'Byrne*, 120 Ga. 618, 48 S. E. 228; *Parker & Co. v. Mathews*, 106 Ga. 49, 31 S. E. 784; *Horne v. Powell*, 88 Ga. 637, 15 S. E. 688; *Winship v. Phillips*, 54 Ga. 237; *Anderson v. Wilson*, 45 Ga. 25; *Robinson v. Schly*, 6 Ga. 515.

[a] **Payment of Judgment.**—A claimant, who fails, when the burden

claimant to interpose a motion to dismiss the levy where the execution or judgment appears from the record to be a nullity.<sup>37</sup>

(5.) *Right To Open and Close.*—In claim cases, the general rule is followed that the party upon whom the burden of proof rests has the right to open and close,<sup>38</sup> whether he be the execution plaintiff,<sup>39</sup> or the claimant.<sup>40</sup>

(6.) *Burden of Proof.*—In some jurisdictions, the execution plaintiff has the burden of proof in all cases where the property levied on is, after the judgment, not in the possession of the defendant in execution;<sup>41</sup> in other jurisdictions he has the burden only when the property was in the possession of the claimant at the time of the levy,<sup>42</sup> and by statute in some jurisdictions, the burden of proof is always on the execution plaintiff to show that the property levied on was subject to his execution.<sup>43</sup> Under some statutes the claimant has the burden

of proof is cast upon him, to show any title or interest in himself to the property, cannot meet the issue by showing that the lien of the judgment has been canceled by payment. *Parker v. Matthews*, 106 Ga. 49, 31 S. E. 784. *Contra*, *Dent v. Smith*, 15 Ala. 286; *Stone v. Stone*, 1 Ala. 582.

37. *Osborne v. Rice*, 107 Ga. 281, 33 S. E. 54; *Moody v. Millen*, 103 Ga. 452, 30 S. E. 258.

[a] **The claimant, at his option**, may instead of moving to dismiss the levy, urge his objection to the introduction in evidence of the record of such proceedings, or move to exclude the plaintiff's execution, if offered by itself, whenever it appears that the same is for any reason void, thus rendering it impossible for him to make out his case. *Osborne v. Rice*, 107 Ga. 281, 33 S. E. 54; *Bosworth v. Clark*, 62 Ga. 286.

[b] **Property Seized Described in Bond.**—"When the claimant has given a forthcoming bond for the property actually seized by the officer executing the *fi. fa.*, it is not error for the judge to refuse to dismiss the levy on the ground that the entry thereof on the *fi. fa.* does not sufficiently describe the property." *Hilton & Dodge Lumber Co. v. Clements*, 108 Ga. 791, 33 S. E. 951.

38. *Lamkin v. Clary*, 103 Ga. 631, 30 S. E. 596; *Powell v. Westmoreland*, 60 Ga. 572; *Belt v. Raguet*, 27 Tex. 471; *Latham v. Selkirk*, 11 Tex. 314. See generally the title "Opening and Closing."

39. *New v. Driver*, 89 Ga. 434, 15 S. E. 535.

40. *Lamkin v. Clary*, 103 Ga. 631, 30 S. E. 596; *Belt v. Raguet*, 27 Tex. 471; *Latham v. Selkirk*, 11 Tex. 314.

[a] **If the defendant in execution was in possession** (1), the burden is cast upon the claimant and he would then be entitled to the opening and conclusion. *Lamkin v. Clary*, 103 Ga. 631, 30 S. E. 596; *Powell v. Westmoreland*, 60 Ga. 572; *Wisembaker & Co. v. West Yellow Pine Co.*, 16 Ga. App. 699, 86 S. E. 46. (2) But if the court directs the plaintiff to assume the affirmative, he is entitled to open and conclude. *James v. Kiser & Co.*, 65 Ga. 515.

**As to duty of sheriff to endorse upon writ** in whose possession the property was found, see *supra*, II, B, 4, i, (IV), (D), (4), (d).

[b] **If the claimant introduces no evidence** he is entitled to conclude. Ga. Code, 1910, §6271; *New v. Driver*, 89 Ga. 434, 15 S. E. 535.

41. *Whitley v. Foster*, 132 Ga. 32, 63 S. E. 698; *Rountree & Co. v. Gaulden*, 123 Ga. 449, 51 S. E. 346; *Southern Min. Co. v. Brown*, 107 Ga. 264, 33 S. E. 73; *Walker v. Hughes*, 90 Ga. 52, 15 S. E. 912; *Smith v. Rothschild & Co.*, 13 Ga. App. 293, 79 S. E. 88; *Butler v. Lee*, 54 Miss. 476.

42. *Panhandle Nat. Bank v. Foster*, 74 Tex. 514, 12 S. W. 223; *Hamburg v. Wood*, 66 Tex. 168, 18 S. W. 623; *King v. Sapp*, 66 Tex. 519, 2 S. W. 573; *Miller v. Sturm*, 36 Tex. 291; *Marrett v. Herrington* (Tex. Civ. App.), 145 S. W. 254; *Producers' Marble Co. v. Bergen* (Tex. Civ. App.), 31 S. W. 89.

43. *Reynolds v. Carter*, 109 Miss.

of proof where the property is found in the possession of the execution defendant,<sup>44</sup> or when the property is taken from the possession of any other person than himself.<sup>45</sup> Where the execution defendant was in possession of the property or had title after the date of the judgment, such fact is sufficient to establish a prima facie case for the execution plaintiff, and shift the onus of proof to the claimant.<sup>46</sup> In some jurisdictions, the court determines who shall be the plaintiff in the issue.<sup>47</sup>

(7.) *Province of Judge or Jury.*—If the evidence introduced in a claim case is conflicting, it is for the jury to determine the fact of ownership at the time of seizure in the goods claimed,<sup>48</sup> and whether the defend-

314, 68 So. 467; *Trice v. Walker*, 71 Miss. 968, 15 So. 787.

44. *Jones v. Newberry*, 16 Ga. App. 424, 85 S. E. 617.

[a] **Execution Defendant in Possession as Agent for Claimant.**—Where the execution defendant professes to be in possession of property levied upon as the agent of the claimant, the principle that possession is prima facie evidence of title still upholds, and the burden of proof is upon the claimant to show ownership in himself. *Dean v. American Harrow Co.*, 112 Ga. 155, 37 S. E. 176; *Richardson v. Subers*, 82 Ga. 427, 9 S. E. 172; *King v. Sapp*, 66 Tex. 519, 2 S. W. 573.

[b] **Husband and Wife in Possession.**—The wife, who is the claimant, has the burden of proof, where the property is found in possession of herself and husband, the execution defendant. *McDuffie v. Greenway*, 24 Tex. 625.

45. *Panhandle Nat. Bank v. Foster*, 74 Tex. 514, 12 S. W. 223; *Miller v. Sturm*, 36 Tex. 291; *Love v. Hudson*, 24 Tex. Civ. App. 377, 59 S. W. 1127; *Pinkard v. Willis*, 24 Tex. Civ. App. 69, 57 S. W. 891; *Cullers v. Gray* (Tex. Civ. App.), 57 S. W. 305.

46. *Ala.*—*Strickland & Co. v. Lesesne*, 160 Ala. 213, 49 So. 233; *Bennett v. McKee*, 144 Ala. 601, 38 So. 129; *Eldridge v. Grice*, 132 Ala. 667, 32 So. 683; *Christian & Craft Groc. Co. v. Michael*, 121 Ala. 84, 25 So. 571, 77 Am. St. Rep. 30; *Vaught v. Oehmig*, 95 Ala. 306, 11 So. 416; *Apfel v. Crane*, 83 Ala. 312, 3 So. 863; *Jones v. Franklin*, 81 Ala. 161, 1 So. 199; *Jackson v. Bain*, 74 Ala. 328. *Ga.*—*Allen v. Clare*, 136 Ga. 550, 71 S. E. 896; *Thompson v. American Mortgage Co.*, 107 Ga. 832, 33 S. E. 689; *Clements v. Stubbs*, 106 Ga. 448, 32 S. E. 584; *Lamkin v. Clary*, 103

*Ga.* 631, 30 S. E. 596; *Tillman v. Fontaine*, 98 Ga. 672, 27 S. E. 149; *Crawford v. Kimbrough*, 76 Ga. 299; *Williams & Co. v. Hart*, 65 Ga. 201; *Knowles v. Jourdan*, 61 Ga. 300. *Ky.*—*Borches v. Bellis*, 110 Ky. 620, 62 S. W. 486. *Miss.*—*Atwood v. Meredith*, 37 Miss. 635; *Thornhill v. Gilmer*, 4 Smed. & M. 153.

[a] **Until the execution plaintiff offers proof of prior possession or other evidence of ownership in the execution defendant, the claimant need offer no evidence of his title, but may rest on plaintiff's failure to sustain his asserted right.** *Jackson v. Bain*, 74 Ala. 328.

[b] **Proof of possession in a tenant of the execution defendant since the judgment casts the burden upon claimant to show a better title.** *Brown v. Houser*, 61 Ga. 629; *Kiser v. Miller*, 58 Ga. 509.

[c] **Possession or Title Before Judgment.**—Proof of possession or title in execution defendant before the rendition of the judgment is not sufficient to shift the burden of proof onto claimant. *Dean v. American Harrow Co.*, 112 Ga. 155, 37 S. E. 176.

47. *Norton v. McNutt*, 55 Ark. 59, 17 S. W. 362; *Borches v. Bellis*, 110 Ky. 620, 62 S. W. 486.

[a] **When Court May Direct Party To Assume the Burden.**—Court should direct which party shall assume the burden of proof and the affirmative where it is difficult to determine from whom the property was taken under the writ. *Miller v. Sturm*, 36 Tex. 291.

48. *Ala.*—*Pruet v. Gunn*, 158 Ala. 123, 46 So. 492; *Cole v. Propst Bros.*, 119 Ala. 99, 24 So. 884. *Mich.*—*Freedman v. Campfield*, 92 Mich. 118, 52 N. W. 630. *Minn.*—*Rollofson v. Nash*, 75 Minn. 237, 77 N. W. 954. *Tex.*—*Cul-*

ant in execution has a leviable interest in them.<sup>49</sup> It is for the jury to say whether the claimant has overcome the prima facie case made out by the fieri facias plaintiff,<sup>50</sup> and whether or not the claim was interposed for the purpose of delay.<sup>51</sup>

(S.) *Instructions.*—(a.) *In General.*—The general rules as to instructions are applicable in claim cases.<sup>52</sup>

(b.) *Peremptory.*<sup>53</sup>—The court may properly direct a verdict for the execution plaintiff<sup>54</sup> or claimant,<sup>55</sup> where the evidence demands a finding in favor of either one.

lers *v.* Gray (Tex. Civ. App.), 57 S. W. 305.

[a] Where the issue is the bona fides of a transfer of property by the defendant in execution to the claimant, and there are circumstances which, if not satisfactorily explained, may be regarded as badges of fraud, it is for the jury, and not the judge, to pass upon such issues. Kelley Bros. *v.* Stovall, 138 Ga. 186, 75 S. E. 6.

[b] Where the evidence as to possession is ambiguous, it is for the jury to determine what was the fact as to such possession. Martin *v.* Cowan, 134 Ga. 477, 68 S. E. 69; Perryman *v.* Morgan, 103 Ga. 555, 29 S. E. 708; Wisenbaker & Co. *v.* West Yellow Pine Co., 16 Ga. App. 699, 86 S. E. 46; First Nat. Bank *v.* Howard (Tex. Civ. App.), 174 S. W. 719.

49. Gibson *v.* Wilson, 130 Ga. 243, 60 S. E. 565.

50. Donaldson *v.* Everett, 122 Ga. 318, 50 S. E. 94; Wisenbaker & Co. *v.* West Yellow Pine Co., 16 Ga. App. 699, 86 S. E. 46.

51. Harvey *v.* Head, 68 Ga. 247; Williams *v.* Cumberland Fertilizer Co. (Ga. App.), 89 S. E. 1091.

52. See Crosby *v.* Hutchinson, 53 Ala. 5; Rice *v.* Warren, 91 Ga. 759, 17 S. E. 1032, and generally the title "Instructions."

[a] Thus, (1) the instructions must not invade the province of the jury (Primrose *v.* Browning, 56 Ga. 369; Craig *v.* Peake, 22 Ill. 185); (2) nor mislead the jury (Nichols *v.* Wheelchel, 70 Ga. 719). (3) They must be a correct statement of the law applicable to the case (Tait *v.* Murphy, 80 Ala. 440, 2 So. 317), (4) and be confined to issues raised by the pleadings (Martin *v.* Fox, 40 Mo. App. 664), (5) but must submit all the issues. Webb *v.* Mallard, 27 Tex. 80.

[b] Where only a part of the prop-

erty levied upon is subject to the writ, it is erroneous for the court to instruct the jury to find the whole property subject. Vining *v.* Officers of Court, 82 Ga. 222, 8 S. E. 185.

[c] If an issue has been raised as to the correctness of the sheriff's valuation of the property, it is error for the court to refuse to instruct the jury that if they find for the execution plaintiff, they should find the value of the property. Linn *v.* Wright, 18 Tex. 317, 70 Am. Dec. 282.

53. See generally the title "Verdict."

54. Kreis *v.* Ray, 133 Ga. 119, 65 S. E. 281; Stinson *v.* Hirsch & Co., 125 Ga. 149, 53 S. E. 1011; Burt *v.* Rubley, 113 Ga. 1144, 39 S. E. 409; Oatts *v.* Wilkins, 110 Ga. 319, 35 S. E. 345; Clements *v.* Stubbs, 106 Ga. 448, 32 S. E. 584; Williams *v.* Cumberland Fertilizer Co. (Ga. App.), 89 S. E. 1091; Shaw *v.* Renfroe, 11 Ga. App. 807, 76 S. E. 263; Brown *v.* Gupton (Tex. Civ. App.), 29 S. W. 88.

55. Ga.—Wall *v.* Harvey, 107 Ga. 404, 33 S. E. 421; Hardman *v.* Cooper, 107 Ga. 251, 33 S. E. 73. Miss.—Becker *v.* Topeka Merc. Co., 109 Miss. 514, 69 So. 497; Webb *v.* Frierson, 15 So. 934; Atwood *v.* Meredith, 37 Miss. 635. Wash.—Washington Nat. Bank *v.* Moyer, 22 Wash. 622, 61 Pac. 712.

[a] If the execution plaintiff fails to carry the burden of showing a valid execution and a valid levy on the property claimed, an affirmative charge for the claimant is proper. Marks *v.* Wood, 133 Ala. 533, 31 So. 978.

[b] Where the court rejects the plaintiff's *fi. fa.* when offered in evidence, it should dismiss plaintiff's case and not direct a verdict to be taken for the claimant. Collins *v.* Hill, 115 Ga. 465, 41 S. E. 678; Hackenhull *v.* Westbrook, 53 Ga. 285.

(9.) *Verdict and Findings*.<sup>56</sup> — The trial of the right of property being brought to determine whether or not the property levied upon is subject to the execution,<sup>57</sup> the verdict must be so phrased as to determine this issue with definiteness.<sup>58</sup> If it be found that the property levied upon is liable to the satisfaction of the writ, the jury shall assess the value of the property,<sup>59</sup> and if the claim was interposed merely for delay, the damages that plaintiff is entitled to, must be assessed.<sup>60</sup> The verdict for the claimant cannot award damages in his favor.<sup>61</sup> But the statute may provide for a finding as to the claimant's mortgage or lien constituting the basis of his claim.<sup>62</sup>

**Effect of Verdict.** — The officer may sell the property if the verdict is for the execution plaintiff,<sup>63</sup> or deliver it to the claimant if the verdict is in his favor.<sup>64</sup>

56. See generally the titles "**Findings and Conclusions**;" "**Verdict**."

57. See *supra*, II, B, 6, d, (XII), (C), (4), (a).

58. *Widincamp v. James*, 129 Ga. 279, 58 S. E. 836; *Neill Bros. & Co. v. Billingsley*, 49 Tex. 161. See *Hooper v. Pair*, 3 Port. (Ala.) 401, 29 Am. Dec. 258.

[a] **A verdict (1) in favor of the plaintiff** in execution is equivalent to the special verdict that the property in issue is subject to the plaintiff's execution. *Thomas v. Estes*, 2 Smed. & M. (Miss.) 439; *Wilber v. Kray & Co.*, 73 Tex. 533, 11 S. W. 540. (2) But where the verdict contains merely a finding for the plaintiff of a sum of money, it is insufficient. *Widincamp v. James*, 129 Ga. 279, 58 S. E. 836.

[b] **Verdicts are to receive a reasonable construction**, and where the issue presented to the jury was whether lots numbered from 4 to 37 were subject to the writ and the jury returned a verdict that lots 20 to 37 were subject to the writ, the verdict will be construed as intending that the remainder of the property was not subject. *Moses v. Eagle & Phenix Mfg. Co.*, 68 Ga. 241.

[c] **A verdict will not be set aside for uncertainty** if it finds that one-half of certain premises were not subject to the writ, without designating which half, where the claim was for one-half without stating which half, the verdict is as certain as the issue submitted. *James v. Cleveland*, 62 Ga. 237. As to plaintiff's right to demur to such claim for uncertainty, see *supra*, II, B, 6, d, (VII), (D).

[d] **Specific Finding as to Property Subject.**—Where the levy and claim

both cover the fee, and a life estate in the property but no more is subject to the execution, the jury ought so to find, instead of finding generally in favor of either party. *McLoughlin v. Ham*, 84 Ga. 786, 11 S. E. 889.

59. *Ala.*—*Catching v. Bowden*, 89 Ala. 604, 8 So. 58; *Tait v. Murphy*, 80 Ala. 440, 2 So. 317. *Fla.*—*Gen. St.*, 1906, §1628, where the claimant has before trial denied under oath, the correctness of the appraisement of the value of the property. *Miss.*—*Weil v. Shedd*, 8 So. 329; *Kibble v. Butler*, 14 Smed. & M. 207; *Pritchard v. Myers*, 3 Smed. & M. 42; *Walker v. Comrs. of Sinking Fund*, 1 Smed. & M. 372; *Penrice v. Cocks*, 1 How. 227. *Neb.*—*Rev. St.*, 1913, §8063. *Ohio.*—*Jones v. Carr & Co.*, 16 Ohio St. 420. *Wyo.*—*Comp. St.*, 1910, §4767.

[a] **A verdict which does not assess the value of the property** should not be received by the court. *Brightman v. Meriwether*, 121 Ala. 602, 25 So. 994; *Tait v. Murphy*, 80 Ala. 440, 2 So. 317.

[b] **If the jury fails to separately assess the value of the articles levied upon**, a judgment will be reversed. *Weil v. Shedd* (Miss.), 8 So. 329.

60. *Ala.*—*Code*, 1907, §6041. *Fla.* *Gen. St.*, 1906, §1628. *Ga.*—*Harvey v. Head*, 68 Ga. 247.

[a] **Where it is found that part of the property was not subject to the levy**, a verdict of damages is erroneous. *Burt v. Lorentz*, 102 Ga. 121, 29 S. E. 137.

61. *Baker v. Boozer*, 58 Ga. 195.

62. *Ala. Code*, 1907, §6043.

63. *Tucker v. Bond*, 23 Ark. 268; *N. J. Comp. St.*, 1910, p. 2255, §33.

64. *Foltz v. Stevens*, 54 Ill. 180.

(10.) *Judgment.*—(a.) *In General.*—The judgment rendered in a claim case must decide the right of property.<sup>65</sup> The general rule that the judgment must conform to the verdict or findings is applicable in claim cases,<sup>66</sup> and it must conform to the statutes providing the form of the judgment.<sup>67</sup> The judgment should not be in the alternative for the property or its value,<sup>68</sup> unless the statute so permits.<sup>69</sup>

(b.) *For Execution Plaintiff.*—In a claim case, the judgment rendered for the execution plaintiff is that the property levied upon is subject to the writ,<sup>70</sup> and directs that the property levied upon be sold,<sup>71</sup> and that the plaintiff recover costs.<sup>72</sup> Or, in some jurisdictions, upon a finding in favor of the execution plaintiff, judgment is rendered for the appraised value of the goods so subject, not exceeding the amount of the writ, and a prescribed per cent in addition thereto.<sup>73</sup> Where damages have been awarded for interposing the claim for delay, they are embraced in the judgment.<sup>74</sup>

(c.) *For Claimant.*—If the issue is found in favor of the claimant, the judgment is rendered against the execution plaintiff for the amount of the claimant's costs,<sup>75</sup> and the property levied upon is ordered released,<sup>76</sup> and the claimant discharged from his bond.<sup>77</sup> Where a claim interposed by a mortgagee in possession is sustained, judgment should

65. Fla. Gen. St., 1906, §1629; *Strobar v. French Piano & Organ Co.*, 48 Fla. 158, 37 So. 177; Wyo. Comp. St., 1910, §4767.

66. *Neill Bros. & Co. v. Billingsley*, 49 Tex. 161; *De Forest v. Miller*, 42 Tex. 34. See generally 15 STANDARD PROC. 55.

[a] A judgment for damages based upon the value of the property is erroneous where there is no finding by the jury as to such value. *Adams v. Carnes*, 111 Ga. 505, 36 S. E. 597.

67. *Neill Bros. & Co. v. Billingsley*, 49 Tex. 161.

Form and sufficiency of judgments generally, see 15 STANDARD PROC. 22, et seq.

68. *Johnson v. Citizens' Bank*, 145 Ala. 654, 39 So. 577.

69. *Shattuck v. Miller*, 50 Miss. 386; *Been v. Lindsey*, 2 Smed. & M. (Miss.) 581; *Thomas v. Estes*, 2 Smed. & M. (Miss.) 439.

70. *Bryan v. Simpson*, 92 Ga. 307, 18 S. E. 547.

71. Ga.—*Bryan v. Simpson*, 92 Ga. 307, 18 S. E. 547. Ill.—*Lansing v. Bates*, 11 Ill. 550. Mo.—*McGregor v. Hampton*, 70 Mo. App. 98.

72. Fla.—Gen. St., 1906, §1629. Ga. *Bryan v. Simpson*, 92 Ga. 307, 18 S. E. 547. Ill.—*Hurd's Rev. St.*, 1916, ch.

140a, §10; *Lansing v. Bates*, 11 Ill. 550. Mo.—*Rev. St.*, 1909, §2205. Ohio. *Jones v. Carr & Co.*, 16 Ohio St. 420.

73. Ark.—*Kirby's Dig.*, 1904, §3270. Fla.—Gen. St., 1906, §1629. Ky.—*Carroll's Code*, 1906, §648; *Combs v. Wallace*, 3 Ky. L. Rep. 384. Tex.—*Vernons' Sayles' Civ. St.*, 1914, §7790.

[a] Value at the Time of Trial. *Johnston v. Standard Oil Co.*, 71 Miss. 397, 14 So. 533.

[b] A judgment for a greater amount than the appraised value of the goods and the per cent thereon, is erroneous. *Combs v. Wallace*, 3 Ky. L. Rep. 384.

[c] In Mississippi, see Code, 1906, §4994.

74. Fla.—Gen. St., 1906, §1629. Ga. *Bryan v. Simpson*, 92 Ga. 307, 18 S. E. 547. Miss.—Code, 1906, §4995.

75. Ill.—*Lansing v. Bates*, 11 Ill. 550. Miss.—*Shattuck v. Miller*, 50 Miss. 386. Mo.—*Rev. St.*, 1909, §2205. Neb. *Rev. St.*, 1913, §8063. Ohio.—*Jones v. Carr & Co.*, 16 Ohio St. 420; *Patty v. Mansfield*, 8 Ohio 369.

76. Ill.—*Hurd's Rev. St.*, 1916, ch. 140a, §10. Miss.—Code, 1906, §4995. Mo.—*McGregor v. Hampton*, 70 Mo. App. 98. Neb.—*Rev. St.*, 1913, §8063. Ohio.—*Jones v. Carr & Co.*, 16 Ohio St. 420; *Patty v. Mansfield*, 8 Ohio 369.

77. Miss. Code, 1906, §4995.

be to permit the mortgagee to retain possession of the property until the mortgage is discharged, and to allow the creditors to sell the property subject to the mortgage.<sup>78</sup> A judgment of dismissal of the levy is a termination of the case favorably to the claimant.<sup>79</sup>

(d.) *Against Execution Defendant*.—As the defendant in execution is not a party to the claim suit,<sup>80</sup> a judgment cannot be rendered against him.<sup>81</sup>

(e.) *Default and Nonsuit*.—In some jurisdictions, the failure of the claimant to appear or join issue will result in a judgment by default against him,<sup>82</sup> but in other jurisdictions, it has been held that a judgment by default cannot be rendered,<sup>83</sup> the proper practice in such jurisdictions being, either to dismiss the claim,<sup>84</sup> or for the plaintiff to make out his case before he is entitled to a verdict or judgment subjecting the property.<sup>85</sup>

(f.) *Amendment of*.—An irregularity in a judgment rendered in

78. *Lapowski v. Taylor*, 13 Tex. Civ. App. 624, 35 S. W. 934.

79. *Plaster v. Terry*, 112 Ga. 702, 37 S. E. 971; *Moody v. Millen*, 103 Ga. 452, 30 S. E. 258; *Collins & Son v. Hudson*, 69 Ga. 684.

80. See *supra*, II, B, 2, 6, d, (XII), (C), (3).

81. *Marx v. Lange, Levy & Co.*, 61 Tex. 547.

[a] *Where the verdict is for the claimant for the property seized and against the plaintiff in the execution, it is not necessary that the verdict and the judgment entered thereon should also include a finding against the defendant in the execution.* *Albert v. Freas*, 103 Md. 583, 64 Atl. 282.

82. *Ariz.*—*Lawler v. Bashford-Burmister Co.*, 5 Ariz. 94, 46 Pac. 72. *Mo. Stevens v. Springer*, 23 Mo. App. 375. *Tex.*—*Martin v. Harnett*, 86 Tex. 517, 25 S. W. 1115; *Ratcliff v. Hicks*, 23 Tex. 173; *Scott v. DeWitt*, 42 Tex. Civ. App. 69, 93 S. W. 215; *Cobb v. Campbell*, 14 Tex. Civ. App. 433, 38 S. W. 246; *Betterton, Irvine & Co. v. Buck*, 2 Wills. Civ. Cas. §198.

[a] *Prerequisite to Entering Default Judgment*.—A default judgment cannot be entered until after the court has directed an issue to be made up between the parties and claimant has failed to join issue upon such direction. *Lawler v. Bashford-Burmister Co.*, 5 Ariz. 94, 46 Pac. 72; *De Forest, Armstrong & Co. v. Miller*, 42 Tex. 34; *Scott v. De Witt*, 42 Tex. Civ. App. 69, 93 S. W. 215.

[b] *No service need be made upon the claimant before a default judgment may be taken against him.* *Martin v. Harnett*, 86 Tex. 517, 25 S. W. 1115.

[c] *Refusal To Enter Default*. Where, upon the call of the docket upon appearance day of the term, claimant's counsel stated in court that he was ready to join issues at such time as the court should reach the case on the docket and direct issues to be made, it was a proper exercise of the discretion of the court to refuse to allow a default judgment to be taken against the claimant upon his failure to appear when the case was reached and to direct issues to be made up. *Scott v. De Witt*, 42 Tex. Civ. App. 69, 93 S. W. 215.

83. *National Furniture Co. v. Edwards*, 105 Ga. 240, 31 S. E. 161; *American Inv. Co. v. Cable Co.*, 4 Ga. App. 106, 60 S. E. 1037.

84. *National Furniture Co. v. Edwards*, 105 Ga. 240, 31 S. E. 161; *Bank of Southwestern Georgia v. Empire Life Ins. Co.*, 10 Ga. App. 320, 73 S. E. 597.

[a] *Where plaintiff fails to appear*, see *Vernon's Sayles' Tex. Civ. St.*, 1914 §7783.

85. *National Furniture Co. v. Edwards*, 105 Ga. 240, 31 S. E. 161; *Bank of Southwestern Georgia v. Empire Life Ins. Co.*, 10 Ga. App. 320, 73 S. E. 597.

[a] *Plaintiff makes out a prima facie case sufficient to entitle him to a verdict finding the property subject to the execution where the entry of levy*

a statutory claim suit may be amended where the judgment is otherwise correct and proper under the pleadings and facts of the case.<sup>86</sup>

(g.) *Effect of.*—aa. *In General.*<sup>87</sup>—A judgment in a claim case is conclusive upon the execution plaintiff and the claimant and their privies, to the same extent as any other judgment.<sup>88</sup> A judgment against a claimant does not determine that the property belongs to the defendant,<sup>89</sup> but it is a final adjudication in favor of the plaintiff that the property is subject to the writ,<sup>90</sup> and to the extent that ownership is determined it is *res adjudicata* as to the parties and their privies.<sup>91</sup>

bb. *Judgment of Justice of Peace.*—A judgment rendered by a justice of the peace in those jurisdictions where the trial of the right of property is had before a justice<sup>92</sup> is not binding upon any of the parties in any respect,<sup>93</sup> except that it concludes the claimant from

on the writ recites that at the time of the levy the property levied upon was in the possession of the defendant in execution. *Bank of Southwestern Georgia v. Empire Life Ins. Co.*, 10 Ga. App. 320, 73 S. E. 597.

86. *Johnson v. Citizens' Bank*, 145 Ala. 654, 39 So. 577; *Ramey v. Peeples Groc. Co.*, 108 Ala. 476, 18 So. 805; *Petree v. Wilson*, 104 Ala. 157, 16 So. 143.

[a] *To Show the True Intendment of the Verdict.*—*Moses v. Eagle & Phoenix Mfg. Co.*, 68 Ga. 241.

Amendment of judgments generally, see 15 STANDARD PROC. 98.

87. See generally the title "Judgments."

88. Ga.—*McLendon v. Shumate*, 128 Ga. 526, 57 S. E. 886; *Hollinshead v. Woodard*, 128 Ga. 7, 57 S. E. 79; *Walker v. Equitable Mortgage Co.*, 114 Ga. 862, 40 S. E. 1010; *Garlington v. Fletcher*, 111 Ga. 861, 36 S. E. 920; *Stamps v. Hardigree*, 100 Ga. 160, 28 S. E. 41; *Welchel v. Gordon*, 63 Ga. 610; *Pol-lard v. King*, 63 Ga. 224. Ill.—*Cassell v. Williams*, 12 Ill. 387. Mo.—*McGregor v. Hampton*, 70 Mo. App. 98; *Stevens v. Springer*, 23 Mo. App. 375.

See generally the titles "Judgments," "Res Judicata."

[a] It is a judicial proceeding, and a judgment therein is as conclusive as a judgment in any other judicial proceeding. *Stevens v. Springer*, 23 Mo. App. 375.

[b] *Transferee.*—(1) A judgment against a claimant does not affect one to whom he had conveyed the property prior to the filing of the claim. *Smith v. Coker*, 110 Ga. 654, 36 S. E. 107. (2)

But one purchasing the property pending the litigation of the claim case is bound by the adjudication. *Jinks v. Lewis*, 94 Ga. 677, 20 S. E. 6.

[c] As a purchaser at sheriff's sale is the privy of the plaintiff in execution, a judgment in a claim case wherein the property has been found subject to the execution levied thereon estops the claimant from setting up title to the same in an action subsequently brought against him for its recovery by one who purchased it at sheriff's sale under the execution. *Garlington v. Fletcher*, 111 Ga. 861, 36 S. E. 920.

[d] The sureties on claimant's bond are bound. *Zurcher v. Krohne, Feiss & Co.*, 63 Tex. 118.

[e] A dismissal of the claim on motion of the plaintiff in the writ, without any appearance on the part of the claimant does not operate as a *res adjudicata* as to the claimant's rights, but he may claim again. *American Inv. Co. v. Cable Co.*, 4 Ga. App. 106, 60 S. E. 1037.

89. *Cassell v. Williams*, 12 Ill. 387, it merely determines that the claimant has no title.

90. *Miller & Co. v. Mattox*, 118 Ga. 269, 45 S. E. 237; *Brannan v. Check*, 103 Ga. 353, 29 S. E. 937; *Heard v. Duke*, 98 Ga. 134, 26 S. E. 485.

91. *Fleekham v. Black*, 1 Ky. L. Rep. 164; *Bullard v. White*, 2 Wills. Civ. Cas. (Tex.), §286.

92. See *supra*, II, B, 6, d, (XII), (A).

93. Kan.—*Graves v. Butcher*, 24 Kan. 291; *Sponenbarger v. Lemert*, 23 Kan. 55. Neb.—*State v. Gillespie*, 9 Neb. 505, 4 N. W. 239. Ohio.—*Jones v.*

all right of redress against the officer making the levy.<sup>94</sup>

(h.) *Execution Upon*.—Upon rendition of a judgment an execution may be issued thereon in the same manner as in other actions,<sup>95</sup> to the extent that it is not satisfied by delivery of the property,<sup>96</sup> and the payment of damages and costs.<sup>97</sup>

(11.) *Costs*.—The matter of costs is largely statutory, and is governed by the general principles and rules elsewhere discussed.<sup>98</sup> It has been held that a successful claimant is not liable for the costs incurred in caring for the property claimed where he refuses to give a forthcoming bond.<sup>99</sup>

(12.) *Appeal*.—An appeal from the judgment is allowed as in other cases of a final determination of the rights of a party,<sup>1</sup> the procedure being governed by that in other cases of review.<sup>2</sup>

(D.) TRIAL BY SHERIFF'S JURY.—(1.) *In General*.<sup>3</sup>—In some jurisdictions, if the sheriff is notified that the property he has levied upon is claimed by a third person,<sup>4</sup> it becomes his duty to have the validity

Carr & Co., 16 Ohio St. 420; Patty v. Mansfield, 8 Ohio 369.

94. Jones v. Carr & Co., 16 Ohio St. 420; Patty v. Mansfield, 8 Ohio 369.

95. Ala.—See Foust v. Greene, 90 Ala. 539, 8 So. 59. Ark.—Kirby's Dig., 1904, §3270. Fla.—Gen. St., 1906, §1639. Ky.—Carroll's Code, 1906, §648. Tex.—Vernon's Sayles' Civ. St., 1914, §7791.

See generally the title "Judgments and Decrees, Enforcement of."

96. Willis v. Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842; Parlin & Orendorff Co. v. Coffey, 25 Tex. Civ. App. 218, 61 S. W. 512; Betterson, Irvine & Co. v. Buck, 2 Wills. Civ. Cas. (Tex.), §202.

[a] It is an absolute right of the claimant to discharge the judgment rendered against him in a trial of the right of property by a return of the property within ten days, and a payment of the damages and value of the use of the property and costs and damages. Parlin & Orendorff Co. v. Coffey, 25 Tex. Civ. App. 218, 61 S. W. 512.

97. Ala.—Code, 1907, §6042. Fla. Gen. St., 1906, §1630. Tex.—Willis v. Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842; Kilgore v. Savage (Tex. Civ. App.), 164 S. W. 1081.

98. See the statutes; and the title "Costs."

[a] Both Parties Partially Successful.—If the judgment is for the claimant as to part of the property and for the plaintiff in execution as to part the court should apportion the costs in

his discretion. Lansing v. Bates, 11 Ill. 550; Sadler v. Anderson, 17 Tex. 245.

99. Peugh v. Corley, 141 Ga. 135, 80 S. E. 633.

[a] Such necessary expense of protecting the property under levy is chargeable as a part of the cost attending the enforcement of the execution. Peugh v. Corley, 141 Ga. 135, 80 S. E. 633.

1. Sellers v. Thomas, 185 Ill. 384, 57 N. E. 10; Empire Tailoring Co. v. First Nat. Bank, 90 Ill. App. 433.

2. See generally 2 STANDARD PROC. 107, and specific titles dealing with appellate procedure.

As to right of claimant to change his statement of claim in an appellate court upon appeal from a judgment of the justice court, see the title "Justices of the Peace."

3. Trial of right of property, see *supra*, II, B, 6, d, (XII), (C).

4. Idaho.—Smith v. Graham, 25 Idaho 174, 136 Pac. 801. N. Y.—De Sisto v. Stimmel, 31 Misc. 711, 65 N. Y. Supp. 314 (*affirmed*, 58 App. Div. 486, 69 N. Y. Supp. 431); Craft v. Brandow, 24 Misc. 306, 52 N. Y. Supp. 1078. N. D. Rev. Code, 1905, §7114. Ore.—Sommer v. Oliver, 39 Ore. 453, 65 Pac. 600; Vulcan Iron Wks. v. Edwards, 27 Ore. 563, 36 Pac. 22, 39 Pac. 403; Remdall v. Swackhamer, 8 Ore. 502. S. D.—Code Civ. Proc., 1910, §343.

[a] In Illinois, this was formerly the practice. Rowe v. Bowen, 28 Ill. 116.

of the claim determined by a sheriff's jury, which is presided over by the sheriff.<sup>5</sup>

(2.) *Character of.*—The proceeding before the sheriff is not judicial.<sup>6</sup> It is not an action.<sup>7</sup>

(3.) *Notice of.*—The sheriff must give notice to the judgment creditor of the time and place of trial.<sup>8</sup>

(4.) *Verdict.*—The verdict rendered by the sheriff's jury is not a judicial determination of the title of the property claimed,<sup>9</sup> and is therefore not conclusive upon any one as to such title.<sup>10</sup> But if the verdict is for the claimant, the levy will be dismissed, unless the judgment creditor gives the sheriff an indemnity bond.<sup>11</sup> The verdict of the sheriff's jury is a full indemnity and protection to the sheriff

[b] **Abolished in Kentucky.**—Carroll's Code, 1906, §659; Watson v. Gabby, 18 B. Mon. (Ky.) 658.

[c] **Left to Sheriff's Discretion.**—De Sisto v. Stimmel, 31 Misc. 711, 65 N. Y. Supp. 314 (*affirmed*, 58 App. Div. 486, 69 N. Y. Supp. 431); Craft v. Brandon, 24 Misc. 306, 52 N. Y. Supp. 1078.

[d] **The service (1) of a written notice of claim upon the sheriff by a third person is all that is necessary to enable the officer to call a jury to try such issue.** Sommer v. Oliver, 39 Ore. 453, 65 Pac. 600. (2) But until such notice is given, the sheriff has no power or authority to summon or call a jury, whatever his views may be as to the title to the property. Vulcan Iron Wks. v. Edwards, 27 Ore. 563, 36 Pac. 22, 39 Pac. 403.

[e] **The sheriff cannot be deprived of this right of protection by any subsequent act of the claimant short of the complete withdrawal of the claim.** Vulcan Iron Wks. v. Edwards, 27 Ore. 563, 36 Pac. 22, 39 Pac. 403.

[f] **A claim which shows on its face a leviable interest in the execution defendant does not justify submission to a jury, and their finding does not entitle the sheriff to demand indemnity before selling the admitted interest of the debtor.** Goodrich v. Bowe, 1 City Ct. (N. Y.) 338.

5. **Cal.**—Perkins v. Thornburgh, 10 Cal. 189. **Idaho.**—Smith v. Graham, 25 Idaho 174, 136 Pac. 801. **N. Y.**—Cohen v. Climax Cycle Co., 19 App. Div. 158, 46 N. Y. Supp. 4, 4 N. Y. Ann. Cas. 332. **Ore.**—Vulcan Iron Wks. v. Edwards, 27 Ore. 563, 36 Pac. 22, 39 Pac. 403.

6. **Cal.**—Perkins v. Thornburgh, 10

116. **N. Y.**—Gilmour Door Co. v. Shea, Cal. 189. **Ill.**—Rowe v. Bowen, 28 Ill. 150 App. Div. 239, 134 N. Y. Supp. 919. **Ore.**—Vulcan Iron Wks. v. Edwards, 27 Ore. 563, 36 Pac. 22, 39 Pac. 403; Capital Lumbering Co. v. Hall, 9 Ore. 93.

7. Hibbard v. Thrasher, 65 Ill. 479, but simply a contest between the execution creditor and the claimant.

8. **Idaho.**—Smith v. Graham, 25 Idaho 174, 136 Pac. 801. **N. D.**—Rev. Code, 1905, §7114. **Ore.**—Vulcan Iron Wks. v. Edwards, 27 Ore. 563, 36 Pac. 22, 39 Pac. 403. **S. D.**—Code Civ. Proc., 1910, §343.

[a] **Notice to the claimant is not provided for by statute and "the law presumes that he will be ready at any time, upon reasonable notice, to submit the merits of his claim to such jury."** Sommer v. Oliver, 39 Ore. 453, 65 Pac. 600.

9. **Idaho.**—Smith v. Graham, 25 Idaho 174, 136 Pac. 801. **Mo.**—Fisher v. Gordon, 8 Mo. 386. **N. Y.**—Gilmour Door Co. v. Shea, 150 App. Div. 239, 134 N. Y. Supp. 919; Cohen v. Climax Cycle Co., 19 App. Div. 158, 46 N. Y. Supp. 4, 4 N. Y. Ann. Cas. 332. **Ore.**—Vulcan Iron Wks. v. Edwards, 27 Ore. 563, 36 Pac. 22, 39 Pac. 403; Capital Lumbering Co. v. Hall, 9 Ore. 93.

10. Gilmour Door Co. v. Shea, 150 App. Div. 239, 134 N. Y. Supp. 919; Cohen v. Climax Cycle Co., 19 App. Div. 158, 46 N. Y. Supp. 4, 4 N. Y. Ann. Cas. 332.

11. **Idaho.**—Smith v. Graham, 25 Idaho 174, 136 Pac. 801. **N. Y.**—De Sisto v. Stimmel, 31 Misc. 711, 65 N. Y. Supp. 314 (*affirmed*, 58 App. Div. 486, 69 N. Y. Supp. 431); Craft v.

proceeding in accordance therewith,<sup>12</sup> but not to other persons, and will therefore not bar an action by the claimant against others for possession of the property,<sup>13</sup> or for damages for taking the same.<sup>14</sup>

(5.) *Judgment*.—The proceeding for the trial of the right of property before a sheriff's jury does not result in a judgment.<sup>15</sup>

(6.) *Costs*.—The losing party must pay the costs.<sup>16</sup>

(7.) *Appeal*.—The action of the sheriff's jury in determining a claim of title to property seized by the sheriff under an execution, not being a judicial determination of such title,<sup>17</sup> is not subject to review by appeal.<sup>18</sup>

7. **Sale on Execution.**—a. *General Statement*.<sup>19</sup>—The sheriff should proceed to make the sale whether the writ be returned or not.<sup>20</sup> Whether mandamus may be used to force the sheriff to proceed with the sale, is elsewhere discussed.<sup>21</sup>

b. *Presumptions*.—The presumption is in favor of the validity and regularity of execution sales;<sup>22</sup> but where the officer sells the

Brandow, 24 Misc. 306, 52 N. Y. Supp. 1078; *Cohen v. Climax Cycle Co.*, 19 App. Div. 158, 46 N. Y. Supp. 4, 4 N. Y. Ann. Cas. 332. **N. D.**—Rev. Code, 1905, §7114. **S. D.**—Code Civ. Proc., 1910, §343.

[a] If the execution plaintiff gives the bond, it becomes the duty of the sheriff to proceed to sell, unless he chooses rather to incur the risk of proving the property not in the defendant, in any action that the plaintiff may bring against him for not selling. *Craft v. Brandow*, 24 Misc. 306, 52 N. Y. Supp. 1078. See *Lord's Ore. Laws*, §232; *Howard v. Conde*, 22 Ore. 581, 30 Pac. 454.

12. **Ky.**—*Philips v. Harriss*, 3 J. J. Marsh. 122, 19 Am. Dec. 166. **Mo.** *Fisher v. Gordon*, 8 Mo. 386. **Ohio.** *Patty v. Mansfield*, 8 Ohio 369. **Ore.** *Sommer v. Oliver*, 39 Ore. 453, 65 Pac. 600; *Hexter v. Schneider*, 14 Ore. 184, 12 Pac. 668; *Capital Lumbering Co. v. Hall*, 9 Ore. 93; *Remdall v. Swackhamer*, 8 Ore. 502.

[a] **As Against Plaintiff in Execution**.—*Craft v. Brandow*, 24 Misc. 306, 52 N. Y. Supp. 1078. See also *Hibbard v. Thrasher*, 65 Ill. 479.

[b] "The object of a trial of the right of property under the statute is merely to furnish an indemnity to the officer in case he disposes of the property in conformity with the verdict." *Hibbard v. Thrasher*, 65 Ill. 479; *Foltz v. Stevens*, 54 Ill. 180; *Rowe v. Bowen*, 28 Ill. 116.

13. *Vulcan Iron Wks. v. Edwards*,

27 Ore. 563, 36 Pac. 22, 39 Pac. 403; *Hexter v. Schneider*, 14 Ore. 184, 12 Pac. 668 (purchaser at sale); *Capital Lumbering Co. v. Hall*, 9 Ore. 93; *Remdall v. Swackhamer*, 8 Ore. 502.

14. *Howard v. Conde*, 22 Ore. 581, 30 Pac. 454; *Capital Lumbering Co. v. Hall*, 9 Ore. 93; *Remdall v. Swackhamer*, 8 Ore. 502.

15. *Vulcan Iron Wks. v. Edwards*, 27 Ore. 563, 36 Pac. 22, 39 Pac. 403.

16. **Idaho**.—*Smith v. Graham*, 25 Idaho 174, 136 Pac. 801. **N. Y.**—Code Civ. Proc., §109. **N. D.**—Rev. Code, 1905, §7114. **Ore.**—*Lord's Law*, §231. **S. D.**—Code Civ. Proc., 1910, §343.

[a] Where the claimant recovered less than half of the property claimed by him, it was proper for the sheriff to tax all the costs against him. *Taylor v. Forman*, 12 Mo. 547.

17. See *supra*, II, B, 6, d, (XII), (D), (2).

18. *Gilmour Door Co. v. Shea*, 150 App. Div. 239, 134 N. Y. Supp. 919; *Cohen v. Climax Cycle Co.*, 19 App. Div. 158, 46 N. Y. Supp. 4, 4 N. Y. Ann. Cas. 332.

**As to right of appeal from judgment determining the right of property**, see *supra*, II, B, 6, d, (XII), (C), (12).

19. **Distinction between judicial and execution sales**, see the title "Judicial Sales."

20. *Willoughby v. Dewey*, 63 Ill. 246.

**Return**, see II, B, 8.

21. See the title "Sheriffs, Constables and Marshals."

22. **Fla.**—*Kendrick v. Latham*, 25

property of a stranger the presumption of the validity of the sale does not apply.<sup>23</sup>

c. *Authority To Sell.*—(I.) *Generally.*—The power of the officer depends upon statutory authority, which authority must be strictly pursued,<sup>24</sup> and if no power exists nothing passes by the sale.<sup>25</sup> Or if for any reason the officer cannot attend the sale it may be held by a deputy;<sup>26</sup> and, on the other hand, the officer can sell the land after his deputy has levied.<sup>27</sup> A private, unauthorized person cannot conduct the sale.<sup>28</sup> Two sheriffs cannot advertise, sell, and convey jointly.<sup>29</sup> The fact that the sheriff conducting the sale is a stockholder in a corporation purchasing at such sale will not invalidate it,<sup>30</sup> and in the absence of a statute declaring such a disqualification, a sale by a sheriff is not void because of the fact that he is related to the defendant.<sup>31</sup>

(II.) *After Expiration of Term.*—The general rule is that the officer who levies an execution should make the sale thereof even though his term has expired, or he has otherwise ceased to hold office,<sup>32</sup> though in a number of jurisdictions the sale is to be conducted by the successor of the officer levying the writ.<sup>33</sup> Some authorities recognize a

Fla. 819, 6 So. 871. Ky.—Scott's Exr. v. Scott, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423. Mass.—Doty v. Gorham, 5 Pick. 487, 16 Am. Dec. 417. Mo.—Blodgett v. Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307; Evans v. Robberson, 92 Mo. 192, 4 S. W. 941; Cabell v. Grubbs, 48 Mo. 353. Mont. Burton v. Kipp, 30 Mont. 275, 76 Pac. 563. N. J.—Hunt v. Swayze, 55 N. J. L. 33, 25 Atl. 850.

23. Spears v. Weddington, 146 Ky. 434, 142 S. W. 679.

24. U. S.—Gantly's Lessee v. Ewing, 3 How. 707, 11 L. ed. 794. Cal.—Weldon v. Rogers, 157 Cal. 410, 108 Pac. 266. N. H.—Husted v. Dakin, 17 Abb. Pr. 137.

25. Wills v. Chandler, 2 Fed. 273, 1 McCrary 276.

26. Young v. Smith, 10 B. Mon. (Ky.) 293.

[a] A general verbal direction by a sheriff to an assistant in his office to make the sales and adjournments necessary on a given day confers no authority to make a sale, and a sale made under such direction will be set aside. Meyer v. Bishop, 27 N. J. Eq. 141.

27. Young v. Smith, 10 B. Mon. (Ky.) 293.

28. McMillan v. Rowe, 15 Neb. 520, 19 N. W. 504.

29. Maffett v. Tonkins, 6 N. J. L. 228.

30. Hardwick v. Jones, 65 Mo. 54.

31. Brackenridge v. Cobb, 2 Tex. Civ. App. 161, 21 S. W. 614, sheriff in this case was a brother-in-law of the defendant.

32. U. S.—Kent v. Roberts, 2 Story 591, 14 Fed. Cas. No. 7,715. Ala. Leavitt v. Smith, 7 Ala. 175. Ark. Byers v. Fowler, 12 Ark. 218, 54 Am. Dec. 271. Ill.—Bellingall v. Duncan, 8 Ill. 477. Ky.—Colyer v. Higgins, 1 Duv. 6, 85 Am. Dec. 601; Lofland v. Ewing, 5 Litt. 42, 15 Am. Dec. 41. Me.—Clark v. Pratt, 55 Me. 546; Tukey v. Smith, 18 Me. 125, 36 Am. Dec. 704. Md.—Busey v. Tuek, 47 Md. 171; Purl's Lessee v. Duvall, 5 Har. & J. 69, 9 Am. Dec. 490. Mich.—Vroman v. Thompson, 51 Mich. 452, 16 N. W. 808. N. J.—Hunt v. Swayze, 55 N. J. L. 33, 25 Atl. 850. N. Y.—Newman v. Beckwith, 61 N. Y. 205; Wood v. Colvin, 2 Hill 566, 38 Am. Dec. 598. N. C. Sanderson v. Rogers, 14 N. C. 38. Ohio. Miner's Lessee v. Cassat, 2 Ohio St. 198.

[a] Executor or administrator of sheriff may sell lands seized by the sheriff before his death. Read v. Stevens, 1 N. J. L. 264.

33. Cal.—Weldon v. Rogers, 157 Cal. 410, 108 Pac. 266. Mich.—See Taylor v. Boardman, 23 Mich. 317. Mo. Merchants Bank of St. Louis v. Harrison, 39 Mo. 433; Carr v. Youse, 39 Mo. 346, 90 Am. Dec. 470. Pa.—Leshey

distinction in this regard between personal property and real estate, holding that in the case of personalty the sale should be by the officer levying the writ, while in the case of real property it should be his successor.<sup>34</sup>

(III.) **Venditioni Exponas.**—(A.) **GENERAL STATEMENT.**—A venditioni exponas is a writ requiring the officer who has levied on property under a writ of execution to proceed to sell the same.<sup>35</sup> It is not an authority but rather an order or mandate compelling a sale.<sup>36</sup> The venditioni exponas is not a process distinct from the fieri facias but a part of it,<sup>37</sup> being for the continuation and completion of the original execution,<sup>38</sup> and only the property included in the previous levy can be sold under it.<sup>39</sup> A venditioni exponas may also contain a fieri facias for the residue of the debt where the goods taken are not sufficient to satisfy the whole.<sup>40</sup> Where the sheriff has returned

*v. Gardner*, 3 Watts & S. 314, 38 Am. Dec. 764. **S. C.**—*Leger v. Doyle*, 11 Rich. L. 109, 70 Am. Dec. 240. **Tenn.** Bank of Tennessee *v. Beatty*, 3 Sneed 305, 65 Am. Dec. 58, real property. **Utah.**—Comp. Laws, 1907, §3252. **Wash.** *Lewis v. Bartlett*, 12 Wash. 212, 40 Pac. 934, 50 Am. St. Rep. 885.

34. *Clark v. Sawyer*, 48 Cal. 133 (but as to present rule in California, see preceding note); *Bank of Tenn. v. Beatty*, 3 Sneed (Tenn.) 305, 65 Am. Dec. 58.

35. See the statutes and the following: **Ala.**—*Dryer v. Graham*, 58 Ala. 623. **Ill.**—*Willoughby v. Dewey*, 63 Ill. 246; *Logsdon v. Spivey*, 54 Ill. 104; *Babcock v. McCamant*, 53 Ill. 214; *Marshall v. Moore*, 36 Ill. 321; *Reddick v. Cloud's Admsrs.*, 7 Ill. 670. **Miss.** *Locke v. Brady*, 30 Miss. 21. **Mo.** *Hicks v. Ellis*, 65 Mo. 176; *Caffery v. Choctaw Coal & Min. Co.*, 95 Mo. App. 174, 68 S. W. 1049. **N. C.**—*Den v. Bank of Cape Fear*, 14 N. C. 279, 22 Am. Dec. 722.

[a] **An Alias Execution.**—A venditioni exponas is in its nature and operation, as to the property on which the levy may have been made, an alias execution. *Dryer v. Graham*, 58 Ala. 623.

[b] “Venditioni exponas is a writ of execution directed to the sheriff to sell goods and chattels, and in some states lands, which he has taken in execution by virtue of a fieri facias and which remain unsold.” *Borden v. Tillman*, 39 Tex. 262.

[c] In Michigan, it is not customary to resort to the writ of venditioni exponas, it being usual to proceed on

the old execution or take out another. *Vroman v. Thompson*, 51 Mich. 452, 16 N. W. 808.

36. **Ill.**—*Logsdon v. Spivey*, 54 Ill. 104; *Bellingall v. Duncan*, 8 Ill. 477; *Reddick v. Cloud's Admsrs.*, 7 Ill. 670; *Phillips v. Dana*, 4 Ill. 551. **Ky.**—*Cox v. Joiner*, 4 Bibb 94; *Keith v. Wilson*, 3 Mete. 201; *Colyer v. Higgins*, 1 Duv. 6, 85 Am. Dec. 601. **Md.**—*Hall v. Clagett*, 63 Md. 57, 63; *Busey v. Tuck*, 47 Md. 171, 172; *Manahan v. Sammon*, 3 Md. 463.

[a] It is an express command to sell and cannot be disobeyed by the sheriff. *St. Bartholomew's Church v. Wood*, 61 Pa. 96.

[b] If its mandate is for sale of lands on which there has been a previous levy, it not only compels a sale, but confers the authority to sell. **Ala.** *Dryer v. Graham*, 58 Ala. 623. **N. C.** *Badham v. Cox*, 33 N. C. 456. **Tex.** *Young v. Smith*, 23 Tex. 598; *Borden v. McRae*, 46 Tex. 400; *Lockridge v. Baldwin*, 20 Tex. 303.

37. **Mo.**—*Hicks v. Ellis*, 65 Mo. 176. **Pa.**—*Neil v. Colwell*, 66 Pa. 216. **Eng.** *Hughes v. Rees*, 4 Mees. & W. 468.

38. *Taylor v. Doe*, 13 How. (U. S.) 293, 14 L. ed. 287; *Dryer v. Graham*, 58 Ala. 623.

[a] The two writs are in fact but one writ, the venditioni exponas being designed to complete what has been commenced. *Whiting v. Beebe*, 12 Ark. 421.

39. *Wood v. Augustine*, 61 Mo. 46; *Borden v. McRae*, 46 Tex. 396.

40. *Quinn v. Wiswall*, 7 Ala. 645. *Contra*, *Fiddeman v. Biddle*, 1 Har. (Del.) 500.

the property unsold for want of buyers,<sup>41</sup> or the property for other reasons may remain unsold,<sup>42</sup> as where the officer whose duty it is to sell either omits, neglects or refuses to sell,<sup>43</sup> a venditioni exponas may issue requiring the officer to sell, the creditor having the right to require its issuance.<sup>44</sup> In some jurisdictions a venditioni exponas is necessary before the sheriff can, after the return day, sell land,<sup>45</sup> or, it has been held, other property.<sup>46</sup> In some states where real property is not primarily liable for debts a venditioni exponas must issue before real property can be taken under execution.<sup>47</sup> A venditioni exponas with an alias fieri facias clause is held the proper writ to keep up the lien created by the levy,<sup>48</sup> though if the lien acquired by the levy of the fieri facias be lost a venditioni exponas thereafter issued has no effect to revive the fieri facias.<sup>49</sup> A venditioni exponas issued after the debtor's death is void where no scire facias or other process has issued to make the heirs or personal representatives of the debtor parties,<sup>50</sup> but the writ may issue after the death of a plaintiff who has caused an execution to be levied.<sup>51</sup> Under a venditioni exponas the officer can only sell the property therein described.<sup>52</sup> The writ in

**Form of,** see 9 STANDARD PROC. 742.

41. *Burge v. Cunningham*, 6 Blackf. (Ind.) 430; *Wolfe v. Wolfe*, 4 Ind. 255; *Loeke v. Brady*, 30 Miss. 21.

42. *Dawson v. Jackson*, 62 Ind. 171; *Den v. Bank of Cape Fear*, 14 N. C. 279, 22 Am. Dec. 722.

43. **Ark.**—*Cummins v. Webb*, 4 Ark. 229. **N. C.**—*Smith v. Spencer*, 25 N. C. 256. **Tex.**—*Borden v. McRae*, 46 Tex. 396.

[a] Where an officer whose duty it is to sell property seized to satisfy an execution, either omits, neglects, or refuses to make sale thereof, according to law, the creditor whose debt or demand the property was seized to satisfy, may have a writ of venditioni exponas, to compel the officer to discharge his duty, and coerce him to sell the property, or forfeit issues to the amount of the demand. *Cummins v. Webb*, 4 Ark. 229.

44. *Cummins v. Webb*, 4 Ark. 229.

45. *Overton v. Perkins*, 10 Yerg. (Tenn.) 328; *Young v. Smith*, 23 Tex. 598, 76 Am. Dec. 81.

[a] **As to Personal Property the Rule Is Different.**—“The reason of the distinction is, that the seizure of personal property vests a special property in the sheriff, who may take possession for the purposes of the execution, and complete the sale after the return day, by virtue of the authority previously given, whereas, a levy on land gives no right of property or posses-

sion. It gives no authority to the officer to take possession and turn the defendant out, but only a right to enter for the purposes of the sale. It confers authority to pass the title merely, not to change the possession; and there must be in existence some lawful authority for the conversion and sale of the property. The execution could confer none after the return day; and hence the necessity of a venditioni exponas for that purpose. *Young v. Smith*, 23 Tex. 598, 76 Am. Dec. 81.

46. *Mardre v. Felton*, 61 N. C. 279.

47. *Cloud v. Lore*, 5 Houst. (Del.) 163. See *Weir v. Clayton*, 19 Ala. 132; *Armstrong v. Jackson*, 1 Blackf. (Ind.) 210, 12 Am. Dec. 225.

[a] Venditioni necessary before sheriff can sell land, see *Glancey's Lessee v. Jones*, 4 Yeates (Pa.) 212; *Porter's Lessee v. Neelan*, 4 Yeates (Pa.) 108.

48. *Yarborough v. State Bank*, 12 N. C. 23.

49. *Pasour v. Rhyne*, 82 N. C. 149.

50. *Barfield v. Barfield*, 113 N. C. 230, 18 S. E. 505; *Samuel v. Zachery*, 26 N. C. 377; *Overton v. Perkins*, 10 Yerg. (Tenn.) 328.

**Sale after death of party generally,** see *infra*, II, B, 7, d, (VII), (C).

51. *Buckner v. Terrill*, Litt. Sel. Cas. (Ky.) 29, 12 Am. Dec. 269.

52. *Fenno v. Coulter*, 14 Ark. 38.

[a] **Though the officer knows there is a mistake in the description,** he can-

some states issues only on order of the proper court,<sup>53</sup> while in others it is issued by the clerk without an express order of the court.<sup>54</sup> A delay in issuing a venditioni exponas may operate to divest the lien of the execution.<sup>55</sup>

(B.) FORM AND CONTENTS OF WRIT. — The writ of venditioni exponas need not contain detailed recitals of the proceedings, prior to the issuing of the execution, a simple recital of the former writ and return, and a command to the sheriff to make the sale, being sufficient.<sup>56</sup> The writ should contain such a description of the property as will identify the subject of sale.<sup>57</sup> Mere clerical errors in the venditioni exponas will on application be remedied.<sup>58</sup>

d. *Manner and Conduct of Sale.* — (I.) *Generally.* — In regard to the manner of an execution sale the plaintiff and the sheriff have a reasonable discretion in carrying out the objects of the writ,<sup>59</sup> it being the duty of the officer to sell in such manner as to produce the highest price and work the least injury to the debtor.<sup>60</sup> The officer simply sells all the right, title and interest of the debtor.<sup>61</sup>

A preliminary proclamation and reading of the writ is sometimes required.<sup>62</sup>

not depart from it and sell other property. *Fenno v. Coulter*, 14 Ark. 38.

53. *Hinderman v. Fisher*, 42 Pa. Super. 128.

54. *Dryer v. Graham*, 58 Ala. 623; *Holmes v. McIndoe*, 20 Wis. 657. See *Weir v. Clayton*, 19 Ala. 132, under old statute.

55. *Zug v. Laughlin*, 23 Ind. 170.

[a] But a delay of twenty-one days from the return to the issuance of the venditioni exponas does not ipso facto divest the lien of the execution. *Zug v. Laughlin*, 23 Ind. 170.

56. *Hall v. Clagett*, 63 Md. 57; *Sterling v. Emick*, Tapp. (Ohio) 326.

[a] **Sufficient Writ.** — Such an order of sale, which recites the issuance of an execution by a justice of the peace of the county in which the lands lie, and its levy by a constable of that county, and also states the numbers of the land, is sufficient, although it does not designate by name the county or the district in which the lands lie. *Weir v. Clayton*, 19 Ala. 132, followed in *McConaughy v. Baxter*, 55 Ala. 379.

Forms of venditioni exponas, see 9 STANDARD PROC. 741, et seq.; in admiralty, 9 STANDARD PROC. 42. For statutory forms of venditioni exponas, see Ala. Civ. Code, 1907, §4120; Ky. St., 1909, §1664.

57. *McConaughy v. Baxter*, 55 Ala. 379.

58. *De Haas v. Bunn*, 2 Pa. 335, 44 Am. Dec. 201; *Perkins v. Woodfolk*, 8 Baxt. (Tenn.) 480.

59. *Matson v. Sweetser*, 50 Ill. App. 518, 528.

60. Ill. — *Hay v. Baugh*, 77 Ill. 500. N. C. — *Skinner v. Warren*, 81 N. C. 373; *State v. Morgan*, 29 N. C. 387. Wash. — *Schaad v. Robinson*, 59 Wash. 346, 109 Pac. 1072.

[a] **The sheriff in selling the property is the agent of both the plaintiffs and defendant, owing a like duty to each, and bound to protect the interest of all parties concerned.** It is his duty to see that the property is not sacrificed and to that end he can return the execution, "no sale for want of bidders." *Davis v. McCann*, 143 Mo. 172, 44 S. W. 795; *Rogers & Baldwin Hdw. Co. v. Building Co.*, 132 Mo. 442, 34 S. W. 57; *Cole Co. v. Madden*, 91 Mo. 585, 4 S. W. 397; *State v. Moore*, 72 Mo. 285; *Shaw v. Potter*, 50 Mo. 281; *Conway v. Nolte*, 11 Mo. 74.

61. Kan. — *Treptow v. Buse*, 10 Kan. 170. Minn. — *Johnson v. Gerber*, 114 Minn. 174, 130 N. W. 995. Miss. — *Willis v. Loeb*, 59 Miss. 169. Mo. — *Dougherty v. Gangloff*, 239 Mo. 649, 144 S. W. 434.

62. Rem. & Bal. Wash. Code, §587.

(II.) **What Law Governs.**—The law in force at the time of the sale governs the conduct of the sale.<sup>63</sup>

In Federal Courts.—A sale on execution, and all proceedings thereunder, by a United States marshal, is governed by the state law in force at the time of the sale and proceedings.<sup>64</sup>

(III.) **When Several Executions on Same Property.**—Where several executions against the same person have been levied on the same property one sale may be made and the proceeds applied according to their priority.<sup>65</sup> But property cannot be sold at one time under different executions against different persons.<sup>66</sup>

When property is sold by a sheriff under two executions, either of which is valid, the sale is sufficient to transfer to the purchaser the execution debtor's title.<sup>67</sup>

63. **U. S.**—*Smith v. Cockrill*, 6 Wall. 756, 18 L. ed. 973. **Ill.**—*Martin v. Gilmore*, 72 Ill. 193. **Ia.**—*Fonda v. Clark*, 43 Iowa 300; *Babcock v. Gurney*, 42 Iowa 154; *Holland v. Dickerson*, 41 Iowa 367. **Ky.**—*Reardon v. Searcy's Heirs*, 2 Bibb 202. **Me.**—*Poor v. Chapin*, 97 Me. 295, 54 Atl. 753. **Mass.**—See *Howe v. Starkweather*, 17 Mass. 240. **Mich.**—*Crane v. Hardy*, 1 Mich. 56. **Ohio.**—*Allen's Lessee v. Parish*, 3 Ohio 187. **Wash.**—*Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046.

But see *McCracken v. Hayward*, 2 How. (U. S.) 608, 11 L. ed. 397; *Hollman v. Collins*, 1 Ind. 24; *Stewart v. Vermilyea*, 8 Blackf. (Ind.) 56; *Lane v. Fox*, 8 Blackf. (Ind.) 58; *Harrison v. Stipp*, 8 Blackf. (Ind.) 455.

[a] **The reason of the rule** is that the remedy pursued to enforce an obligation must be according to the law in force at the time such remedy is sought. *Reardon v. Searcy's Heirs*, 2 Bibb (Ky.) 202.

64. **U. S.**—*Smith v. Cockrill*, 6 Wall. 756, 18 L. ed. 973. **Ill.**—*Martin v. Gilmore*, 72 Ill. 193. **Mo.**—*Evans v. Labadie*, 10 Mo. 425.

See generally the title "United States Courts."

65. **Ky.**—*Locke v. Coleman*, 4 T. B. Mon. 315; *Knight v. Applegate's Heirs*, 3 T. B. Mon. 335; *Brace v. Shaw*, 16 B. Mon. 43; *Southard v. Pope's Exr.*, 9 B. Mon. 261. **Me.**—*Chapman v. Androscoggin R. R. Co.*, 54 Me. 160, the sale must be under but one execution, and the surplus, if any, applied to other executions in order of priority. **Mich.**—*Geney v. Maynard*, 44 Mich. 578, 7 N. W. 173. **N. Y.**—See *Varnum v. Hart*, 119 N. Y. 101, 23 N. E. 183.

**Ohio.**—*Douglass v. McCoy*, 5 Ohio 522. **Pa.**—*Watmough v. Francis*, 2 Clark 261. **Tenn.**—See *Tuck v. Chaffin*, 89 Tenn. 566, 15 S. W. 97; *Simpson v. Sparkman*, 13 Lea 360.

66. *Bledsoe v. Willingham*, 62 Ga. 550; *Building Assn. v. Henry*, 3 Phila. (Pa.) 34.

[a] **Different interests of different persons** in same piece of property cannot be sold at one sale. *Danneel v. Klein*, 47 La. Ann. 928, 17 So. 466.

[b] A sheriff cannot legally sell a larger estate than that embraced in his levy. Nor can three levies of three several executions, each against a different defendant be consolidated as authority to sell, so as to make a single act of sale under the whole pass title. Thus, where one of the levies was upon an estate for life in certain realty as the property of one person, the sole defendant in the first *feri facias*, and another of the levies was upon an undivided half in remainder in the same realty as the property of another person, the sole defendant in the second *feri facias*, and another of the levies was upon an undivided half in remainder in the same realty, as the property of another person, the sole defendant in the third *feri facias*, a sale of the realty under all of the *feri facias* and levies, as one single transaction, and for a gross sum, was illegal and void. The purchaser acquired nothing—no title, no right to possession. *Bledsoe v. Willingham*, 62 Ga. 550.

67. *De Loach v. Robbins*, 102 Ala. 288, 14 So. 777; *Simpson v. Sparkman*, 13 Lea (Tenn.) 360.

(IV.) Notice of Sale. — (A.) NOTICE TO PUBLIC. — (1.) *Necessity and General Statement.* — In many jurisdictions it is required that public notice of the sale be given by publication in a newspaper,<sup>68</sup> by posting<sup>69</sup> in

68. See the statutes and the following: **Ga.**—*Lamb v. Allen*, 50 Ga. 207. **Ill.**—*Pearson v. Bradley*, 48 Ill. 250. **Ind.**—*Hill v. Pressley*, 96 Ind. 447; *Smith v. Rowles*, 85 Ind. 264. **La.**—*Soulier v. Benker*, 37 La. Ann. 162; *Wells v. Merz*, 23 La. Ann. 392. **Mass.**—*Blake v. Rogers*, 210 Mass. 588, 97 N. E. 68. **Mo.**—*Walton v. Harris*, 73 Mo. 489. **Neb.**—Comp. Laws, 1910, §§366, 367. **N. D.**—Publishing if possible; if not, by posting. Rev. Code, 1905, §§7130, 7131. **Okla.**—Comp. Laws, 1909, §5975. **Wyo.**—St., 1910, §4694.

[a] If there be no newspaper published in the county in which land is levied on for sale, notice is then published in the nearest newspaper having the largest or a general circulation in such county, and in such case notice need not be published at any place in said county. *Lamb v. Allen*, 50 Ga. 207.

[b] Where the defendant was the owner and publisher of the only newspaper in the county and refused to permit the publication of the notice in his paper, it was held that notice by handbills was legal notice within the meaning of the statute. *Walton v. Harris*, 73 Mo. 489.

[c] **Election of Creditor.**—It is the official duty of the sheriff to give the plaintiff or his attorney a reasonable opportunity to exercise the statutory privileges of designating the newspaper in which he desires the publication of the notice made. If the sheriff gives the notice to a newspaper before the creditor has had a reasonable opportunity to designate a paper of his choice, it is his duty to give the notice also to the paper so designated. *State v. Wilson*, 158 Mo. App. 105, 139 S. W. 705.

[d] **Election of Debtor.**—When the debtor has the right to select the newspaper, his selection must be made promptly upon receiving notice of the seizure. The sheriff does not have to hunt the debtor to learn from him what newspaper he will select. *Soulier v. Benker*, 37 La. Ann. 162.

[e] **Failure To Print in Official Journal.**—Where the advertisement is required to be in an official journal,

an objection that the advertisement was not made in the official journal is without weight, if at the time of the advertisement there was no official journal in the jurisdiction. *Wells v. Merz*, 23 La. Ann. 392.

[f] **Mandamus To Compel Publication.**—A paper having been properly designated, the owners of such paper or any other person having a pecuniary interest in the publishing of such notice may by mandamus compel the sheriff to have the notice published in such paper. The execution creditor, however, cannot compel the sheriff by mandamus to perform this duty where it does not appear that he will be injured in a pecuniary way by the sheriff's breach of duty. If the sheriff knows of the designation by the creditor a formal demand on such officer need not be made as a condition precedent to a mandamus. *State v. Wilson*, 158 Mo. App. 105, 139 S. W. 705. See the title "*Sheriffs, Constables and Marshals.*"

Defects in notice of sale as ground for setting aside, see *infra*, II, B, 7, k, (1V), (F).

Notice on postponement of sale, see *infra*, II, B, 7, d, (VI), (B).

69. See the statutes and the following: **Ky.**—*Lawrence v. Speed*, 2 Bibb 401. **La.**—*Pumphrey v. Delahousaye*, 9 Rob. 42; *Vincent v. Sanford*, 5 La. Ann. 560; *Fox v. Tio*, 1 La. Ann. 334. **N. H.**—*Russell v. Dyer*, 40 N. H. 173. **N. Y.**—*Schmidt v. Barry*, 21 Civ. Proc. 21, 15 N. Y. Supp. 122, 39 N. Y. St. 403. **Vt.**—*Austin v. Soule*, 36 Vt. 645. **Wash.**—*Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046.

[a] **Statute (1) held directory only,** and failure to post notices as required will not render the sale void. *McDonald v. Winton*, 4 Lane. Law Rev. (Pa.) 194; *Jones v. Planters' Bank*, 3 Humph. (Tenn.) 76. (2) Statute being merely directory a failure to literally comply with its requirements will not invalidate purchaser's title. *Huffman v. Gaines*, 47 Ark. 226, 1 S. W. 100.

[b] Where the statute does not specify the number of notices one will be sufficient. *Holmes v. Jordan*, 163 Mass. 147, 39 N. E. 1005.

conspicuous places, or in both ways.<sup>70</sup> Where the statute provides that notice may be by publication "or" by posting, either method will suffice.<sup>71</sup> Whether a particular place is a public place within the meaning of the statute, is a question partly of fact and partly of law.<sup>72</sup> No notice can be substituted for the required statutory notice.<sup>73</sup> The same notice may serve for sale under two separate writs,<sup>74</sup> and where one execution is issued on several judgments one advertisement of a sale thereunder is sufficient.<sup>75</sup> The fact that the land to be sold may not appear on the records in the name of the defendant will not alter the manner of giving notice.<sup>76</sup>

**Waiver.**—The parties to the suit may waive notice of the sale,<sup>77</sup> and, some decisions hold, the execution debtor alone may waive the notice.<sup>78</sup>

**Presumption.**—In the absence of proof to the contrary it will be presumed that proper notice of the sale has been given.<sup>79</sup>

(2.) *Form and Contents of Notice.*—(a.) *Requisites in General.*—Whether the notice must be in English or may, under some circumstances, be

[c] **In Town in Which Taken.**—Under a statute requiring notice of the sale to be posted in the town in which the property was taken, it is error to post notice in another town to which the officer removed the property. *Schmidt v. Barry*, 21 Civ. Proc. 21, 15 N. Y. Supp. 122, 39 N. Y. St. 403.

70. See the statutes, and *Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195.

[a] **The object of the notice** is to inform the public so that there may be competitive bidding. **Ark.**—*Woods v. Hayes*, 85 Ark. 163, 107 S. W. 387. **Mass.**—*Blake v. Rogers*, 210 Mass. 588, 97 N. E. 68. **R. I.**—*Barrows v. Nat. Rubber Co.*, 12 R. I. 173.

[b] **When property is perishable** the sale may be without notice. **Mo. Rev. St.**, 1909, §2208.

71. *Ollis v. Kirkpatrick*, 3 Idaho 247, 28 Pac. 435; *Fitch v. Heirs of Dunlap*, 2 Ohio 78.

72. *Russell v. Dyer*, 40 N. H. 173.

[a] **Mixed Question of Law and Fact.**—The nature and situation of the places, and the uses to which they are applied, are matters of fact, to be settled by a jury. But when these are settled, whether the place is to be considered a public place within the intent of the statute, is purely a question of law. *Russell v. Dyer*, 40 N. H. 173.

[b] **"Public Place."**—A statute requiring goods to be levied upon and sold on an execution to be advertised and sold at some "public place," means

a place where the advertisement would be likely to attract general attention so that its contents might reasonably be expected to become a matter of notoriety; a barn, dwelling-house, shed, or even a rock or tree, if answering this condition may be a public place within the meaning of the statute. *Austin v. Soule*, 36 Vt. 645. See also *Russell v. Dyer*, 40 N. H. 173.

73. *Russell v. Dyer*, 40 N. H. 173.

74. *Derry Bank v. Wester*, 44 N. H. 264.

75. *Arnold v. Dinsmore*, 3 Coldw. (Tenn.) 235.

76. *Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195.

77. *Wederstrandt v. Marsh*, 11 Rob. (La.) 533; *Davis v. Murray*, 2 Mill (S. C.) 143, 12 Am. Dec. 661.

78. **Ky.**—*Greer v. Wintersmith*, 85 Ky. 516, 4 S. W. 232. **La.**—*Barron v. Sollibellos*, 28 La. Ann. 289. **S. C.**—*Davis v. Murray*, 2 Mill 143, 12 Am. Dec. 661, if there are no legal liens against property. **Vt.**—*Burroughs v. Wright*, 19 Vt. 510.

79. **La.**—*Soniat v. Miles*, 32 La. Ann. 164. **Md.**—*Hanson v. Barnes' Lessee*, 3 Gill & J. 359, 22 Am. Dec. 322. **Mass.**—*Holmes v. Jordan*, 163 Mass. 147, 39 N. E. 1005. **Mich.**—See *Grand Rapids Nat. Bank v. Kritzer*, 116 Mich. 688, 75 N. W. 90. **Mo.**—*Evans v. Robertson*, 92 Mo. 192, 4 S. W. 941, 1 Am. St. Rep. 701; *Chandler v. Bailey*, 89 Mo. 641, 1 S. W. 745. **N. Y.**—*Wood v. Morehouse*, 45 N. Y. 368.

in a foreign language, depends upon the statute.<sup>80</sup> The notice should contain the date,<sup>81</sup> the hour<sup>82</sup> and place of sale,<sup>83</sup> the name of the owner,<sup>84</sup> name of the plaintiff,<sup>85</sup> and a description of the property.<sup>86</sup> The notice should be signed by the sheriff.<sup>87</sup> In some jurisdictions the

80. See the statutes and the following: **La.**—Code Pr., art. 668. **N. M.**—Comp. Laws, 1897, §3113. **N. Y.**—Code Civ. Proc., 1908, §1429. **Ohio.**—Gen. Code, 1910, §§11,683, 11,684. **Pa.**—Purdon's Dig., p. 1568.

81. **Ill.**—McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388. **Mo.**—Harrison v. Cachelin, 35 Mo. 77. **Pa.**—Purdon's Dig., p. 1568. **S. C.**—Code, 1902, §2617. **S. D.**—Comp. Laws, 1910, §366. **Vt.**—Pub. St., 1906, §5456.

[a] **Where the sale is to continue** from day to day it should be so stated in the notice. **Ga.** Code, 1895, §5456.

[b] **Mistake in Date.**—Notice of sale on Saturday the twenty-fourth is insufficient where the twenty-fourth falls on Sunday, to support a sale on the twenty-third, notwithstanding an alteration in the notice to correct the date, eight days before the sale. *Thayer v. Roberts*, 44 Me. 247.

82. See the statutes.

[a] **Failure To Specify the Hour.** A sale of real estate on execution will not be set aside because it was advertised to take place between 12 and 5 o'clock of the day of sale, without specifying the particular hour, where there is no proof of fraud or unfair practice. *Coxe v. Holsted*, 2 N. J. Eq. 311.

[b] **Unnecessary to state the hour of sale.** *Evans v. Robberson*, 92 Mo. 192, 4 S. W. 941, 1 Am. St. Rep. 701.

83. See the statutes and the following: **La.**—*Zacharie v. Winter*, 17 La. 76. **Mass.**—*Whitaker v. Sumner*, 7 Pick. 551, 19 Am. Dec. 298. **Mo.**—*Harrison v. Cachelin*, 35 Mo. 77. **Tenn.**—*Hinson v. Hinson*, 5 Sneed 322, 73 Am. Dec. 129.

84. *Ganong v. Green*, 64 Mich. 488, 31 N. W. 461; *Farr v. Sims*, Rich. Eq. Cas. (S. C.) 122.

[a] **But where one of several owners is unknown to the officer, the omission to include the name of such owner from the advertisement will not prevent his interest being sold.** *Caldwell v. Blake*, 69 Me. 458.

[b] **Failure to mention (1) one of the defendants held immaterial.** *Har-*

*rison v. Cachelin*, 35 Mo. 79. (2) In *Citizens' Nat. Bank v. Interior L. & I. Co.*, 14 Tex. Civ. App. 301, 37 S. W. 447, it was held that the notice need not state which one of several defendants owned the interest in the property to be sold.

[c] **Where the statute does not require it, a failure to state who the defendant in execution is, or whose property it is that is advertised for sale, will not vitiate the sale, though it would be very proper to specify these matters.** *Mich.*—*Ganong v. Green*, 64 Mich. 488, 31 N. W. 461; *Perkins v. Spaulding*, 2 Mich. 157. **N. Y.**—*Chapman v. Morrill*, 19 Hun 318. **Tex.**—*Citizens' Nat. Bank v. Interior Land & I. Co.*, 14 Tex. Civ. App. 301, 37 S. W. 447.

[d] **Execution Against Town.**—Where the statute requires the officer to publish in his notice of sale of property of an individual under an execution against a town "the names of such proprietors as are known to him and, if the names are not known, the number of the lots," it is not a compliance if the officer fail to state the name of any proprietor and states in his notice "that the proprietors thereof were mostly unknown to me." *Crafts v. Elliottsville*, 47 Me. 141. See also *Caldwell v. Blake*, 69 Me. 458.

85. *Farr v. Sims*, Rich. Eq. Cas. (S. C.) 122.

[a] **Variance in Name.**—Giving the plaintiff's name as Bartlett instead of Bassett is immaterial. *Horton v. Bassett*, 16 R. I. 419, 16 Atl. 715.

86. See *infra*, II, B, 7, (IV), (A), (2), (b).

87. **May be signed by deputy sheriff.** *Wallis v. Thomas*, 6 La. Ann. 76.

[a] **An execution issued on a judgment rendered in the supreme court, when executed by a sheriff of a county, is executed by him as the deputy of the sheriff of the supreme court; however, it is sufficient if he sign the notice of sale under such execution as county sheriff, instead of as deputy to the sheriff of the supreme court.** *Ross v. Banta*, 140 Ind. 120, 34 N. E. 865.

terms of the sale should be advertised.<sup>88</sup> In the absence of statute the notice need not contain a description of the judgment and the amount due thereunder.<sup>89</sup> Mere surplusage in the notice will not affect the validity of the sale.<sup>90</sup> Special statutory forms of notice have been provided for in some states.<sup>91</sup>

(b.) *Description of Property.*—The notice should contain such a description of the property as will be sufficient to identify it with reasonable certainty so that no one may be misled thereby,<sup>92</sup> or injury done

88. *Farr v. Sims*, Rich. Eq. Cas. (S. C.) 122.

[a] **If the sheriff intends to sell for specie** the notice should so state. *Farr v. Sims*, Rich. Eq. Cas. (S. C.) 122.

89. *State v. Haverly*, 63 Neb. 87, 88 N. W. 172; *Citizens' Nat. Bank v. Interior Land & I. Co.*, 14 Tex. Civ. App. 301, 37 S. W. 447.

[a] **Statement Required.**—N. M. Comp. Laws, 1897, §3115.

90. *Thompson v. Barrow*, 7 La. Ann. 669; *Bradley v. Heffernan*, 156 Mo. 653, 57 S. W. 763.

[a] **Too Much Property Advertised.** The notice is not rendered invalid by including therein more than the sheriff was authorized to or did in fact sell. *Northwestern Mut. Life Ins. Co. v. Marshall*, 1 Neb. (Unof.) 36, 95 N. W. 357.

91. See Mont. Rev. Codes, 1907, §6828; Utah Comp. Laws, 1907, §3249.

92. See the statutes and the following: **Ark.**—*Woods v. Hayes*, 85 Ark. 163, 107 S. W. 387. **Ga.**—*Collier v. Vason*, 12 Ga. 440, 58 Am. Dec. 481. **Ill.**—*Pollard v. King*, 63 Ill. 36; *Grundy County Nat. Bank v. Rulison*, 61 Ill. App. 388. **Kan.**—See *Wheatley v. Terry*, 6 Kan. 427. **Ky.**—*Humpich v. Drake*, 19 Ky. L. Rep. 1782, 44 S. W. 632. **La.**—*De Armond v. Courtney*, 12 La. Ann. 251; *McDonough v. Gravier's Curator*, 9 La. (O. S.) 330, 531. **Md.** *Berry v. Griffith*, 2 Har. & G. 337, 18 Am. Dec. 309. **Minn.**—*Herrick v. Ammerman*, 32 Minn. 544, 21 N. W. 836. **Mo.**—*State v. Keeler*, 49 Mo. 548. **Neb.** *Stull v. Seymour*, 63 Neb. 87, 88 N. W. 174; *Helmer v. Rehm*, 14 Neb. 219, 15 N. W. 344. **S. C.**—*Farr v. Sims*, Rich. Eq. Cas. 122.

[a] **Description should be as accurate** as the nature of the case will allow, so that bidders may know what they are bidding for, and the property of the debtor may not be unnecessarily

sacrificed. *De Armond v. Courtney*, 12 La. Ann. 251.

[b] **Description Not Misleading.** Fact that notice describes land to be sold as being in range 14 west, instead of range 15 west, and no one appears to have been misled by the defective description, the sale will not be set aside. *Woods v. Hayes*, 85 Ark. 163, 107 S. W. 387.

[c] **Metes and Bounds.**—If the public is properly informed of the property it will not be necessary to describe the property by metes and bounds, great particularity not being required. *Stevens v. Bond*, 44 Md. 506; *Allen v. Cole*, 9 N. J. Eq. 286, 59 Am. Dec. 416.

[d] **Well Known Tract.**—A description of the property as an undivided third part of the lots in a certain named addition to St. Louis, it appearing that the addition was well known by its name, is sufficient. *Lisa v. Lindell*, 21 Mo. 127, 64 Am. Dec. 222.

[e] **Size of Lot.**—The fact that the property is misdescribed in one of the two papers in which the notice was published as being upon a lot 20×18 feet, when in fact the lot was 20×181 feet, will not invalidate the sale. *Neafie v. Conrad*, 6 W. N. C. (Pa.) 303.

[f] **A description by city blocks instead of by lots held valid** in the absence of anything to show that the amount of the purchase price had been affected. *Citizens' Nat. Bank v. Interior L. & I. Co.*, 14 Tex. Civ. App. 301, 37 S. W. 447.

[g] **Every article need not be specified** in the notice of sale, but the most prominent and valuable should be. An unexpired term in a farm is of this description and ought to be specially mentioned. *Sipple v. Scotten*, 1 Harr. (Del.) 107.

[h] **Interest of an heir in the succession** is insufficiently described when

the defendant.<sup>93</sup> And a description which is uncertain and vague,<sup>94</sup> or which misdescribes the property,<sup>95</sup> vitiates the sale. The character, condition and location of the property are considered in determining the adequacy of the description.<sup>96</sup> The name of the county need not be given where the description otherwise identifies and locates the property.<sup>97</sup> Where real property is sold the notice should state the principal improvements on the premises,<sup>98</sup> so as to advise prospective purchasers of the nature and value of the property.<sup>99</sup>

(3.) *Length of Notice.*—The length of the notice depends upon the statute and differs in the several jurisdictions.<sup>1</sup> Where the property is perishable or consists of live stock, statutes sometimes permit notice

the advertisement fails to show the proportion of the heir's interest, or how many heirs there are, or the amount of the inventory, or of what property the succession consisted. *De Armond v. Courtney*, 12 La. Ann. 251.

93. *McPherson v. Foster*, 4 Wash. C. C. 45, 16 Fed. Cas. No. 8,921; *State v. Keeler*, 49 Mo. 548.

94. *La.*—*McDonough v. Gravier's Curator*, 9 La. (O. S.) 330, 531. *Mo.* *Evans v. Ashley*, 8 Mo. 177. *R. I.* *Childs v. Ballou*, 5 R. I. 537.

[a] *City or Town Not Given.*—A description of real estate in the notice of sale as "lot 5, block 39," giving the county and state, but not the city or town, is not sufficient. *Herrick v. Ammerman*, 32 Minn. 544, 21 N. W. 836.

[b] *Where a person owns several lots* in a town laid off on a particular tract of land the sheriff cannot sell his interest in those lots by an advertisement offering for sale the whole tract on which the town was laid off, such description being too vague and uncertain. *Evans v. Ashley*, 8 Mo. 177.

95. *Hoeflich v. Hoeflich*, 12 Pa. Co. Ct. 370.

96. *Collier v. Vason*, 12 Ga. 440, 58 Am. Dec. 481.

[a] *Question of Fact.*—Whether the advertisement by the sheriff of "eight city lots in the City of Albany, Nos. not recollected, but known as Joseph B. Shore's property," be sufficient description, is a question of fact for the jury to decide upon the evidence. *Collier v. Vason*, 12 Ga. 440, 58 Am. Dec. 481.

97. *Duncan v. Matney*, 29 Mo. 369.

[a] If section, township and range be given, together with title of court and names of parties, the name of the

county and state in which the property is situated need not be given. *Stull v. Seymour*, 63 Neb. 87, 88 N. W. 174.

98. *Oldham v. Hossenger*, 5 Houst. (Del.) 434. But see *Allen v. Cole*, 9 N. J. Eq. 286, 59 Am. Dec. 416, holding that the number of buildings or their character need not be described if the property be identified.

99. See *Schaeffer v. Latshaw*, 1 Woodw. Dec. (Pa.) 487.

[a] *The failure to give notice of a stone quarry* on the land making it worth five times the sale price, vitiates the sale. *Schaeffer v. Latshaw*, 1 Woodw. Dec. (Pa.) 487.

[b] *Where Sale Price Not Affected.* But a failure to state the improvements on the land where there is no misdescription of the land and it is not claimed that the property sold for an inadequate consideration will not vitiate the sale. *Dougherty's Case*, 16 Pa. Co. Ct. 214; *Parker v. Lynch*, 13 Pa. Co. Ct. 86.

1. See the statutes of the several states, and the following: *Kan.*—*Watkins v. Williams*, 33 Kan. 149, 5 Pac. 771. *Ky.*—*Sanders' Heirs v. Norton*, 4 T. B. Mon. 464. *La.*—*Schwann v. Sanders*, 121 La. 461, 46 So. 573. *Pa.* *Currens v. Blocher*, 21 Pa. Super. 30. *S. C.*—*Ex parte Alexander*, 35 S. C. 409, 14 S. E. 854. *S. D.*—*Bowman v. Knott*, 8 S. D. 330, 66 N. W. 457.

[a] *Change in the advertisement* as to the description of the property held not to invalidate it by shortening the required notice. *Barrows v. National Rubber Co.*, 12 R. I. 173.

Effect of failure to give notice for length of time, see *infra*, II, B, 7, k, (IV), (F).

Confirmation as cure of defects of notice, see *infra*, II, B, 7, i, (III).

to be shortened to a reasonable time considering the character and condition of the property.<sup>2</sup>

(4.) *Specific Kinds of Property*.—In some instances special provision is made for notice where the sale is of a corporate franchise,<sup>3</sup> or stock,<sup>4</sup> or of a term of years.<sup>5</sup>

(5.) *Compelling Notice*.—The execution debtor may apply to the court to compel the giving of the required notice where a delay would be prejudicial.<sup>6</sup>

(6.) *Affidavit of Publication*.—In some states the publication of notice of sale must be proved by the affidavit of some one familiar with the facts.<sup>7</sup>

(B.) NOTICE TO PLAINTIFFS IN EXECUTION.—Statutes sometimes require notice to be given to the execution plaintiffs.<sup>8</sup>

(C.) NOTICE TO EXECUTION DEBTOR OR HIS REPRESENTATIVE.—Notice of the sale must, in many jurisdictions, be given to the debtor,<sup>9</sup> or in the

2. See the statutes.

[a] It is the duty of the sheriff to obtain authority from the court to make an immediate sale. *Arnold v. Fowler*, 94 Md. 497, 51 Atl. 299, 89 Am. St. Rep. 444.

[b] "The words 'liable to deterioration from keeping,' employed in the Georgia Civil Code, §5463, for the purpose of designating a class of personal property which may, under its provisions, be brought to speedy sale, do not apply to articles which because of their enduring nature are unlikely, merely by reason of the lapse of a brief space of time, to undergo changes in form or otherwise causing depreciation in value, but to articles which are for such a reason subject to such changes. An ordinary cotton-press does not fall within the class described by the words above quoted." *Jolley v. Hardeman*, 111 Ga. 749, 36 S. E. 952.

3. Me. Rev. St., 1903, ch. 86, §17; N. H. Pub. St., 1901, ch. 232, §12.

4. Fla. Gen. St., 1906, §1648; Me. Rev. St., 1903, ch. 86, §16.

5. Mass Rev. Laws, 1902, p. 1601, §52.

6. *Baldwin v. Talbot*, 46 Mich. 19, 8 N. W. 565.

7. *Thompson v. Higginbotham*, 18 Kan. 42; *Vroman v. Thompson*, 51 Mich. 452, 16 N. W. 808. See *Magney v. Roberts*, 129 Iowa 218, 105 N. W. 430.

[a] Affidavit of publisher may be sworn to before register of deeds. *Thompson v. Higginbotham*, 18 Kan. 42.

8. *Clements v. Williamson*, 5 Houst. (Del.) 25, and to the plaintiff in any other execution in hands of sheriff.

9. Del.—*Wolf v. Heathers*, 4 Harr. 325. La.—*Guidery v. Guidery*, 2 Mart. (O. S.) 132. Me.—Rev. St., 1903, ch. 8, §33. Mass.—Rev. Laws, 1902, p. 1607; *Parker v. Abbott*, 130 Mass. 25. Minn.—Rev. Laws, 1905, §4305. N. H. Pub. St., 1901, ch. 233, §20; *Russell v. Dyer*, 40 N. H. 173. N. C.—Rev., 1905, §642. See *Borden v. Smith*, 20 N. C. 27. Pa.—*Purdon's Dig.*, p. 1568. Tenn.—*Hinson v. Hinson*, 5 Sneed 322; *Mitchell v. Lipe*, 8 Yerg. 179, 29 Am. Dec. 116; *Richards v. Meeks*, 11 Humph. 455, 54 Am. Dec. 49; *Downing v. Stephens*, 1 Baxt. 454; *Prater v. McDonough*, 7 Lea 670. Tex.—*Leeper v. O'Donohue*, 18 Tex. Civ. App. 531, 45 S. W. 327. Vt.—Pub. St., 1906, §2176.

[a] Where (1) defendant is out of the county but in the state, he is to be personally served with notice. *Young v. Schofield*, 132 Mo. 650, 34 S. W. 497. (2) But not where he is a non-resident of the state though he has an attorney in fact within the state. *Norman v. Eastburn*, 230 Mo. 168, 130 S. W. 276. (3) Personal service is sufficient if made before judgment, though defendant is a non-resident of the county at the time the writ is issued. *Dougherty v. Gangloff*, 239 Mo. 649, 144 S. W. 434.

[b] Not Applicable Where the Execution Is Based on a Justice's Transcript.—*McAnaw v. Matthis*, 129 Mo. 142, 31 S. W. 344.

[c] Posting notice at place of business held to be an insufficient service.

case of a deceased debtor, to his representatives.<sup>10</sup> According to some authorities the statutory requirement need not be complied with when there is an appearance by the defendant,<sup>11</sup> or where the defendant is in possession and occupancy of the premises to be sold,<sup>12</sup> or has actual notice of the sale.<sup>13</sup> In some states a notice to a judgment debtor of the time and place appointed for the sale is properly served by leaving it at his last and usual place of abode,<sup>14</sup> but this is not sufficient under a statute requiring personal notice.<sup>15</sup> In some jurisdictions the statute requires notice to be served on the defendant when he is in possession.<sup>16</sup> The object of giving notice of sales under execution is to inform the debtor that his property is about to be sold.<sup>17</sup> This notice to the defendant should specify the time<sup>18</sup> and place of the sale.<sup>19</sup>

*Richards v. Meeks*, 11 Humph. (Tenn.) 455.

[d] **Service on tenant of defendant insufficient.** *Lafferty v. Conn*, 3 Sneed (Tenn.) 221. But see *Lewis v. Woodall*, 4 Houst. (Del.) 543.

[e] **Advertising and Personal Service.** Under a statute requiring twenty days' notice by advertising and by personal service on the defendant, it has been held necessary that such service be made twenty days before the sale. *Leeper v. O'Donohue*, 18 Tex. Civ. App. 531, 45 S. W. 327.

[f] **Notice of Advertisement.**—In *Snouffer v. Heisig*, 62 Tex. Civ. App. 81, 130 S. W. 912, the court said: "The notice that the judgment existed, and that the same would be enforced by a sale of the property if it was not paid, was not equivalent to the notice required by statute to the defendant in the execution that it was actually advertised for sale. *Bean v. City of Brownwood*, 91 Tex. 684, 45 S. W. 897."

[g] **Where the officer has promised to notify the debtor's attorney** of the date of the sale, his failure to do so is sufficient to set aside the sale. *State v. Innes*, 137 Mo. App. 420, 118 S. W. 1168.

[h] **Presumption of Notice.**—Where a sheriff's return of an execution sale does not show that notice of the sale was served upon execution defendant, it will not be presumed that notice was not given. *Corriell v. Doolittle*, 2 Gr. (Iowa) 385. But see *Downing v. Stephens*, 1 Baxt. (Tenn.) 454.

[i] **In Washington personal notice not required.** *Johnson v. Johnson*, 66 Wash. 113, 119 Pac. 22; *Merritt v. Graves*, 52 Wash. 57, 100 Pac. 164.

10. *Ransom v. Williams*, 2 Wall. (U.

S.) 313, 17 L. ed. 803; *McLaughlin v. McCumber*, 36 Pa. 14.

11. *Young v. Schofield*, 132 Mo. 650, 34 S. W. 497, appearance tantamount to personal service.

12. *Crowder v. Sims*, 7 Humph. (Tenn.) 257.

13. *Neafie v. Conrad*, 6 W. N. C. (Pa.) 303.

[a] *Contra.*—The fact that the defendant actually knew of the proposed sale will not affect the error in failing to give him the proper notice. *Richards v. Meeks*, 11 Humph. (Tenn.) 455, 54 Am. Dec. 49; *Carney v. Carney*, 10 Yerg. (Tenn.) 491. See also *Prater v. McDonough*, 7 Lea (Tenn.) 670, that a defective notice cannot be supplemented by proof that defendant had otherwise acquired knowledge of the fact omitted in the notice.

14. *Holmes v. Jordan*, 163 Mass. 147, 39 N. E. 1007; *Croacher v. Oesting*, 143 Mass. 195, 9 N. E. 532.

[a] Leaving notice at defendant's residence a sufficient service. *White v. Chestnut's Lessee*, 11 Humph. (Tenn.) 79.

15. *Parker v. Abbott*, 130 Mass. 25.

16. *Davis v. Brown* (Tenn.), 62 S. W. 381; *Shultz v. Elliott*, 11 Humph. (Tenn.) 183.

[a] **Leaving copy at defendant's dwelling sufficient.** *Shultz v. Elliott*, 11 Humph. (Tenn.) 183.

17. *Blake v. Rogers*, 210 Mass. 588, 97 N. E. 68; *Barrows v. Nat. Rubber Co.*, 12 R. I. 173.

18. *Prater v. McDonough*, 7 Lea (Tenn.) 670; *Hinson v. Hinson*, 5 Sneed (Tenn.) 322, 73 Am. Dec. 129.

19. *Prater v. McDonough*, 7 Lea (Tenn.) 670; *Hinson v. Hinson*, 5 Sneed (Tenn.) 322, 73 Am. Dec. 129, failure to do so renders the sale void.

It is a question of law for the court whether the notice contains all the requisites of the statute.<sup>20</sup>

(V.) Appraisal.—(A.) NECESSITY FOR.—In many instances it is necessary or proper that the value of the property levied on shall be ascertained through appraisers,<sup>21</sup> but the appraisal may be waived.<sup>22</sup>

It is the duty of the officer to notify the debtor and allow him a reasonable specified time in which to appoint an appraiser.<sup>23</sup>

A second appraisement is provided for in some jurisdictions where the property for some reason is not sold at the time advertised.<sup>24</sup>

(B.) APPOINTMENT OF APPRAISERS.—The statute governs the method of appointing appraisers,<sup>25</sup> and sometimes provides that each of the

[a] Presence of defendant at the sale is no waiver of notice of its time and place. *Hinson v. Hinson*, 5 Sneed (Tenn.) 322, 73 Am. Dec. 129.

20. *Prater v. McDonough*, 7 Lea (Tenn.) 670.

21. See the statutes of the several states and *Kearney Land & Inv. Co. v. Aspinwall*, 45 Neb. 601, 63 N. W. 827.

[a] Personal property held by the execution debtor and another jointly need not be inventoried and appraised. *Richart v. Goodpaster*, 25 Ky. L. Rep. 889, 76 S. W. 831.

[b] No appraisement of real estate sold upon execution is required, even where such sale is expressed to be subject to mortgage. *Armstead v. Jones*, 71 Kan. 142, 80 Pac. 56.

[c] No appraisal necessary (1) where the property was fraudulently conveyed (N. M. Com. Laws, 1897, §3130), (2) or the sale is for debts or taxes due the state (Neb. Comp. St., 1911, §7065), (3) or if the execution runs against an officer for moneys received by him and not accounted for. Neb. Comp. St., 1911, §7067. Ohio.—Gen. Code, 1910, §11,680. Wyo.—Comp. St., 1910, §4701.

[d] Where the officer's return is silent on the subject it will be presumed, in the absence of proof to the contrary, that the sheriff did his duty in the premises, and caused the land to be appraised before sale; and the burden is on the party attacking such sale to show that there was no appraisement. *Talbot v. Hale*, 72 Ind. 1.

[e] A fraudulent appraisement is as if none had been made. *Zacharie v. Winter*, 17 La. 76.

22. La.—Code Prac., art. 653. Okla. Comp. Laws, 1909, §5978. Pa.—Purd. Dig., pp. 1562, 1563.

23. La.—Code Prac., §671. Me.

*Harriman v. Cummings*, 45 Me. 351; *Howe v. Wildes*, 34 Me. 566. N. H. *Gilbert v. Berlin*, 70 N. H. 396, 48 Atl. 279. Vt.—*Briggs v. Green*, 33 Vt. 565; *Stanton v. Bannister*, 2 Vt. 464.

[a] Where an officer making a levy returns that he notified the debtor to be present at the time and place to select an appraiser, "which he utterly refused to do," this is sufficient evidence of the notice required by the statute. *Keen v. Briggs*, 46 Me. 467.

[b] Specifying Time.—The time to be given the debtor within which to appoint an appraiser should be specified in the notice. *Fitch v. Tyler*, 34 Me. 463.

[c] If debtor is a corporation, notice to the clerk, treasurer, agent, or one of the directors to choose an appraiser, is sufficient. N. H. Pub. St., 1901, ch. 233, §4.

[d] What is a "reasonable" time, to be allowed to the debtor, in which to choose an appraiser, is submitted to the judgment of the officer. *Fitch v. Tyler*, 34 Me. 463.

[e] When the debtor has gone to parts unknown to the officer, no notice need be given, nor need notice be given to the attorney in the suit unless he has been specially appointed by the debtor as his agent for that purpose. *Gilman v. Thompson*, 11 Vt. 643; *Galusha v. Sinclear*, 3 Vt. 394.

Notice to debtor in general, see *infra*, II, B, 7, (IV), (C).

24. See the statutes.

[a] Twice Advertised.—An officer has no authority to cause real estate to be re-appraised until it has been twice advertised and twice offered for sale. *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113.

25. See the statutes.

[a] Approval of Court.—In §6 of

parties may select an appraiser, and upon their failure or refusal to do so, the sheriff may make the appointment, and in case they cannot agree they or the sheriff should name an umpire.<sup>26</sup> Where several parcels of land have been taken at different times, there may be different sets of appraisers.<sup>27</sup>

(C.) QUALIFICATIONS OF APPRAISERS. — The appraisers should be disinterested persons of the neighborhood.<sup>28</sup> Whether they must be resi-

the Pennsylvania Act of May 26, 1897, P. L. 95, which reads "the value of the goods and chattels claimed shall be determined by appraisers appointed by the sheriff subject to the approval thereof by the court," the word "thereof" refers to the valuation of the goods as determined by the appraisers, and not to the mere appointment of the appraisers. *Lowry v. Letzelter*, 45 Pa. Super. 143.

[b] Where a party has acquiesced in the valuation of the goods made by the appraisers, and has given the bond required by the statute in double the amount of that valuation, he cannot subsequently object to the admission of the appraisement in evidence because "the appointment of the appraisers was not made according to law." *Lowry v. Letzelter*, 45 Pa. Super. 143.

26. See *Boynton v. Grant*, 52 Me. 220; *Harriman v. Cummings*, 45 Me. 351.

[a] In *Richardson v. Payne*, 114 Mass. 429, it was held that the officer having no authority by Rev. St., ch. 73, §3 (Gen. St., ch. 103, §3), to appoint an appraiser for the creditor; and that as in appointing he had not assumed to be the creditor's agent, his act was not ratified by the creditor's acceptance of seizure.

[b] The assignee of an insolvent debtor is the proper person to appoint an appraiser. *Fellows v. Hoyt*, 69 N. H. 179, 44 Atl. 929.

[c] If the parties mutually agree on the appraisers it is sufficient, for as said in the opinion of the court in *Eastman v. Curtis*, 4 Vt. 616, 620, "If the parties mutually agreed upon the appraisers, each one did in fact choose an appraiser."

27. Me. Rev. St., 1903, ch. 78, §4.

28. Ia.—Code, 1897, §4041. Neb. Comp. St., 1911, §7060. Ohio.—Gen. Code, 1910, §11,672.

[a] The Word Neighborhood Is a Relative and Indefinite Term.—In a

very sparsely settled community, a person residing in a town thirty-five miles distant, might be "of the neighborhood." But prima facie he is not, and if the vicinity of the land is so sparsely settled as to extend the neighborhood to thirty-five miles, these facts should be shown, and the prima facie condition should be thus rebutted. *Woods v. Cochrane*, 38 Iowa 484, 485.

[b] Appraisers living within a mile and a quarter from property levied on held to be prima facie from the neighborhood. *State v. Jungling*, 116 Mo. 162, 22 S. W. 686.

[c] Unfriendly feelings towards an execution debtor on the part of those appointed appraisers of his estate upon the levy of the execution, do not constitute a legal disqualification. The officer making the appointment is the sole judge of their fitness in this respect. *Briggs v. Green*, 33 Vt. 565.

[d] A subsequent mortgagee of property sold at sheriff's sale who made a private arrangement with the purchaser, who was the seizing creditor, was an incompetent appraiser. *Zacharie v. Winter*, 17 La. 76.

[e] A tenant in common with the judgment debtor held to be incompetent as an appraiser. *Cowdrey v. Sheldon*, 122 Mass. 267.

[f] A purchaser of real estate on which the same judgment is a lien cannot be an appraiser of the personal property levied on, even though the judgment creditor makes no objection to him. *Conover v. Walling*, 28 N. J. Eq. 333.

[g] The fact that the officer chose his brother-in-law as an appraiser does not vitiate the levy, where neither the officer nor the appraiser had any interest in the land or its value. *Brown v. Washington*, 110 Mass. 529, 531.

[h] The surviving husband of the sister of one of the parties is not disqualified as an appraiser. *Blodgett v. Brinsmaid*, 9 Vt. 27.

[i] Want of qualification of one of

dents of the county depends upon the statute.<sup>29</sup> If an appraiser has the other qualifications the fact that he is not twenty-one years of age does not disqualify him.<sup>30</sup> In extending an execution upon real estate lying in different parts of a county, different appraisers may be selected and employed.<sup>31</sup>

(D.) THE APPRAISEMENT. — (1.) *General Statement.* — Several interests in or parcels of real estate may legally be appraised together in one gross estimate,<sup>32</sup> or two parcels lying side by side may be separately appraised.<sup>33</sup> If the property is at the time within the jurisdiction, it makes no difference whether the list or inventory is actually made in or out of the county.<sup>34</sup> In making the appraisement, encumbrances on the property should be deducted.<sup>35</sup> Unnecessary matters in the appraisement may be rejected as surplusage.<sup>36</sup>

(2.) *Description of Property.* — The inventory and appraisement of goods seized under execution should specify particularly the articles or property seized.<sup>37</sup>

the appraisers of real estate sold under execution, as that he was not a householder, is a mere irregularity not affecting the power of the sheriff to sell. *Hill v. Baker*, 32 Iowa 302.

29. See the statutes.

[a] It is not requisite that the appraisers should be residents of the county, in which the land lies. *Fitch v. Tyler*, 34 Me. 463.

30. *White v. Laurel Land Co.*, 20 Ky. L. Rep. 775, 82 S. W. 571.

31. *Boylston v. Carver*, 11 Mass. 515.

32. *Peabody v. Minot*, 24 Pick. (Mass.) 329; *Bond v. Bond*, 2 Pick. (Mass.) 382.

[a] *Joint Ownership.*—In levying an execution against two joint debtors upon real estate held by them in common, it is not necessary to appraise each one's share separately. *Dwinel v. Soper*, 32 Me. 119.

[b] Where the appraisers appraise land not by the acre but in gross, it is no legal objection to the validity of the extent that they certify the number of acres, deducting a certain quantity for roads, although it does not otherwise appear that there are any highways upon the land. *Fletcher v. State Capital Bank*, 37 N. H. 369.

33. *Hathorn v. Corson*, 77 Me. 582, 1 Atl. 738.

34. *Dean v. Thatcher*, 32 N. J. L. 470; *Walker v. Hill's Exrs.*, 22 N. J. Eq. 513, 530.

35. See the statutes.

[a] If the liens are ascertained by

the sheriff, instead of the appraisers, and the sale in fact made for more than two-thirds the appraised value of the property, exclusive of prior incumbrances, the sale would not be rendered invalid for the reason that the encumbrances were thus ascertained. It would be but a mere technical irregularity, working no prejudice to the defendant in execution. *Brown v. Butters*, 40 Iowa 544.

[b] But where two parcels of land were levied on, one of which was subject to a mortgage and the other not, the levy was held not to be invalid because both parcels were appraised as one estate, and no deduction was made on account of the mortgage. *Pettee v. Peppard*, 125 Mass. 66.

36. *Symonds v. Harris*, 51 Me. 14.

[a] *Inconsistency in Appraisement.* Where the appraisers appraised a parcel of real estate, and set out an undivided proportional part of it to the creditor, at an appraised value which did not agree with their appraisement of the whole parcel, the latter, being unnecessary, may be treated as surplusage and disregarded. *Symonds v. Harris*, 51 Me. 14.

37. *La.*—Code Pr., art. 676. *Me.* *Stevenson v. Fuller*, 75 Me. 324; *Jones v. Buck*, 34 Me. 301. *N. J.*—*Hustick v. Allen*, 1 N. J. L. 168.

[a] In a levy of land by the number of its lot and reference to the deed from the debtor's grantor, there is a sufficient description by metes and

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(3.) *Subscription and Oath.*—The appraisement should be in writing, properly subscribed, and under oath.<sup>38</sup>

(E.) *OBJECTIONS.*—After the sale is made it is too late for the parties for the first time to question the correctness of the appraisement on any other ground than that of fraud.<sup>39</sup>

(F.) *FILING.*—It is the duty of an officer to deposit a copy of the appraisement with the clerk of the court before the sale is advertised.<sup>40</sup>

(VI.) *Postponement.*—(A.) *Generally.*—Statutes generally provide for postponing or adjourning the sale if it cannot be had or completed on the day advertised.<sup>41</sup> The officer conducting the sale has the power,<sup>42</sup>

bounds, within the import of the statute. *Cowan v. Wheeler*, 31 Me. 439.

38. See the statutes.

[a] *A failure to have the appraisers sworn* will not affect the title of the purchaser, unless the purchaser participates in the irregularity. *Guelot v. Pearce*, 18 Ky. L. Rep. 1004, 38 S. W. 892; *Sayers v. Hahn*, 5 Ky. L. Rep. 320. See also *Hall v. Staples*, 74 Me. 178.

[b] *Identity of person subscribing the appraiser's return.* See *Boynton v. Grant*, 52 Me. 220.

39. *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113; *Kearney Land & Inv. Co. v. Aspinwall*, 45 Neb. 601, 63 N. W. 827; *Vought v. Foxworthy*, 38 Neb. 790, 57 N. W. 538.

40. *Neb.*—*Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113 (*overruling* *La Flume v. Jones*, 5 Neb. 256); *Kearney Land & Inv. Co. v. Aspinwall*, 45 Neb. 601, 63 N. W. 827. *Ohio.*—*Gen. Code*, 1910, §11,673. *Okla.*—*Comp. Laws*, 1909, §5979. *Wyo.*—*Comp. St.*, 1910, §4699.

41. See the statutes.

[a] *In Nebraska*, there is no statute authorizing an adjournment of an execution sale. *Fraaman v. Fraaman*, 64 Neb. 472, 90 N. W. 245, 97 Am. St. Rep. 450.

[b] *Where there is only one bidder* present this fact does not warrant a postponement under a statute authorizing a postponement for want of bidders. *Gilbert v. Watts-De Golyer Co.*, 169 Ill. 129, 48 N. E. 430, 61 Am. St. Rep. 154. See also *State v. Johnson*, 2 N. C. 293.

42. *U. S.*—*United States v. Drennen*, 1 Hempst. 320, 25 Fed. Cas. No. 14,992. *Idaho.*—*Ollis v. Kirkpatrick*, 3 Idaho 247, 28 Pac. 435. *Ill.*—*Gilbert*

*v. Watts-De Golyer Co.*, 169 Ill. 129, 48 N. E. 430, 61 Am. St. Rep. 154; *Roseman v. Miller*, 84 Ill. 297; *Phelps v. Conover*, 25 Ill. 309. *Me.*—*Crafts v. Elliottsville*, 47 Me. 141. *Mass.*—*Frazee v. Nelson*, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391; *Warren v. Leland*, 9 Mass. 265. *N. J.*—*Coxe v. Halsted*, 2 N. J. Eq. 311. *N. C.*—*Mordecai v. Speight*, 14 N. C. 428, 24 Am. Dec. 266; *Pope v. Bradley*, 10 N. C. 16. *Pa.*—*Hollister v. Vanderlin*, 165 Pa. 248, 30 Atl. 1002, 36 W. N. C. 41, 44 Am. St. Rep. 657; *Schofield v. Caselberry*, 9 W. N. C. 95. *R. I.*—*Aldrich v. Grimes*, 14 R. I. 219; *Reynolds v. Hoxsie*, 6 R. I. 463. *Vt.*—*Jewett v. Guyer*, 38 Vt. 209.

[a] *Effect of an improper adjournment* is to render the sale voidable, upon proper proceedings, but not void. *Jackson v. Spink*, 59 Ill. 404.

[b] *Not sufficient cause* that sheriff had heard indirectly that a third person claimed the property. *Gilbert v. Watts-De Golyer Co.*, 169 Ill. 129, 48 N. E. 430.

[c] *One more adjournment than is authorized by statute* is a mere irregularity to be taken advantage of only on a showing of prejudice. *Reese v. Dobbins*, 51 Iowa 282, 1 N. W. 540.

[d] *Compliance With Statute.*—Where the statute authorizes an adjournment, if necessary, "from day to day, not exceeding three days," it is illegal to adjourn the sale from the sixteenth to the twenty-second day of the same month. *Crafts v. Elliottsville*, 47 Me. 141.

[e] *When advertised for a general election day* the sheriff may postpone it until the succeeding day. *Pope v. Bradley*, 10 N. C. 16.

[f] *By consent of the parties* the

for good cause, to adjourn the sale, even in the absence of statute;<sup>43</sup> the propriety of so doing resting in his sound discretion.<sup>44</sup> The adjournment may be to a different place.<sup>45</sup>

(B.) NOTICE ON POSTPONEMENT.—When the sale is postponed a new notice of the sale is required in some states,<sup>46</sup> while in other states the

sale may certainly be postponed. *Hilliard v. Wilson*, 76 Tex. 180, 13 S. W. 25.

43. *Russell v. Richards*, 11 Me. 371, 26 Am. Dec. 532; *Aldrich v. Grimes*, 14 R. I. 219; *Reynolds v. Hoxsie*, 6 R. I. 463. *Contra*, *Enloe v. Miles*, 12 Smed. & M. (Miss.) 147.

[a] **Postponement Without Statutory Authority.**—“Upon a careful examination, we have not found any authority expressly given by statute to a sheriff to adjourn the vendue of personal property taken on execution from, and belonging to an individual, either to a subsequent day or to a different place. Yet it is easy to state cases where such sheriff might not have possible time to complete the sale on the day appointed, owing to the amount of the property, and the multitude of articles, which he had seised. Again, the day appointed might be so stormy that no persons could or would attend the auction with a view of purchasing, or for some other cause, as was the fact in the present case; or if present, persons might not incline to bid. In such circumstances what could a sheriff do, unless he could adjourn the sale? Must the creditor lose his debt, by losing the attachment, without any fault in any one on whom he could effectually call for damages? This would seem a harsh construction of a law, made for the benefit of creditors. When an officer, acting fairly, and anxiously consulting the best interests of the creditor and the debtor too, adjourns the sale, so as to obtain as high a price as he can, must a court of law pronounce this very act an official wrong, and declare the sale void in consequence, and on the objection of one who has no interest whatever in the question, whether the articles are sold at a high price or a low one? But as to the authority of a sheriff to adjourn his vendue, we are not obliged to depend on general reasoning as to expediency and convenience.” *Russell v. Richards*, 11 Me. 371, 26 Am. Dec. 532.

[b] Although the statute provides for adjournment under certain circumstances, the sale may be adjourned for good cause even where those circumstances do not exist. *Aldrich v. Grimes*, 14 R. I. 219.

44. \* *Ill.*—*Phelps v. Conover*, 25 Ill. 309. *N. C.*—*Pope v. Bradley*, 10 N. C. 16. *Vt.*—*Jewett v. Guyer*, 38 Vt. 209.

[a] A sheriff must exercise the right to postpone with impartiality towards all parties interested. *Copper v. Iowa Trust & Sav. Bank*, 149 Iowa 1336, 128 N. W. 373.

[b] Arbitrary exercise of this power of postponing renders the officer liable in damages for the consequences. *Gilbert v. Watts-De Golyer Co.*, 169 Ill. 129, 48 N. E. 430, 61 Am. St. Rep. 154.

[c] An abuse of discretion in postponing the sale may be ground for setting aside the sale. *Copper v. Iowa Trust & Savings Bank*, 149 Iowa 336, 128 N. W. 373. See *Lawyers' Cooperative Pub. Co. v. Bennett*, 34 Fla. 302, 16 So. 185.

45. *Russell v. Richards*, 11 Me. 371, 26 Am. Dec. 532.

[a] Provided it be to a place which he was authorized to appoint as the place of sale in the first instance. *Jewett v. Guyer*, 38 Vt. 209.

46. See the statutes and the following: *Ill.*—*Matson v. Sweetser*, 50 Ill. App. 518. *La.*—*Montgomery v. Barrow*, 19 La. Ann. 169. *Mo.*—*Ladd v. Shippie*, 57 Mo. 523. *N. Y.*—*Frederick v. Wheelock*, 3 Thomp. & C. 210.

Notice of sale in general, see *supra*, II, B, 7, d, (IV).

[a] Where the sale is enjoined after notice has been given, it is not proper to give oral notice of an adjournment to another day, and after the dissolution of the injunction sell without a new publication. The notice required by the statute must be given *de novo*. *Patten v. Stewart*, 26 Ind. 395.

[b] New notice by writing the same on the original notice, or putting notice thereof under the original. *Ollis v. Kirkpatrick*, 3 Idaho 247, 23 Pac. 435.

notice of the adjourned sale may be by proclamation,<sup>47</sup> unless, in some jurisdictions, the adjournment is for more than a specified time.<sup>48</sup>

(VII.) **Time of Sale.**—(A.) **GENERAL RULES.**—The days and hours at which execution sales may properly be held have been variously provided for by the statutes.<sup>49</sup> Where the statute designates the day or days on which execution sales may take place a sale made on any other day is void,<sup>50</sup> unless consented to by the parties in execution.<sup>51</sup> A sale of property before the time authorized by law,<sup>52</sup> or before the hour advertised,<sup>53</sup> is invalid. If the sale be made on a day not named

[c] **The sheriff (1) need not sign the notice of postponement where the first notice was properly signed.** *Osgood v. Blackmore*, 59 Ill. 261. (2) Failure of sheriff to sign notice of postponement officially, is a mere clerical error which may be disregarded. *Cord v. Hirsch*, 17 Wis. 403.

47. Me. Rev. St., 1903, §37. **Mass.** Rev. Laws, 1902, p. 1607. **N. J.**—*Allen v. Cole*, 9 N. J. Eq. 286, 59 Am. Dec. 416; *Coxe v. Halsted*, 2 N. J. Eq. 311. **N. C.**—See *Mordecai v. Speight*, 14 N. C. 428, 24 Am. Dec. 266. **Ore.** Lord's Laws. §239. **S. D.**—Comp. Laws, 1910, §370. **Utah.**—Comp. Laws, 1907, §3251. **Vt.**—Pub. St., 1906, §2178. **Wash.**—Rem. & Bal. Code, §585.

[a] **A postponement will not cure a defect of failure to give notice for the acquired length of time unless a new and independent notice be given for the proper period.** *Sawyer v. Wilson*, 61 Me. 529.

[b] Where sale has been made and bidders have left the place of sale and the sheriff upon hearing that the purchaser will not comply with the bid, returns to the place of sale and announces an adjournment, such will not be a sufficient advertisement. The proclamation must be made in the presence and hearing of the persons assembled at the time fixed for the sale. *Weatherby v. Slape*, 58 N. J. Eq. 550, 43 Atl. 898.

48. Mich. Comp. Laws, 1907, §10332; N. D. Rev. Codes, 1905, §7134.

49. See generally the statutes.

[a] **Sale on Holiday.**—In *Crabtree v. Whiteselle*, 65 Tex. 111, it was held that under the statute which provides that sales shall be on the first Tuesday of the month, a sale made on that day is valid although such day may fall on a legal holiday. But see *Rice v. Gable*, 1 Pa. Co. Ct. 567, holding that a sale may be set aside if on holiday.

[b] **During Term of Court.**—Sale during session of county court and not shown to be during a term of the circuit court is void, not only in a direct proceeding, but also in a collateral way. *Bruce v. Leary*, 55 Mo. 431; *Merchants' Bank v. Evans*, 51 Mo. 335; *Sarpy v. Detchemendy*, 31 Mo. 196.

50. Conn.—*Morey v. Hoyt*, 65 Conn. 516, 33 Atl. 496. **Ky.**—*Wile v. Sweeny*, 2 Duv. 161; *Casey v. Gregory*, 13 B. Mon. 505; *Chambers v. Hays*, 6 B. Mon. 115. **N. C.**—*Loudermilk v. Corpening*, 101 N. C. 649, 8 S. E. 117; *Mayers v. Carter*, 87 N. C. 146.

[a] In *Cain v. Maples*, 1 Hill L. (S. C.) 304, 26 Am. Dec. 184, under a statute providing that execution sales should be held on the first Monday, the sale took place on the following Tuesday, it was held not to render the sale void, for great harm would result if sales were to be set aside because of such irregularities on the part of the sheriff.

51. *Wile v. Sweeny*, 2 Duv. (Ky.) 161; *Casey v. Gregory*, 13 B. Mon. (Ky.) 505.

[a] A sale under execution, at a time and place other than that prescribed by the statute, by the consent of the plaintiff and defendant, is not void, if there was no intention to defraud, and no other lien on the property at the time of sale. *Cawthorn v. McCraw*, 9 Ala. 519.

[b] Written consent of both plaintiff and defendant. *Chambers v. Hays*, 6 B. Mon. (Ky.) 115.

52. *Camp v. Ganley*, 6 Ill. App. 499. See also *Mushback v. Ryerson*, 11 N. J. L. 346.

[a] **Waiver of objection to sale before the hour authorized by law.** *Duke v. Clark*, 58 Miss. 465.

53. *Williams v. Jones*, 1 Bush (Ky.) 621, it being sold for inadequate price.

in the notice of sale it will be set aside.<sup>54</sup> In some states the time of the sale is a matter resting in the discretion of the sheriff.<sup>55</sup> The fact that sale was at an unusual hour may invalidate it or at least render it voidable.<sup>56</sup> The execution sale should be had without unnecessary delay,<sup>57</sup> but there can be no iron rule which compels plaintiff and sheriff to have property levied upon, sold at the earliest possible day. A reasonable discretion is allowed to be exercised, in order that the object of the writ may be accomplished, not frustrated, and that the property of the debtor be not needlessly sacrificed.<sup>58</sup> The defendant will not be heard to complain of a delay which was for his benefit.<sup>59</sup> A sale made on the return day is good.<sup>60</sup>

(B.) AFTER RETURN DAY.—The authorities are not in accord as to whether an execution sale may properly be made after the return date of the writ, some holding that the sale of real estate after the return day is without authority,<sup>61</sup> but the weight of authority seems to be

54. *Wheatley v. Terry*, 6 Kan. 427.

55. *Nesbitt v. Dallam*, 7 Gill & J. (Md.) 494, 28 Am. Dec. 236.

[a] **He must act with ordinary prudence and judgment** or the sale will be vacated. *Nesbitt v. Dallam*, 7 Gill & J. (Md.) 494, 28 Am. Dec. 236.

56. **Four o'clock in the morning**, renders it voidable and liable to be set aside. *Rigney v. Small*, 60 Ill. 416.

[a] **At an unusually late hour**, as between nine and ten o'clock at night. *McNaughton v. McLean*, 73 Mich. 250, 41 N. W. 267.

[b] **After Ten P. M.**—This fact of itself not sufficient, but considered with other circumstances may be sufficient to cause sale to be set aside. *Greenwood v. Lehigh Coal Co.*, 1 Clark (Pa.) 393.

[c] **After sunset**, sale is void. *Carnrick v. Myers*, 14 Barb. (N. Y.) 9.

57. *Matson v. Sweetser*, 50 Ill. App. 518, 524; *Plaisted v. Hoar*, 45 Me. 380.

[a] **Interest of a partner** in the partnership property may be sold on execution, subject to the rights of other parties, without waiting to ascertain just what those rights are. *De Forest, Armstrong & Co. v. Miller*, 42 Tex. 34.

[b] **Lapse of three years** from the levy of the *feri facias*, on land, during which plaintiff had writs of venditioni exponas continually issued in succession, will not affect the sale afterward made. *Locke v. Coleman*, 4 T. B. Men. (Ky.) 315.

[c] **While the judgment lien remains**, the sale may be made. *Hender-*

*son v. Trimmier*, 32 S. C. 269, 11 S. E. 540.

58. *Powell v. Governor*, 9 Ala. 36; *Matson v. Sweetser*, 50 Ill. App. 518, 527.

[a] **Perishable property** may be sold at such time as the officer may select. Ala. Civ. Code, 1907, §4111.

[b] **If sale takes place at first term** at which it could be made, it is not invalid because the levy was made more than a year before. *Boyd v. Jones*, 49 Mo. 202.

[c] **In the Absence of Fraud**.—In *Ludeman v. Hirth*, 96 Mich. 17, 55 N. W. 449, citing *Ward v. Citizens' Bank*, 46 Mich. 332, 9 N. W. 437, it was held that "a lien upon real estate by virtue of a levy under execution is not lost by delay in proceeding to a sale, where no fraudulent purpose is shown on the part of the execution creditor."

59. *Payne v. Billingham*, 10 Iowa 360.

60. *Tayloe v. Gaskins*, 12 N. C. 295; *St. Bartholomew's Church v. Wood*, 61 Pa. 96.

61. **Ala.**—*Hawes v. Rucker*, 94 Ala. 166, 10 So. 85. But see *Mitchell v. Corbin*, 91 Ala. 599, 8 So. 810. **Ark.** *Hightower v. Handlin*, 27 Ark. 20. **Miss.**—*Lehr v. Doe*, 3 Smed. & M. 468. **Neb.**—*Buckley v. Mason*, 52 Neb. 639, 72 N. W. 1043. **S. C.**—*Sims v. Randal*, 1 Brev. 85. **Tex.**—*Cain v. Woodward*, 74 Tex. 549, 12 S. W. 319; *Mitchell v. Ireland*, 54 Tex. 301; *Hester v. Duprey*, 46 Tex. 625; *Terry v. Cutler*, 4 Tex. Civ. App. 570, 23 S. W. 539.

[a] **An order of sale issued by a**

that an officer, making a levy before the return day, may make sale afterwards.<sup>62</sup>

(C.) AFTER DEATH OF PARTY.—(1.) *Death of Plaintiff*.—If an execution be levied and the plaintiff die before a sale of the property, the lien created by the levy is not lost, nor is any scire facias necessary, to authorize the issue of a venditioni exponas, and a sale.<sup>63</sup>

(2.) *After Death of Defendant*.—In the absence of statute an execution, issued after the death of the defendant in the judgment, is void, and, consequently, a sale under it is also void, and may be set aside, on motion, at the instance of the heir-at-law.<sup>64</sup> But when an execution is received by the sheriff during the life of the defendant, and its lien is preserved as authorized by the statute, lands may be sold under a levy made after his death, as if he were still alive.<sup>65</sup>

justice of the peace to a constable, for sale of personal property remaining in his hands unsold at the return day of the execution is unauthorized by any statute and confers no authority on the constable. *Chaney v. Burford Lumb. Co.*, 132 Ala. 315, 31 So. 369.

[b] **Venditioni Exponas Necessary.** Cannot be after a return day without a venditioni exponas. *Overton v. Perkins*, 10 Yerg. (Tenn.) 328; *Rogers' Lessee v. Cawood*, 1 Swan (Tenn.) 142; *Young v. Smith*, 23 Tex. 598, 76 Am. Dec. 81.

[c] A sheriff cannot levy and sell under an execution after it has been returned. *Cook v. Wood*, 16 N. J. L. 254.

62. **U. S.**—*Wheaton v. Sexton's Lessee*, 4 Wheat. 503, 4 L. ed. 626. **Cal.** *Southern Cal. Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627. **Idaho.**—*Ollis v. Kirkpatrick*, 3 Idaho 247, 28 Pac. 435. **Ill.**—*Corbin v. Pearce*, 81 Ill. 462; *Willoughby v. Dewey*, 63 Ill. 246. **Ind.**—*Rose v. Ingram*, 98 Ind. 276; *Lowry v. Reed*, 89 Ind. 442. **Ia.**—*Walton v. Wray*, 54 Iowa 531, 6 N. W. 742; *Bomberger, Wright & Co. v. Griener*, 18 Iowa 477. **Ky.** *St.*, 1909, §1664. **La.**—*Briant v. Hebert*, 30 La. Ann. 1127. **Me.**—*Caldwell v. Blake*, 69 Me. 458. **Md.**—*Busey v. Tuck*, 47 Md. 171; *Gaither v. Martin*, 3 Md. 146. **Mass.**—*Rev. Laws*, 1902, p. 1602. **Mich.**—*Vroman v. Thompson*, 51 Mich. 452, 16 N. W. 808; *Blair v. Compton*, 33 Mich. 414. **Minn.**—*Spencer v. Haug*, 45 Minn. 231, 47 N. W. 794; *Knox v. Randall*, 24 Minn. 479. **Mo.**—*Karnes v. Alexander*, 92 Mo. 660, 1 S. W. 518; *Kane v. McCowan*, 55 Mo. 181; *State Bank v. Bray*, 37 Mo. 194;

*Hombs v. Corbin*, 20 Mo. App. 497. **N. C.**—*Brooks v. Ratcliff*, 33 N. C. 321; *Lanier v. Stone*, 8 N. C. 329. **N. D.** *Rev. Codes*, 1905, §7136. **Vt.**—*Barnard v. Stevens*, 2 Aik. 429.

[a] **In Pennsylvania** the sale may be made at any time within six days after the return day of the writ. *Rhodes v. Barnett*, 196 Pa. 429, 46 Atl. 438.

[b] "A sheriff may retain a *fi. fa.* in his hands, after a levy, and after an ineffectual effort to sell, not only until the return day has passed, but until several terms have passed, and may then sell." *Moreland v. Bowling*, 3 Gill (Md.) 500.

[c] **Where no Prohibition in Statute.** *Wyant v. Tuthill*, 17 Neb. 495, 23 N. W. 342; *Johnson v. Bemis*, 7 Neb. 224. 63. *Morgan v. Winn's Admr.*, 17 B. Mon. (Ky.) 233.

As to right to issue execution generally after death of plaintiff, see 15 STANDARD PROC. 764.

As to levy of execution after death of plaintiff, see 15 STANDARD PROC. 920.

64. **U. S.**—*Erwin's Lessee v. Dundas*, 4 How. 58, 74, 11 L. ed. 875. **Ala.** *Beach v. Dennis*, 47 Ala. 262. **Tex.** *Fleming v. Ball*, 25 Tex. Civ. App. 209, 60 S. W. 985, reviewing Texas authorities.

[a] **Voidable only by direct proceeding for that purpose.** *Doe ex dem. Shelton v. Hamilton*, 23 Miss. 496.

**Issuance of execution after death of defendant**, see 15 STANDARD PROC. 767.

65. **Ala.**—*Civ. Code*, 1907, §4101; *Sims v. Eslava*, 74 Ala. 594; *Keel v. Larkin*, 72 Ala. 493; *Hurt v. Nave's Admr.*, 49 Ala. 459. **Ark.**—*Davis v. Oswalt*, 18 Ark. 414. **Idaho.**—*Rev.*

(VIII.) **Place of Sale.** — Generally execution sales are held at the door of the court house of the county wherein the property is situated.<sup>60</sup> But statutes sometimes provide for sale at other places,<sup>67</sup> as in vicinity of the place of levy;<sup>68</sup> and where the property consists of merchandise or property not capable of moving except at great expense, the sale should be had at the place of levy,<sup>69</sup> or such other place as may be stated in the advertisement and is most expedient.<sup>70</sup> Under certain circumstances different portions of the property may be sold at different places.<sup>71</sup> The sale of perishable goods should be had at such place as is most advantageous to all parties.<sup>72</sup> The sale

Code, 1908, §5475. **Ia.**—*Sprott v. Reid*, 3 Gr. 489. **Me.**—*Coffin v. Freeman*, 84 Me. 535, 24 Atl. 986. **Md.**—*Boyd v. Harris*, 1 Md. Ch. 466. **Mich.**—Comp. Laws, 1907, §857. **Miss.**—Code, 1906, §3976. **Mo.**—*Mundy's Admr. v. Bryan*, 18 Mo. 29. **N. J.**—*Wait v. Savage*, 15 Atl. 225.

[a] **An execution levy on land in the life of the judgment debtor may be enforced by venditioni exponas after his death.** *Hare v. Hall*, 41 Ark. 372; *Powell v. Macon*, 40 Ark. 541; *Bellin-gall v. Duncan*, 8 Ill. 477.

**Levy of execution where defendant dies after delivery of same to sheriff,** see 15 STANDARD PROC. 920.

66. See the statutes.

[a] **At the door of the building occupied and used as a courthouse.** *Kane v. McCowan*, 55 Mo. 181, in which it appears that the courthouse was being occupied by soldiers, while a neighboring church was used as the courthouse.

[b] **A sale in the sheriff's office was proper, where he had acted in good faith.** *Howland v. Pettey*, 15 R. I. 603, 10 Atl. 650.

[c] **When there are two courthouses in a county, which have co-equal and co-ordinate powers within certain designated precincts of the particular county, sales of land under execution may be made at either courthouse.** *Anniston Pipe Works v. Williams*, 106 Ala. 321, 18 So. 111.

[d] **Though otherwise provided by private local law, a sale at the courthouse in conformity with the general law assented to by the debtor is valid.** *Biggs v. Brickell*, 68 N. C. 239.

67. See the statutes.

[a] **Public Place.**—In *Goss v. Car-dell*, 53 Vt. 447, it was held that the failure to sell at a "public place" was immaterial in a case where the prop-

erty was sold on the premises of the owner which was on the public road, and notices of the sale were posted on the fence in front of the place.

[b] **Cumbersome personalty to be sold at any convenient place.** *Miss. Code*, 1908, §3982.

[c] **Statutes Are Mandatory.**—*A. G. Rhodes & Son Furniture Co. v. Jenk-ins*, 2 Ga. App. 475, 58 S. E. 897; *Jones v. Rogers*, 85 Miss. 830, 38 So. 742; *Koch v. Bridges*, 45 Miss. 247. A failure to sell personal property at the place designated in the notice of sale is ground for setting the sale aside. *Murphy v. Hill*, 77 Ind. 129.

[d] **Sale Near Place Advertised.** A sale of wheat advertised for a certain place held valid though actually held thirty-five rods away but in plain view of the place advertised. *Perkins v. Spaulding*, 2 Mich. 157.

68. *Ky. St.*, 1909, §1695; *S. C. Code*, 1902, §2619.

[a] **Live stock at any public place in neighborhood of defendant's residence.** *Miss. Code*, 1906, §3982.

[b] **Sale should be in the town where the levy was made rather than the town to which the property has been removed.** *Collins v. Perkins*, 31 Vt. 624.

69. *Fla.*—*Gen. St.*, 1906, §1633. *Ga. Code*, 1895, §5455. *La.*—*Code Pr.*, art. 666.

70. *Ala. Civ. Code*, 1907, §4109; *Conn. Gen. St.*, 1902, §904.

71. *Drake v. Mooney*, 31 Vt. 617, when the character and situation of personal property and the interests of the parties require it.

72. *Md.*—*Arnold v. Fowler*, 94 Md. 497, 51 Atl. 299. *Mich.*—Comp. Laws, 1907, §10360. *Miss.*—*Code*, 1906, §3986.

[a] **At Such Place as the Officer May Select.**—*Ala. Civ. Code*, 1907, §4111.

of real property need not be made on the premises.<sup>73</sup> Generally a sheriff can sell only such property as is found in his county, unless otherwise provided by statute.<sup>74</sup> Where the county line divides the premises the officer may sell the land lying in both counties, if the statute permits it,<sup>75</sup> otherwise the sale is good only as to the land in his county.<sup>76</sup>

(IX.) **Public or Private Sale.**—As a general rule execution sales should be at public auction to the highest bidder.<sup>77</sup> But in some jurisdictions statutes provide for a private sale, if the court, for good cause shown, on application of either party, so orders,<sup>78</sup> or the sale may be private where the parties so consent.<sup>79</sup> The difference between a sheriff's sale and a private sale consists rather in the character of the sale than in the publicity attending it.<sup>80</sup>

(X.) **Amount of Property To Be Sold.**—No more property should be sold under execution than is reasonably necessary to satisfy the debt and costs.<sup>81</sup> The authorities are not in accord as to the effect of a sale of more land than is necessary to pay the execution debt, some<sup>82</sup>

73. *Nesbitt v. Dallam*, 7 Gill & J. (Md.) 494, 28 Am. Dec. 236.

74. *Oldfield v. Eulert*, 148 Ill. 614, 36 N. E. 615.

[a] **In Township.**—Where an officer, under process issued by a justice of the peace, seizes property in one township, and advertises and sells the same in another township, the sale will be invalid as against the owner. *Paulsen v. Hall*, 39 Kan. 365, 18 Pac. 225.

75. See the statutes.

76. *Tonopah Banking Corp. v. McKane Min. Co.*, 31 Nev. 295, 103 Pac. 230; *Alred v. Montague*, 26 Tex. 733.

77. See the statutes and *Ormond v. Faircloth*, 1 N. C. 636, 3 N. C. 336, 5 N. C. 35.

78. *Ohio Gen. Code*, 1910, §11670; *Wyo. St.*, 1910, §4696.

79. *Jones v. Loftin*, 9 N. C. 199.

[a] **Private Sale by Consent.**—A sheriff having levied execution on the property of a debtor, may by the consent of the debtor and the plaintiffs in the executions act as the agent of the debtor, and dispose of the property at private sale on credit. *Jones v. Loftin*, 9 N. C. 199.

80. *Austin v. Soule*, 36 Vt. 645.

[a] **Number Present Immaterial.** A sale is not necessarily void or even voidable because there is no one present at the sale but the sheriff and the plaintiff who is the only bidder. *Gilbert v. Watts-DeGolyer Co.*, 169 Ill. 129, 48 N. E. 430; *Power v. Larabee*, 3 N. D. 502, 57 N. W. 789, 44 Am. St.

Rep. 577. But see *Wharmby v. McNertney*, 4 Kulp (Pa.) 101, holding that where plaintiff is the only bidder and bystander the sale should be adjourned, a purchase by the plaintiff is invalid.

81. See the statutes, and *Ga. Cooney v. City of Atlanta*, 136 Ga. 118, 70 S. E. 950. **Ia.**—*Fortin v. Sedgwick*, 133 Iowa 233, 110 N. W. 460. **Mo.** *Gordon v. O'Neil*, 96 Mo. 350, 9 S. W. 920. **N. Y.**—*Tiernan v. Wilson*, 6 Johns. Ch. 411.

[a] **A sale of a strip from the side of a tract** so that the portions sold and unsold both abutted on the highway was proper. *Howland v. Pettay*, 15 E. L. 603, 10 Atl. 650.

[b] **Fractional undivided interest** in property cannot be sold where the defendant has the entire title. The officer cannot make the defendant and purchaser tenants in common. *Willbanks v. Untriner*, 98 Ga. 801, 25 S. E. 841.

[c] **Rule rests on public policy** and does not need a statute to support it. *Fortin v. Sedgwick*, 133 Iowa 233, 110 N. W. 460.

**Sale in parcels or en masse**, see II, B, 7, d, (XII).

82. See *Fortin v. Sedgwick*, 133 Iowa 233, 110 N. W. 460; *Sublett v. Gardner*, 144 Ky. 190, 137 S. W. 864; *Dawson v. Litsey*, 10 Bush (Ky.) 408; *Shropshire v. Pullen*, 3 Bush (Ky.) 512; *Adams v. Keiser*, 7 Dana (Ky.) 208; *Addison v. Crow*, 5 Dana (Ky.) 271;

courts holding the sale void, others that it is at most voidable,<sup>83</sup> and that a slight excess does not vitiate the sale.<sup>84</sup> The officer should not sell a less interest or title in the property than the defendant actually owns,<sup>85</sup> though in some states the rents and profits of real estate should be offered before the fee,<sup>86</sup> then if no bids are received the fee may be sold.<sup>87</sup>

(XI.) **Presence of Property.**—The general rule is that where the property to be sold consists of personalty, capable of manual delivery, it should be in the presence of the bidders, subject to their inspection.<sup>88</sup> The fact that personalty is not present at the place of sale

*Morrison v. Bruce*, 9 Dana (Ky.) 211; *Cooper v. Martin*, 1 Dana (Ky.) 23.

[a] But a mistake as to the number of acres in the tract, selling it as containing one hundred three acres when in fact it contains one hundred fifty-three, does not make the sale void. *Meehan v. Edwards*, 92 Ky. 574, 18 S. W. 519.

[b] Sale of additional parcels, after enough has been sold to satisfy the judgment debt, is void. *Plummer v. Whitney*, 33 Minn. 427, 23 N. W. 841.

[c] An excessive sale (1) is void if the value of the property sold is greatly in excess of the amount to be raised. *Cornelius v. Burford*, 28 Tex. 202, 91 Am. Dec. 309. (2) The sale of four hundred forty-six acres worth above \$800.00, for the sum of thirteen dollars, to satisfy an execution for ten dollars and twenty-five cents, is void. *Tiernan v. Wilson*, 6 Johns. Ch. (N. Y.) 411.

[d] Long acquiescence of the execution defendant will be treated as a confirmation by him of the sale and thus make perfect the title of the execution purchaser, especially as against a mere trespasser. *Meehan v. Edwards*, 92 Ky. 574, 18 S. W. 519, 19 S. W. 179.

83. *Weaver v. Guyer*, 59 Ind. 195.

[a] **Discretion of Officer.**—Where he sells entire premises the sale is valid though there may be an error in judgment as to propriety of detaching a portion and selling it. *Van Dyne v. Van Dyne*, 16 N. J. Eq. 93.

84. *Humphrey v. Beeson*, 1 G. Gr. (Iowa) 199, 48 Am. Dec. 370.

85. *Pillsbury v. Smyth*, 25 Me. 427, sale of an equity of redemption where the debtor owns the entire fee and there is no mortgage on the property is void.

[a] Sale is not void because the officer sells a life estate in a slave when

the defendant owns the absolute estate in the slave. *O'Conner v. Youngblood*, 16 Ala. 718.

86. *Marmon v. White*, 151 Ind. 445, 51 N. E. 930; *Milburn v. Phillips*, 136 Ind. 680, 34 N. E. 983, 36 N. E. 360; *Adler v. Sewell*, 29 Ind. 598; *Mehrhoff v. Dittenbacher*, 4 Ind. App. 447, 31 N. E. 41.

87. *Marmon v. White*, 151 Ind. 445, 51 N. E. 930; *Piel v. Watson*, 44 Ind. 447.

88. See the statutes and the following: Ala.—*Brock v. Berry*, 132 Ala. 95, 31 So. 517, 90 Am. St. Rep. 896. Ark.—*Rowan v. Refeld*, 31 Ark. 648; *Kennedy & Co. v. Clayton*, 29 Ark. 270. Ill.—*Tibbetts v. Jageman*, 58 Ill. 43; *Herod v. Bartley*, 15 Ill. 58. Ind. *Murphy v. Hill*, 77 Ind. 129; *Gaskill v. Aldrich*, 41 Ind. 338. Ky.—*Burns v. Ray*, 18 B. Mon. 392. Me.—*Penney v. Earle*, 87 Me. 167, 32 Atl. 879; *Lawry v. Ellis*, 85 Me. 500, 27 Atl. 518. Md. *Horsely v. Knowles*, 74 Md. 602, 22 Atl. 1104. Mich.—*Wingfield v. Adams*, 34 Mich. 437; *Blair v. Compton*, 33 Mich. 414. N. Y.—*Stonebridge v. Perkins*, 141 N. Y. 1, 35 N. E. 980; *Morgan v. Holladay*, 48 How. Pr. 86; *Cresson v. Stout*, 17 Johns. 116, 8 Am. Dec. 373. Tex.—*Dickinson Paper Co. v. Mail Publishing Co.* (Tex. Civ. App.), 31 S. W. 1083; *Brown v. Lane*, 19 Tex. 203.

[a] **Contingent and complicated contracts** cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all of its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy and announced at the sale. *Crandall v. Blen*, 13 Cal. 15.

is ground for setting the sale aside.<sup>89</sup> These requirements will be met, however, if the property is in plain view, or so near that it can be personally inspected by all present at the sale who may choose to examine it,<sup>90</sup> and the rule may be waived by the parties.<sup>91</sup>

**(XII.) In Parcels or En Masse.**—(A.) GENERAL RULE.—Generally the property should be sold in such lots and parcels as is calculated to bring the highest price,<sup>92</sup> the officer having considerable discretion in the matter.<sup>93</sup> Whenever it is doubtful whether property levied on is

[b] **The sale of a hog, in a pen from one to two hundred rods from the place of sale, and entirely out of sight, has been held to be unauthorized although the sale was in good faith.** *Brookbank v. Kennard*, 41 Ind. 339.

[c] **Where the defendant, in execution has merely an interest without right to the exclusive possession, the interest may be sold and conveyed without the presence or delivery of the property.** *Sayles' Tex. Civ. St.*, §2372.

[d] **Cattle on Range.**—(1) A sale, under execution, of a lot of cattle running on the range at the time of the sale, is against public policy, and void. *Rowan v. Refeld*, 31 Ark. 648. (2) But the rule is otherwise in Texas. *Sayles' Civ. St.*, §2373.

[e] **A Sale in the Absence of the Goods Is Void.**—Ark.—*Rowan v. Refeld*, 31 Ark. 648; *Kennedy & Co. v. Clayton*, 29 Ark. 270. Ill.—*Tibbetts v. Jageman*, 58 Ill. 43. Mich.—*Winfield v. Adams*, 34 Mich. 437. N. C.—*McNeely v. Hart*, 30 N. C. 492, 49 Am. Dec. 404; *Smith v. Tritt*, 18 N. C. 241, 28 Am. Dec. 565; *Ainsworth v. Greenlee*, 7 N. C. 450, 9 Am. Dec. 615. Tenn.—*Gift v. Anderson*, 5 Humph. 577.

[a] **Sale Voidable Only.**—*Eads v. Stephens*, 63 Mo. 90.

89. Ind.—*Murphy v. Hill*, 77 Ind. 129. Mo.—*Eads v. Stephens*, 63 Mo. 90. N. J.—*Boylan v. Kelly*, 36 N. J. Eq. 331.

90. See *Phillips v. Brown*, 74 Me. 549; *Alston v. Morphew*, 113 N. C. 460, 18 S. E. 335; *Klopp v. Witmoyer*, 43 Pa. 219, 82 Am. Dec. 561.

[a] **Sale of crop of corn, sheriff in view of, but not on or immediately near field, held valid.** *Skinner v. Skinner*, 26 N. C. 173.

91. *Cook v. Timmons*, 67 Ill. 203; *Gift v. Anderson*, 5 Humph. (Tenn.) 577.

92. See the statutes and the following: Ala.—*Brock v. Berry*, 132 Ala. 95, 31 So. 517, 90 Am. St. Rep. 896. Ga.—*Palmour v. Roper*, 119 Ga. 10, 45 S. E. 790. N. Y.—*Berry v. Kelly*, 4 Robt. 106. N. C.—*State v. Morgan*, 29 N. C. 387, 47 Am. Dec. 329; *McLeod v. Pearce*, 9 N. C. 110, 11 Am. Dec. 742. Pa.—See *Evans v. Crone*, 17 Pa. Co. Ct. 86.

[a] The officer in selling realty where more than one property is described in the advertisement, must offer each particular property immediately after reading the description of it. *Hansecom v. Henderson*, 1 Phila. (Pa.) 576.

[b] **At the Option of Owner.**—*Feild, Brown v. Dortch*, 34 Ark. 399, statute directory.

[a] **Sale by lots or government additions contemplated by Michigan statute, see** *Wolf v. Holton*, 117 Mich. 321, 75 N. W. 762.

[d] **By the Acre.**—The Washington statute "providing that sales on execution shall be by the acre, is directory, and does not require land to be sold one acre at a time; one bid upon a tract of a certain number of acres will be construed as a bid at so much per acre, and is not a substantial irregularity." *Bartlett Estate Co. v. Fairhaven Land Co.*, 56 Wash. 437, 105 Pac. 848.

93. Ill.—*Matson v. Sweetser*, 50 Ill. App. 518. Ind.—*Sherry v. Nick*, 1 Ind. 575. Mich.—*Perkins v. Spaulding*, 2 Mich. 157. Mo.—*Shelton v. Franklin*, 224 Mo. 342, 123 S. W. 1084. N. C.—*Davis v. Abbott*, 25 N. C. 137. Ohio.—*Liessee of State v. Macalester*, 9 Ohio 19. Ore.—*British Columbia Bank v. Page*, 7 Ore. 454. Pa.—*Evans v. Crone*, 17 Pa. Co. Ct. 86.

[a] **Discretion of Officer.**—In *Bergin v. Hayward*, 102 Mass. 414, 426, the court says: "From the necessity of the case, much must be left to his

property susceptible of division, the action of the sheriff, taken in good faith and without abuse of discretion, is conclusive.<sup>94</sup> The parties may by consent decide whether the sale shall be in parcels or en masse.<sup>95</sup> Generally property which in its nature is divisible must be sold in parcels,<sup>96</sup> thus personal property should very seldom and only under special circumstances be sold en masse,<sup>97</sup> and when real property consists of several known lots or parcels, they should be sold separately or offered for sale in parcels,<sup>98</sup> the proper course being to offer each

reasonable and fair discretion. There may be cases in which it would be injudicious to sell the articles singly, or in any other way than by the case, or the dozen, or perhaps even by the lot. He must act in good faith, so as to make the process as little oppressive to the debtor and as productive to the creditors as circumstances will allow, paying, of course, all due regard to general usage and established practice in like cases. We can not say, however, that it would necessarily and under all circumstances, be illegal or improper for the officer to set up in one lot the whole of a stock in trade, or the entire contents of a workshop, or all the machinery, tools and fixtures of a specific manufactory. It is certainly possible to conceive of cases in which subdivision might be injurious to all concerned." See also *Matson v. Sweetser*, 50 Ill. App. 518, 529.

94. *Nelson v. Bronnenburg*, 81 Ind. 193; *Perkins v. Spaulding*, 2 Mich. 157.

95. *Bruce v. Westervelt*, 2 E. D. Smith (N. Y.) 440; *Yost v. Smith*, 105 Pa. 628, 51 Am. Rep. 219. See also *Smith v. Meldren*, 107 Pa. 348.

96. *Ala.*—*Brock v. Berry*, 132 Ala. 95, 31 So. 517, 90 Am. St. Rep. 896. *Cal.*—*Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475. *D. C.*—*Hart v. Hines*, 10 App. Cas. 366. *Ill.*—*Rigney v. Small*, 60 Ill. 416; *Day v. Graham*, 6 Ill. 435; *McLean County Bank v. Flagg*, 31 Ill. 290, 83 Am. Dec. 224. *Ind.*—*Brake v. Brownlee*, 91 Ind. 359. *Ia.*—*Williams v. Allison*, 33 Iowa 278. *Me.*—*Stone v. Bartlett*, 46 Me. 438. *Md.*—*Nesbitt v. Dallam*, 7 Gill & J. 494, 28 Am. Dec. 236. *Mich.*—*Harvey v. McAdams*, 32 Mich. 472. *N. Y.*—*Cunningham v. Cassidy*, 17 N. Y. 276, 7 Abb. Pr. 183. *Tenn.*—*Stephens v. Taylor*, 6 Lea 307.

But see cases and notes, *supra*, this section.

[a] It is a question of fact for the jury whether a failure to sell in parcels was injurious or not. *Thompson v. Hodges*, 10 N. C. 51.

97. *Brock v. Berry*, 132 Ala. 95, 31 So. 517, 90 Am. St. Rep. 896; *McLeod v. Pearce*, 9 N. C. 110, 11 Am. Dec. 742. *Compare*, *Matson v. Sweetser*, 50 Ill. App. 518, 529; *Bergin v. Hayward*, 102 Mass. 414.

98. See the statutes and the following: *Ala.*—*Anniston Pipe Works v. Williams*, 106 Ala. 324, 18 So. 111, 54 Am. St. Rep. 51; *Wheeler v. Kennedy*, 1 Ala. 292. *Cal.*—*Browne v. Ferrea*, 51 Cal. 552. *D. C.*—*Hart v. Hines*, 10 App. Cas. 366. *Ga.*—*Cooney v. Atlanta*, 136 Ga. 118, 70 S. E. 950; *Forbes v. Hall*, 102 Ga. 47, 28 S. E. 915. *Idaho.*—*Ollis v. Kirkpatrick*, 3 Idaho 247, 28 Pac. 435. *Ill.*—*Palmer v. Riddle*, 180 Ill. 461, 54 N. E. 227; *Lurton v. Rodgers*, 139 Ill. 554, 29 N. E. 866; *Brown v. Duncan*, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545; *Cohen v. Menard*, 31 Ill. App. 503. *Ind.*—*Catlett v. Gilbert*, 23 Ind. 614; *State v. Leach*, 10 Ind. 308; *Voss v. Johnson*, 41 Ind. 19. *Ia.*—*Williams v. Allison*, 33 Iowa 278; *White v. Watts*, 18 Iowa 74. *Kan.*—*Pritchard v. Madren*, 31 Kan. 38, 2 Pac. 691; *Bell v. Taylor*, 14 Kan. 278; *Johnson v. Hovey*, 9 Kan. 61. *Ky.*—*Humpich v. Drake*, 19 Ky. L. Rep. 1782, 44 S. W. 632. *Mo.*—*Gordon v. Hickman*, 96 Mo. 350, 9 S. W. 920; *State v. Yancy*, 61 Mo. 397. *N. J.*—*Coxe v. Halsted*, 2 N. J. Eq. 311. *N. Y.*—*Jackson ex dem. Vanderlyn v. Newton*, 18 Johns. 355. *Pa.*—See *Klopp v. Witmoyer*, 43 Pa. 219, 82 Am. Dec. 561. *S. C.*—*Hammett v. Farmer*, 26 S. C. 566, 2 S. E. 507.

[a] By the acre in the discretion of the sheriff. *Davis v. Abbott*, 25 N. C. 137.

[b] The judgment debtor may by parol waive a sale of the land in parcels, and give authority to sell en

tract separately, and then continue adding others until a sale is had, or it is ascertained that nothing less than the whole will be sufficient.<sup>99</sup> Where no bids are received or it appears that by reason of special circumstances a sale en masse will be more advantageous, they may then be sold in a lump.<sup>1</sup> And from the nature of the property it

masse. *Hudepohl v. Liberty Hill Water & Min. Co.*, 94 Cal. 588, 29 Pac. 1025, 28 Am. St. Rep. 149; *Williamson v. Logan*, 1 B. Mon. (Ky.) 237.

[c] **Contiguous parcels of land forming one entire tract** may be levied on and sold as one tract, although the same be composed of fractional parts of different land lots. *Conley v. Redwine*, 109 Ga. 640, 35 S. E. 92, 77 Am. St. Rep. 398.

[d] **Part of a governmental subdivision which has never been subdivided** may be sold as one tract though the statute provides that lands susceptible of division be sold in separate tracts or lots. *Henderson v. Harness*, 184 Ill. 520, 56 N. E. 786.

[e] **Entire tracts of property** should not be divided so as to be oppressive or injurious to the parties. *McLean County Bank v. Flagg*, 31 Ill. 290, 83 Am. Dec. 224.

[f] **A map or plan need not be furnished** by the defendant showing that the property consists of several parcels, the officer should ascertain this. *Reed v. Diven*, 7 Ind. 189.

[g] **In Michigan** the statute permits sale in parcels only, and the sale of the whole, after an offer in parcels has failed to bring bidders, is not allowable. *Udell v. Kahn*, 31 Mich. 195.

[h] **Dividing the tract by proposed streets**, with a view to laying it out in building lots, the streets not being legally established, nor even marked by fences, is not such a division as to demand a separate sale under execution of the different portions of it. *Coxe v. Halsted*, 2 N. J. Eq. 311.

[i] **Title papers of judgment debtor are to determine** whether for the purposes of the sale realty shall be treated as one lot or several lots. *Ament v. Brennan*, 1 Tenn. Ch. 431.

[j] **Statute held directory only.** *Minn.*—*Tillman v. Jackson*, 1 Minn. 183. *Mo.*—*Shelton v. Franklin*, 224 Mo. 342, 123 S. W. 1084, 135 Am. St. Rep. 537; *Fine v. St. Louis Public Schools*, 30 Mo. 166; *Sheehan v. Stackhouse*, 10 Mo. App. 469. *N. Y.*—*Har-*

*gin v. Wicks*, 92 Hun 155, 36 N. Y. Supp. 375. *Ore.*—*Griswold v. Stoughton*, 2 Ore. 61, 84 Am. Dec. 409.

[k] **Mandatory.**—*Piel v. Brayer*, 30 Ind. 332, 95 Am. Dec. 699.

[l] **Presumption** is that property was sold in parcels as required. *Love v. Cherry*, 24 Iowa 204.

99. *Ill.*—*Miller v. McAlister*, 197 Ill. 72, 64 N. E. 254; *Henderson v. Harness*, 184 Ill. 520, 56 N. E. 786; *Cohen v. Menard*, 136 Ill. 130, 24 N. E. 604; *Phelps v. Conover*, 25 Ill. 309. *Ind.*—*Weaver v. Guyer*, 59 Ind. 195; *Voss v. Johnson*, 41 Ind. 19. *Ia.*—*Burmeister v. Dewey*, 27 Iowa 468. *Kan.*—*Bell v. Taylor*, 14 Kan. 277. *Ky.*—*White v. Roberts*, 112 Ky. 788, 66 S. W. 758. *La.*—*MacDonough v. Elam*, 1 La. 489, 20 Am. Dec. 284.

[a] **Where the tracts are separated** the rule applies with especial force. *Cohen v. Menard*, 136 Ill. 130, 24 N. E. 604.

1. *Ga.*—*Palmour v. Roper*, 119 Ga. 10, 45 S. E. 790. *Idaho.*—*Ollis v. Kirkpatrick*, 3 Idaho 247, 28 Pac. 435. *Ill.*—*Bressler v. Martin*, 42 Ill. App. 356. *Ind.*—*Nix v. Williams*, 110 Ind. 234, 11 N. E. 36; *Mugge v. Helgemeier*, 81 Ind. 120. *Ia.*—*Copper v. Iowa Trust & Sav. Bk.*, 149 Ia. 336, 128 N. W. 373; *Connecticut Mut. Life Ins. Co. v. Brown*, 81 Iowa 42, 46 N. W. 749; *Lamb v. McConkey*, 76 Iowa 47, 40 N. W. 77; *Hill v. Baker*, 32 Iowa 302; *Burmeister v. Dewey*, 27 Iowa 468. *Kan.*—*Bell v. Taylor*, 14 Kan. 277. *S. C.*—*Hammett v. Farmer*, 26 S. C. 566, 2 S. E. 507. *S. D.*—*First Nat. Bank v. Black Hills Fair Assn.*, 2 S. D. 145, 48 N. W. 852.

[a] **Where a division would produce a sacrifice** land should be sold en masse. *Doyle v. Sleeper*, 1 Dana (Ky.) 531.

[b] **The sale en masse (1) of two lots occupied by one building** is not irregular. *Bowden v. Hadley*, 138 Iowa 711, 116 N. W. 689. (2) Where a man owning two lots has put up a single building covering one of them and a small part of the other, the premises

may be more proper to sell en masse.<sup>2</sup> In some jurisdictions the debtor has the right to demand a sale in parcels.<sup>3</sup>

When a portion of the property is claimed by a third person and he requires it to be sold separately his request must be complied with.<sup>4</sup>

Under a several judgment even if a single execution against all would be valid, it would not authorize a sale of property of the several parties en masse.<sup>5</sup>

(B.) JOINT PROPERTY. — Where the debtor owns an undivided interest in property it must be sold as such, since the officer cannot partition the property,<sup>6</sup> and on execution against two persons, each owning an undivided part of a tract of land, both interests<sup>7</sup> may be

so covered should be sold on execution as one parcel. *Geney v. Maynard*, 44 Mich. 578, 7 N. W. 173.

[c] Where there are heavy encumbrances and adverse claims the fact that the property is sold en masse will not affect the sale, it not being probable, in view of all the circumstances, that a sale in parcels would have brought more. *New England Loan & Trust Co. v. Avery* (Tex. Civ. App.), 41 S. W. 673.

[d] Holding Bids in Abeyance. When the bid for a single parcel is not sufficient to satisfy the judgment it is very questionable whether the debtor can be heard to complain if the sheriff holds the bids for separate parcels in abeyance until he offers the property as a whole to see if he receives a bid therefor exceeding the amount of all the separate bids. *Barnes v. Zoercher*, 126 Ind. 434, 26 N. E. 172. See also *Brake v. Brownlee*, 91 Ind. 359; *Nesbit v. Hanway*, 87 Ind. 400.

2. *Gleason v. Hill*, 65 Cal. 17, 2 Pac. 413.

[a] Water Rights and Appurtenances.—Where several water ditches and water rights appertaining to them constitute a single connected system of water supply, so that some of the ditches would be useless if owned and held by different parties, they may be sold under execution as a single parcel. *Gleason v. Hill*, 65 Cal. 17, 2 Pac. 413.

[b] Each railroad track would be sold as a whole to the bidder for the shortest term of years to collect tolls for the use of it. *Detroit v. Detroit City Ry. Co.*, 76 Mich. 421, 43 N. W. 447.

3. See the statutes, and *Grapen-*

*gether v. Fejervary*, 9 Iowa 163, 74 Am. Dec. 336.

[a] A demand is necessary (1) to take advantage of this rule. *Bauduc v. Conrey*, 10 Rob. (La.) 466; *Lennon v. Heindel*, 56 N. J. Eq. 8, 37 Atl. 147. (2) And if none be made the defendant cannot complain. *Taylor v. Graham*, 18 La. Ann. 656, 89 Am. Dec. 699. (3) But see *Com. v. Burnett*, 19 Ky. L. Rep. 1836, 44 S. W. 966, holding that failure of debtor to demand the quantities in which his property shall be sold cannot prejudice his rights.

[b] Failure to comply with demand of defendant renders the sale invalid. *Grapengether v. Fejervary*, 9 Iowa 163, 74 Am. Dec. 336.

4. Cal.—Code Civ. Proc., 1909, §694. Idaho.—Rev. Codes, 1908, §4484. Minn. Rev. Laws, 1905, §4306. Mont.—Rev. Codes, 1907, §6830. Nev.—Rev. Laws, 1912, §5292. N. Y.—*Neilson v. Neilson*, 5 Barb. 565. Ore.—Lord's Ore. Laws, §238. Utah.—Comp. Laws, 1907, §3254. Wash.—Rem. & Bal. Code, §583.

[a] Purchasers pendente lite are not included within this rule. *Bartlett Estate Co. v. Fairhaven Land Co.*, 56 Wash. 437, 105 Pac. 848. Compare, *Sansberry v. Lord*, 82 Ind. 521.

5. *Brown v. Duncan*, 132 Ill. 413, 23 N. E. 1126.

6. *Nelson v. Bronnenburg*, 81 Ind. 193.

7. *Jones v. Lewis*, 30 N. C. 70, 47 Am. Dec. 338.

[a] A sale of a city lot, occupied by two joint defendants as single lot, with nothing to indicate a division into two parts, the value of the whole not appearing to be in excess of the judgment, is not a nullity, though the de-

sold at one bid, though there is authority to the contrary.<sup>8</sup>

(C.) PROPERTY SUBJECT TO ENCUMBRANCES. — If there be two mortgages embracing the same piece of real estate a sale of the rights in equity of redemption under both mortgages, at the same time and for one sum, is proper,<sup>9</sup> but a joint sale of two or more rights of redeeming several parcels of land from several mortgages will be void,<sup>10</sup> though the tracts covered by the several mortgages are in part the same.<sup>11</sup> Personal property subject to a mortgage should be sold en masse.<sup>12</sup>

(D.) EFFECT OF IRREGULARITIES. — Generally the disregard of the rules as to sale en masse or in parcels merely renders the sale voidable and hence not subject to collateral attack;<sup>13</sup> and unless it affirmatively appears that the discretion of the officer in dividing the property has been abused, the sale will not be set aside for alleged irregularity in the division,<sup>14</sup> or for a failure to subdivide,<sup>15</sup> the presumption being that the officer sold in accordance with the statute.<sup>16</sup> There is, how-

pendants each have title in severalty to separate parts of the lot. *Jones v. Kokomo Bldg. Assn.*, 77 Ind. 340.

8. *Ballard v. Scruggs*, 90 Tenn. 585, 18 S. W. 259, 25 Am. St. Rep. 703.

9. *Hobart v. Bennett*, 77 Me. 401; *Bartlett v. Stearns*, 73 Me. 17.

10. *Bartlett v. Stearns*, 73 Me. 17.

11. *Smith v. Dow*, 51 Me. 21.

12. *Knutson v. Rosenberger*, 81 Neb. 761, 116 N. W. 687, 129 Am. St. Rep. 711; *Carpenter v. Simmons*, 28 How. Pr. 12, 1 Robt. (N. Y.) 360.

[a] The reason is that only the right to redeem the property can be conveyed and that right is not susceptible of division. *Carpenter v. Simmons*, 28 How. Pr. 12, 1 Robt. (N. Y.) 360.

13. Cal.—*Hudepohl v. Liberty Hill Water & Min. Co.*, 94 Cal. 588, 29 Pac. 1025. Ill.—*Palmer v. Riddle*, 180 Ill. 461, 54 N. E. 227. Ind.—See *Jones v. Kokomo Bldg. Assn.*, 77 Ind. 340; *Patton v. Stewart*, 19 Ind. 233. Miss.—*Baldwin v. Dreyfus*, 92 Miss. 94, 45 So. 428. Mo.—*Norman v. Eastburn*, 230 Mo. 168, 130 S. W. 276; *Shelton v. Franklin*, 224 Mo. 342, 123 S. W. 1084; *Lewis v. Whitten*, 112 Mo. 318, 20 S. W. 617; *Bouldin v. Ewart*, 63 Mo. 330; *Rector v. Hartt*, 8 Mo. 448, 41 Am. Dec. 650. See opinion of Valiant, C. J., in *Shelton v. Horrell*, 232 Mo. 358, 382, 134 S. W. 988, 137 S. W. 264. N. Y.—*Mohawk Bank v. Atwater*, 2 Paige 54; *Welch v. Woodruff*, 51 Hun 637, 3 N. Y. Supp. 622. N. D.—*Power v. Larabee*, 3 N. D. 502, 57 N. W. 789, 44 Am. St. Rep. 577. Tex.—*Glascock v. Price*, 92 Tex. 271, 47 S. W. 965;

*New England L. & T. Co. v. Avery* (Tex. Civ. App.), 41 S. W. 673. Wis.—*Bunker v. Rand*, 19 Wis. 253, 88 Am. Dec. 684.

[a] Valid until set aside by a direct proceeding therefor. *Palmer v. Riddle*, 180 Ill. 461, 54 N. E. 227. 14. *Lynch v. Reese*, 97 Ind. 360.

[a] An abuse of this direction may be and should be reviewed by the court either upon motion or direct attack by a bill in equity. *Shelton v. Franklin*, 224 Mo. 342, 123 S. W. 1084.

15. *Norman v. Eastburn*, 230 Mo. 168, 130 S. W. 276.

[a] Fact that property sold at sacrifice not sufficient to justify setting sale aside where sold en masse instead of in parcels. *Greenup v. Stoker*, 12 Ill. 24, 52 Am. Dec. 474.

[b] Prejudice Must Be Shown. *Gillespie v. Smith*, 29 Ill. 473, 81 Am. Dec. 328.

[c] In the absence of fraud in the sale, it will not be set aside because en masse instead of in parcels. Ill.—*Prather v. Hill*, 36 Ill. 402; *Ross v. Mead*, 10 Ill. 171. Minn.—*Tillman v. Jackson*, 1 Minn. 183. See also *Coolbaugh v. Roemer*, 32 Minn. 445, 21 N. W. 472. N. C.—*Huggins v. Ketchum*, 20 N. C. 550.

16. *Foley v. Kane*, 53 Iowa 64, 4 N. W. 821.

[a] The recital in a sheriff's deed that the property therein described was sold, together with other property, for a specified sum, is not sufficient to establish the fact that both tracts were sold together in gross. *Foley v. Kane*, 53 Iowa 64, 4 N. W. 821.

ever, authority in a number of states holding such a sale void.<sup>17</sup>

(XIII.) Order in Which Separate Parcels or Kinds of Property Are Sold. Some statutes permit the debtor to direct which articles or lots of the property shall be first sold,<sup>18</sup> and the officer will have no authority to sell except in the order directed.<sup>19</sup> In such case a failure to observe the defendant's directions is ground for setting the sale aside.<sup>20</sup> If no such request is made the officer determines the order in which the property shall be sold.<sup>21</sup> The debtor may waive compliance with statutes directing the order of sale.<sup>22</sup> Lands bound by the judgment, which have been aliened, should be sold in the inverse order of the dates of their alienation.<sup>23</sup> Personal property should be sold before

[b] But where the levy has been greater than authorized by law, no presumption will prevail in favor of the sale that the land was ever offered in less tracts than sold, without success, before being offered as sold. *Cook v. Jenkins & Co.*, 30 Iowa 452.

17. Ga.—*Forbes v. Hall*, 102 Ga. 47, 28 S. E. 915, 66 Am. St. Rep. 152. Ky.—*Humpich v. Drake*, 19 Ky. L. Rep. 1782, 44 S. W. 632. Pa.—*Klopp v. Witmoyer*, 43 Pa. 219, 82 Am. Dec. 561, and note. Tenn.—*Brien v. Robinson*, 102 Tenn. 157, 52 S. W. 802.

[a] A sale is void where to satisfy a judgment of \$365.80 four acres were sold, one part of which had on it a two-story house, stable and orchard worth from \$1500 to \$2000 and separated from the other part, worth \$2000 to \$2500, by a fence and wagon road. *Bardeus v. Huber*, 45 Ind. 235.

18. See generally the statutes and the following: Cal.—Code Civ. Proc., 1915, §694. Idaho.—Rev. Code, 1908, §4484; *Wooddy v. Jameson*, 5 Idaho 466, 50 Pac. 1008. Ind.—*Davis v. Campbell*, 12 Ind. 192. Ky.—St., 1909, §1683. Mo.—Rev. St., 1909, §2207; *Cantwell v. Johnson*, 236 Mo. 575, 139 S. W. 365. Mont.—Rev. Codes, 1907, §6830. Nev.—Rev. Laws, 1912, §5292. N. D.—Rev. Codes, 1905, §1733. S. D. Comp. Laws, 1910, §369. Utah.—Comp. Laws, 1907, §3254.

[a] If a defendant has personal property, and so conceals it or places it out of the way that the officer cannot find it, if the defendant wishes to save his real estate, it is his duty to turn over or expose such property before the sale of the real property. *First Nat. Bank v. Black Hills Fair Assn.*, 2 S. D. 145, 48 N. W. 852.

[b] Where the debtor has conveyed

the property the sale is not invalid merely because the debtor has other property available. The vendee may obtain an order requiring resort to such other property first, but in the absence of such order the sale is not invalid. *Sansberry v. Lord*, 82 Ind. 521. Compare, *Bartlett Estate Co. v. Fairhaven Land Co.*, 56 Wash. 437, 105 Pac. 848.

19. *Wooddy v. Jameson*, 5 Idaho 466, 50 Pac. 1008.

[a] Statutes directory in nature. *Wheeling, L. E. & P. Coal Co. v. First Nat. Bank*, 55 Ohio St. 233, 45 N. E. 630.

20. *Wooddy v. Jameson*, 5 Idaho 466, 50 Pac. 1008; *Dobbins v. Wilson*, 107 Ill. 17.

21. See the statutes.

[a] Custom of sheriff to sell properties according to the alphabetical order of the first letter of the names of counsel who have issued the writs, should not be departed from. *Sargeant v. Goslin*, 1 Phila. (Pa.) 301.

22. *Wheeling, L. E. & P. Coal Co. v. First Nat. Bank*, 55 Ohio St. 233, 45 N. E. 630.

[a] Waiver presumed unless debtor assert his right by direct proceeding to set aside. *Wheeling, L. E. & P. Coal Co. v. First Nat. Bank*, 55 Ohio St. 233, 45 N. E. 630.

23. Ind.—*Ritter v. Cost*, 99 Ind. 80. Ohio.—*Commercial Bank v. Western Reserve Bank*, 11 Ohio 444, 38 Am. Dec. 739. Va.—*McClung v. Beirne*, 10 Leigh (37 Va.) 394, 34 Am. Dec. 739.

[a] The failure to sell in the inverse order of the alienation does not render the sale void, and any objection to the sale on that ground may be lost by laches. *Clark v. Glos*, 180 Ill. 556, 54 N. E. 631.

real estate,<sup>24</sup> and unincumbered property should be first offered.<sup>25</sup>

(XIV.) **Warning to Bidders.**—An announcement by the sheriff that whoever purchases the property will take it subject to a lawsuit by the execution defendant, and subject to any claims he has upon it, will not invalidate the sale.<sup>26</sup> A sale has been held to be voidable because of the erroneous statement of the incumbrances upon the property sold.<sup>27</sup> A warning by the sheriff that he will not accept checks in payment is not improper.<sup>28</sup>

(XV.) **Bidding.**—(A.) **GENERAL STATEMENT.**—Though only one bid be made that will not invalidate the sale if effort was made to secure other bids.<sup>29</sup> The sheriff is not bound to take the bare word of any person who may choose to bid and to call himself an agent of the execution creditor.<sup>30</sup> Bids may be sent by mail and announced by the sheriff at the time of sale.<sup>31</sup> There is no impropriety in receiving a bid over the telephone, provided the officer makes public outcry of the bid, at the place of sale, before striking off the property.<sup>32</sup>

**Time Limit.**—The sheriff cannot limit the time for bids to less than that prescribed by law.<sup>33</sup>

(B.) **CONDUCT AND AGREEMENTS AFFECTING BIDS.**—Combinations or agreements which are not made to prevent competition or to otherwise work an unfair advantage will not defeat the sale.<sup>34</sup> But an

24. *Saunders v. Reilly*, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472; *Neilson v. Neilson*, 5 Barb. (N. Y.) 565.

[a] **Remedy of debtor**, where real estate is sold before personalty, is against the sheriff. *Neilson v. Neilson*, 5 Barb. (N. Y.) 565.

25. *Marshall v. Moore*, 36 Ill. 321.

26. *Guerin v. Kraner*, 97 Ind. 533.

27. *Thompson v. Currier*, 70 N. H. 259, 47 Atl. 76.

28. *Bartlett Estate Co. v. Fairhaven Land Co.*, 56 Wash. 437, 105 Pac. 848.

29. *Swires v. Brotherline*, 41 Pa. 135, 80 Am. Dec. 601.

30. *Cowgill v. Wooden*, 2 Blackf. (Ind.) 332.

31. *Dickerman v. Burgess*, 20 Ill. 266; *Brannin v. Broadus*, 94 Ky. 33, 21 S. W. 344.

[a] But see *Sparling v. Todd*, 27 Ohio St. 521, bids in writing must come to the officer's hands at the time of the sale, and the officer cannot act as agent to offer a bid in writing received before the sale.

[b] **The plaintiff in an execution** may leave a specific bid with the officer which the latter may cry without violating a statute which prohibits him in his own behalf from buying or bid-

ding for property at his own sales. *Brannin v. Broadus*, 94 Ky. 33, 21 S. W. 344.

[c] **Written bid is waiver of prior bids by the same person.** *Faunce v. Sedgwick*, 8 Pa. 407.

32. *Vietor Inv. Co. v. Roerig*, 22 Colo. App. 257, 124 Pac. 349.

33. *Parker v. Pratt*, 8 N. J. Eq. 104.

34. *Kitchen v. St. Louis, etc. Ry. Co.*, 69 Mo. 224; *Stewart v. Severance*, 43 Mo. 322.

[a] **Agreement by Execution Plaintiffs.**—It is not sufficient ground to avoid a sale that the plaintiffs in the execution combined not to bid against each other, especially where the sale was open at the court house on court day. *Young v. Smith*, 10 B. Mon. (Ky.) 293; *Bailey v. Morgan*, 44 N. C. 352.

[b] **Agreement for Joint Purchase.** Evidence of an agreement between three persons that the three of them would buy the property and one only would do the bidding held not sufficient to show an agreement to suppress competition. *Snouffer v. Heisig*, 62 Tex. Civ. App. 81, 130 S. W. 912. See also *Boyd v. Jones*, 60 Mo. 454; *Braden v. O'Neil*, 183 Pa. 462, 38 Atl. 1023.

execution sale where fraudulent means are used to deter bidders and prevent a fair sale is invalid.<sup>35</sup>

(C.) **WITHDRAWING BIDS.**—Circumstances may arise when it would be proper to allow a bidder to withdraw his bid,<sup>36</sup> and it has been held that a bidder may withdraw his bid at any time before the property is struck off to him.<sup>37</sup> But where property has been sold to the execution creditor, he cannot afterward withdraw his bid, and treat the sale as a nullity, except with the consent of the execution debtor.<sup>38</sup>

(D.) **REJECTING BIDS.**—When a purchaser refuses or fails to pay under one bid the officer may reject any subsequent bid of such person,<sup>39</sup> nor is he bound to pay attention to or accept the bid of a person who is unable to pay the purchase price.<sup>40</sup> A conditional bid should be rejected,<sup>41</sup> as a bid conditioned that the money be applied to the bidder's execution.<sup>42</sup> And generally if the bids be inadequate the sheriff may reject them and return the property unsold for want of buyers.<sup>43</sup>

35. **Cal.**—*Pekin Min. & M. Co. v. Kennedy*, 81 Cal. 356, 22 Pac. 679.

**Ind.**—*Gilbert v. Carter*, 10 Ind. 16, 65

Am. Dec. 655. **Mo.**—*Durfee v. Moran*, 57

Mo. 374. **N. J.**—*Hamburgh Mfg. Co. v. Edsall*, 5 N. J. Eq. 249, *affirmed*,

*Edsall v. Hamburgh Mfg. Co.*, 5 N. J. Eq. 658.

**N. Y.**—*Troup v. Wood*, 4

*Johns. Ch.* 228; *Hamley v. Cramer*, 4

*Cow.* 717. **N. C.**—*Smith v. Greenlee*, 13

N. C. 126, 18 Am. Dec. 564. **Pa.**

*Phelps v. Benson*, 161 Pa. 418, 29 Atl.

86; *Hogg v. Wilkins*, 1 Grant's Cas. 67.

**S. C.**—*Martin v. Ranlett*, 5 Rich. L. 541,

57 Am. Dec. 770.

[a] If no harm results from such an agreement, the property selling for its full value, the sale is not affected. *Thames v. Miller*, 2 Woods 564, 23 Fed. Cas. No. 13,860.

[b] Where fraud is contemplated by an agreement for the purchase of a judgment by another judgment creditor, with an understanding that the vendor shall not bid, and vendee of the judgment purchases at the sale, the sale is void. *Oram v. Rothermel*, 98 Pa. 300.

[c] Question of fact whether fraud committed. *Oram v. Rothermel*, 98 Pa. 300.

36. *Fuson v. Conn. General Life Ins. Co.*, 53 Iowa 609, 6 N. W. 7.

[a] On an adjournment of the sale a bid is impliedly withdrawn. *Donaldson v. Kerr*, 6 Pa. 486.

[b] A bid will be deemed to have been withdrawn where the purchaser permits a number of years to pass

without demanding a deed. *Jones v. Rogers*, 85 Miss. 802, 38 So. 742.

37. *Hibernia Sav. & L. Soc. v. Behnke*, 121 Cal. 339, 53 Pac. 812; *Fisher v. Seltzer*, 23 Pa. 308, 62 Am. Dec. 335.

[a] The sheriff cannot deprive him of this right by prescribing conditions. *Fisher v. Seltzer*, 23 Pa. 308, 62 Am. Dec. 335.

38. *Fuson v. Connecticut General Life Ins. Co.*, 53 Iowa 609, 6 N. W. 7; *Downard v. Crenshaw*, 49 Iowa 296; *Miller v. Achureh*, 50 Ore. 478, 93 Pac. 332.

39. See the statutes.

[a] Officer cannot make a conditional acceptance or rejection. *Favrot v. Bates*, 1 McGloin (La.) 130.

40. *Hobbs v. Beavers*, 2 Ind. 142, 52 Am. Dec. 500; *Flomerfelt v. Zellers*, 7 N. J. L. 153.

41. **Ill.**—*Dewey v. Willoughby*, 72 Ill. 250. **Ind.**—*Swope v. Ardery*, 5 Ind. 213.

**La.**—*Martinez v. Fouche*, 2 McGloin 130.

42. *Isler v. Colgrove*, 75 N. C. 334; *Faunce v. Sedgwick*, 8 Pa. 407.

[a] **Refusal To Give Security.**—Because a duly authorized agent of the plaintiff in execution refuses to give security his bid cannot be rejected. *Merwin v. Smith*, 2 N. J. Eq. 182.

43. *Henderson v. Sublett*, 21 Ala. 626; *Lankford v. Jackson*, 21 Ala. 650; *Donham v. Hoover*, 135 Mo. 210, 36 S. W. 627; *Shaw v. Potter*, 50 Mo. 281.

[a] Where the property is offered

Where a bid is fraudulently refused the bidder may go into equity and have the sale resumed at the point of his bid,<sup>44</sup> but he cannot be declared the purchaser even though his bid was higher than the one accepted.<sup>45</sup>

(E.) RELIEF AGAINST BID. — If a purchaser of personal property at execution sale has bid more than the property is worth, the court will not relieve him, unless he was influenced so to do by artifice or fraud.<sup>46</sup>

(XVI.) Necessary Amount of Purchase Price. — Statutes sometimes provide that the property cannot be sold for less than a specified fraction of the appraised value exclusive of incumbrances,<sup>47</sup> but in the absence of any showing to the contrary, it will not be presumed that the sales were made in violation of the statute in this respect.<sup>48</sup> In some states the officer should attempt to raise the money by selling the least possible amount of property necessary to satisfy the execution.<sup>49</sup>

(XVII.) Terms of Sale. — (A.) GENERALLY. — The purchaser is bound by the terms announced by the officer at the time of the sale,<sup>50</sup> but the sheriff has no power to impose terms or conditions not authorized by law,<sup>51</sup> and unauthorized agreements by him with the purchaser regarding the payment are not binding on the officer or the creditor.<sup>52</sup> The vendee may be given time to look into the title.<sup>53</sup>

(B.) FOR CASH OR CREDIT. — Unless specially excepted by statute,<sup>54</sup> or waived by agreement of the parties,<sup>55</sup> all execution sales must be

first in parcels, the bids may be rejected and the property offered en masse. *Barnes v. Zoercher*, 127 Ind. 105, 26 N. E. 769.

44. *United States v. Vestal*, 12 Fed. 59; *Duffy v. Rutherford*, 21 Ga. 363, 68 Am. Dec. 459.

45. *United States v. Vestal*, 12 Fed. 59.

46. *Delaware, etc. R. Co. v. Blair*, 28 N. J. L. 139.

47. See the statutes and the following: *Brown v. Butters*, 40 Iowa 544; *Maple v. Nelson*, 31 Iowa 322; *De Jarrette v. Verner*, 40 Kan. 224, 19 Pac. 666.

Inadequacy of price as ground for setting sale aside, see *infra*, II, B, 7, k, (IV), (H).

48. *Brown v. Butters*, 40 Iowa 544, 546.

49. *Crump v. J. I. Case Threshing Machine Co.*, 136 Ky. 60, 123 S. W. 333.

[a] Error in This Respect Waived. *Thomas' Admr. v. Thomas' Heirs*, 87 Ky. 343, 10 S. W. 282.

50. *Backen v. Hamilton*, 18 La. Ann. 553.

[a] A change in the terms of the sale, more favorable to the debtor, will not invalidate the sale. *Nichols v. McCall*, 13 La. Ann. 215.

51. *Stevenson v. Black*, 1 N. J. Eq. 338; *Umbehauer v. Aulenbaugh*, 3 Watts & S. (Pa.) 259; *Aulenbaugh v. Umbehauer*, 8 Watts (Pa.) 48.

[a] Conditional Sales. — In *Webster v. Denison*, 25 Vt. 493, the court said: "The law does not recognize any such sales on executions, as conditional sales, or defeasible sales, or sales vesting a title, liable to be defeated by redemption."

52. *Simmons v. Cook*, 109 Ga. 553, 34 S. E. 1033.

53. *Pomeroy v. Winship*, 12 Mass. 514, 7 Am. Dec. 91.

54. See the statutes.

[a] Statute Not Applicable to Criminal Cases. — *Hall v. Doyle*, 35 Ark. 445.

55. La. — *Marx v. Sanders*, 108 La. 140, 32 So. 331. Miss. — *Tiffany & Co. v. Johnson*, 27 Miss. 227. N. H. — *Chase v. Monroe*, 30 N. H. 427.

[a] If parties consent, sale may be on credit. *Jones v. Loftin*, 9 N. C. 199.

only for cash,<sup>56</sup> and when the sheriff learns that a bidder will not pay cash, he may treat it as no sale and again put the property up for sale.<sup>57</sup>

(XVIII.) **Specific Kinds of Property.**—(A.) **CHATTELS REAL.**—An estate for years in land must be sold in the same manner as personal property.<sup>58</sup> But by statute in some states any interest in lands is to be sold as real estate.<sup>59</sup>

(B.) **CORPORATE PROPERTY.**—(1.) *Generally.*—Special statutes in some jurisdictions regulate the sale of corporate property.<sup>60</sup>

56. See generally the statutes, and the following: *Cal.*—*People v. Hays*, 5 *Cal.* 66. *Ind.*—*Ruckle v. Barbour*, 48 *Ind.* 274; *Chapman v. Harwood*, 8 *Blackf.* 82, 44 *Am. Dec.* 736. *Minn.* *Carlson v. Headline*, 100 *Minn.* 327, 111 *N. W.* 259. *Nev.*—*Dazet v. Laundry*, 21 *Nev.* 291, 30 *Pac.* 1064. *N. H.*—*Chandler v. Goodrich*, 58 *N. H.* 525; *Chase v. Monroe*, 30 *N. H.* 427. *N. Y.*—*Watson v. Hoboken*, *P. M. Co.*, 140 *N. Y. Supp.* 822. *W. Va.*—*Baker v. Rathbone Oil Tr. Co.*, 7 *W. Va.* 454.

[a] **Spot Cash Unnecessary.**—But in *Aldrich v. Wilcox*, 10 *R. I.* 405, it was held that it is an oppression to demand cash on the spot by the terms of sale, but that a reasonable time for payment, to be determined by the particular circumstances of each case, should in all cases be allowed.

[b] **Plaintiff in the first of several executions cannot demand that his bid be credited on his execution, but the sheriff may demand that the purchase price be paid in cash.** *Isler v. Colegrove*, 75 *N. C.* 334. See also *Isler v. Andrews*, 66 *N. C.* 552.

[c] **A check given in payment will not come within the meaning of the requirement for cash, where payment on such check is stopped, but a purchaser who has given a check in part payment of his bid, and stopped payment, will not be heard to object that the sale was not for cash alone, but was partly upon credit.** *Meherin v. Saunders*, 131 *Cal.* 681, 63 *Pac.* 1084.

[d] **A sale is not complete until the money is paid.** Hence where the bidder is given until the opening of the bank on the next day to make payment, the debtor may satisfy the debt in the meantime and defeat the sale. *Rowe v. Granger*, 103 *N. Y. Supp.* 439.

57. *Cal.*—*People v. Hays*, 5 *Cal.* 66. *Ill.*—*Bradley v. Geo. Challoner's Sons*

*Co.*, 103 *Ill. App.* 618. *N. C.*—*Isler v. Colegrove*, 75 *N. C.* 334.

[a] **The delay of the purchaser until the return day of the execution to pay the balance due, will be construed into a refusal on his part to pay the amount of his bid upon the property.** *People v. Hays*, 5 *Cal.* 66.

58. *Chapman v. Gray*, 15 *Mass.* 439; *Buhl v. Kenyon*, 11 *Mich.* 249, 83 *Am. Dec.* 738.

[a] See, however, *Mitnacht v. Cocks*, 65 *How. Pr. (N. Y.)* 84, holding that to maintain summary proceedings to remove a judgment debtor after a sale of leasehold interests on execution, the sale must be advertised and conducted as a sale of real property, and indicating that such interests may be sold either as real or personal property.

[b] **If sold as real estate such sale is void.** *Buhl v. Kenyon*, 11 *Mich.* 249, 83 *Am. Dec.* 738.

59. *Hyatt v. Vincennes Nat. Bank*, 113 *U. S.* 408, 5 *Sup. Ct.* 573, 28 *L. ed.* 1009 (*Indiana*); *Reilley v. Anderson*, 33 *Wash.* 58, 73 *Pac.* 799.

60. See the statutes, and 5 *STANDARD PROC.* 676.

[a] **Railroad.**—Roadbed, rails and right of way of a railroad corporation must be sold as real estate. *Hart v. Benton-Bellefontaine Ry. Co.*, 7 *Mo. App.* 446.

[b] **A sale of the franchise of a corporation must be predicated on a bid for the entire sum demanded in the execution, with costs, and the only competition allowed by the act, is, as to who will take the income for the shortest length of time, paying the whole debt and costs, demanded in the execution.** *Taylor v. Jerkins*, 51 *N. C.* 316.

[c] **Corporate property should not be sold piecemeal but only in its entirety under Pennsylvania statute.**

(2.) *Corporate Stock*.—Shares of corporate stock should be sold in much the same manner as other property,<sup>61</sup> but upon payment by the purchaser of the amount of his bid,<sup>62</sup> the officer holding the sale should furnish a bill of sale, certificate or certified copy of the execution and return thereon, as the various statutes may provide, to be left with the proper officer of the corporation, who will be required to transfer the stock on the book of the company.<sup>63</sup> Only such portion of the debtor's stock, or interest should be sold as is necessary.<sup>64</sup>

(C.) *ENCUMBERED PROPERTY*.—The sheriff need not search the public records to find whether property which is sold is encumbered.<sup>65</sup> He sells the property subject to all encumbrances.<sup>66</sup> Mortgaged property must be sold in bulk and not in parcels.<sup>67</sup>

(D.) *NOTICE*.—Statutes sometimes contain special provisions as to notice of sale of certain kinds of property.<sup>68</sup>

e. *Who May Purchase*.—(I.) *Generally*.—The fact that one took part in the proceedings leading up to the sale will not necessarily prevent his being a purchaser at the sale.<sup>69</sup> Tenants in common or

Longstreth v. Philadelphia & R. R. Co., 11 W. N. C. (Pa.) 94.

61. See the statutes.

[a] In *Massachusetts*.—Hussey v. Manufacturers' & Mechanics' Bank, 10 Pick. (Mass.) 415; Howe v. Starkweather, 17 Mass. 240.

[b] *Corporate shares were not at common law subject to levy and sale under execution, and statutes authorizing it must be substantially complied with, or the sale will be unauthorized and void.* Blair v. Compton, 33 Mich. 414.

62. Perkins v. Webb, 169 Ill. 86, 48 N. E. 322.

63. See the statutes.

[a] *A charter provision that "no stockholder shall sell his or her stock, or any portion of the same, without first giving the corporation the refusal of the same for ten days at the price he is willing to sell" does not apply to a sheriff's sale on execution against a stockholder.* Barrows v. Nat. Rubber Co., 12 R. I. 173.

64. Ga. Code, 1895, §5431; Blair v. Compton, 33 Mich. 414.

65. Treasury Comrs. v. Hart, 1 Brev. (S. C.) 492.

66. *Ill.*—See *People v. Johnson*, 15 Ill. App. 153. *Ky.*—See *Lee v. Fellows & Co.*, 10 B. Mon. 117. *Mich.*—*King v. Hubbell*, 42 Mich. 597, 4 N. W. 440. *N. Y.*—*Carpenter v. Simmons*, 28 How. Pr. 12, 1 Robt. 360. *S. C.*—*Treasury Comrs. v. Hart*, 1 Brev. 492.

[a] *Failure to expressly make the*

*sale subject to the encumbrance does not render the sale void. The sale is necessarily subject whether declared so or not.* Swan v. Stephens, 99 Mass. 7.

[b] *A mortgagee cannot enjoin sale of realty which is subject to his mortgage because the execution plaintiff asserts in public that the mortgage is void and his judgment a prior lien.* Ramsdell v. Tama-Water-Power Co., 84 Iowa 484, 51 N. W. 245.

67. *King v. Hubbell*, 42 Mich. 597, 4 N. W. 440; *Carpenter v. Simmons*, 28 How. Pr. 12, 1 Robt. (N. Y.) 360.

[a] *Equity of redemption cannot be divided and sold in parcels.* Ind. Nelson v. Bronnenburg, 81 Ind. 193. *Mich.*—*Ganong v. Green*, 71 Mich. 1, 38 N. W. 661. *N. Y.*—*Tiff v. Barton*, 4 Denio 171.

[b] *But two or more rights of redeeming several parcels of land from several mortgages should be sold separately and not for a gross sum.* Fletcher v. Stone, 3 Pick. (Mass.) 250.

68. See *supra*, II, B, 7, d, (IV), (A), (4).

69. Wyatt v. Clepper, 5 Ala. 703.

[a] *Attorney for execution creditor may purchase.* Arnold v. Ness, 212 Fed. 290.

[b] *One of the appraisers of the land may purchase.* Best v. Zutavern, 53 Neb. 604, 74 N. W. 64.

[c] *Where a deputy clerk issues an execution, without authority from the judgment plaintiff, and without any*

partners of the execution debtor may purchase.<sup>70</sup> A receiver appointed to apply the property of debtor in payment of his debts cannot purchase.<sup>71</sup>

(II.) **State, County, Town, etc.**—The state cannot purchase where property is sold to satisfy a judgment in its favor,<sup>72</sup> nor can a county,<sup>73</sup> though a New England town may.<sup>74</sup>

(III.) **Sheriff, Constable, etc.**—The officer making the sale cannot become the purchaser himself,<sup>75</sup> nor can he purchase through an agent,<sup>76</sup> or as agent for another,<sup>77</sup> or jointly with others.<sup>78</sup> The pro-

direction from his principal so to do, and afterwards becomes a purchaser at a sale on the execution, he can take no benefit from his purchase, although no actual fraud entered into the transaction. *Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457.

[d] **One who is agent for both the debtor and creditor** in effecting the sale cannot himself become the purchaser. *White v. Trotter*, 14 Smed. & M. (Miss.) 30, 53 Am. Dec. 112.

70. *Gunter v. Laffan*, 7 Cal. 588. But see *Evans v. Gibson*, 29 Mo. 223, 77 Am. Dec. 565, containing dictum that where a tenant in common buys up an incumbrance, equity will consider it as inuring to the benefit of the common title.

[a] **Partner.**—*Bradbury v. Barnes*, 19 Cal. 120.

[b] **On execution against a partnership** one partner may purchase for his individual benefit. *Baird v. Baird*, 21 N. C. 524, 31 Am. Dec. 399. *Contra*, *Evans v. Gibson*, 29 Mo. 223, 77 Am. Dec. 565.

71. *Sheldon v. Saenz*, 59 How. Pr. (N. Y.) 377.

72. *Littleton v. State*, 2 Lea (Tenn.) 669.

73. *Williams v. Lash*, 8 Minn. 496, a county has no capacity to become purchaser of real estate, sold on execution in its favor, where the purchase is not made for the public use of the county within the meaning of the statute.

74. *Town of Corinth v. Locke*, 62 Vt. 411, 20 Atl. 809, 11 L. R. A. 207.

75. *Conn.*—*Mills v. Goodsell*, 5 Conn. 475, 13 Am. Dec. 90. *Ga.*—*Coleman v. Malcolm*, 101 Ga. 303, 28 S. E. 861; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435. *Ill.*—*Wickliff v. Robinson*, 18 Ill. 145. *Ky.*—*Price v. Thompson*, 84 Ky. 219, 1 S. W. 408; *Smith v. Pope*, 5 B. Mon. 337; *Dixon v. Sharp*,

1 A. K. Marsh. 211; *Stapp v. Toler*, 3 Bibb 450. *La.*—*McCluskey v. Webb*, 4 Rob. 201. *Me.*—*Knight v. Herrin*, 48 Me. 533. *N. H.*—*Perkins v. Thompson*, 3 N. H. 144. *N. C.*—*Robinson v. Clark*, 52 N. C. 562, 78 Am. Dec. 265; *Stewart v. Rutherford*, 49 N. C. 483; *Ormond v. Faircloth*, 3 N. C. 336; *Anonymous*, 2 N. C. 2. *Vt.*—*Caswell v. Jones*, 65 Vt. 457, 26 Atl. 529, 36 Am. St. Rep. 879, 20 L. R. A. 503; *Downing v. Lyford*, 57 Vt. 507; *Woodbury v. Parker*, 19 Vt. 353, 47 Am. Dec. 695. *Wash.*—See *Roger v. Whitham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. Rep. 1105.

[a] **Without consent of creditor** sheriff cannot purchase. *Mills v. Goodsell*, 5 Conn. 475, 13 Am. Dec. 90.

[b] **A crier** employed merely as a mouthpiece, the constable conducting the sale, is not within the rule and may purchase. *Crook v. Williams*, 20 Pa. 342. *Contra*, *Giles v. Bank of S. W. Georgia*, 102 Ga. 702, 29 S. E. 600, crier cannot purchase.

[c] **Where the sale is by two officers**, one cannot purchase. *Robinson v. Clark*, 52 N. C. 562, 78 Am. Dec. 265.

76. *N. C.*—*Robinson v. Clark*, 52 N. C. 562, 78 Am. Dec. 265. *S. C.*—*Mathe-ney v. McDonald*, 5 Strobb. 77. *Vt.*—*Downing v. Lyford*, 57 Vt. 507.

[a] **A sale to sheriff's agent** is not necessarily void, but voidable for fraud in fact. *Isaac's Lessee v. Clarke*, 2 Gill (Md.) 1.

77. *Coleman v. Maclean*, 101 Ga. 303, 28 S. E. 861.

[a] **Cannot buy for a Third Person.**—*Dixon v. Sharp*, 1 A. K. Marsh. (Ky.) 211.

78. *Ill.*—*Wickliff v. Robinson*, 18 Ill. 145. *Mo.*—*Shotwell v. Munroe*, 42 Mo. App. 669. *Tenn.*—*Johnson v. Pryor*, 5 Hayw. 243.

[a] **That sheriff is a stockholder in purchasing corporation** does not render

hibition includes a deputy sheriff.<sup>79</sup> But one whose term of office has expired and who does not conduct the sale may buy at a sale of property levied on by him while in office.<sup>80</sup> And the parties may authorize the sheriff to become the purchaser.<sup>81</sup> A purchase by the sheriff's wife is voidable.<sup>82</sup>

(IV.) Defendants, Their Families, Representatives, etc.—One of two defendants may purchase the property of his co-defendant on execution sale thereof.<sup>83</sup> According to some authorities, a purchase at the sale for the benefit of the defendant is void,<sup>84</sup> though it is held that one acting for the defendant may purchase to prevent a sacrifice.<sup>85</sup> The wife<sup>86</sup> or daughter<sup>87</sup> of the debtor may purchase where there is no fraud and the purchase is for their own use and benefit. In some jurisdictions the debtor's personal representative cannot purchase,<sup>88</sup> while in other states he may.<sup>89</sup>

sale void. *Hardwick v. Jones*, 65 Mo. 54.

79. *Smith v. Pope*, 5 B. Mon. (Ky.) 337.

[a] Deputy sheriff cannot purchase at sale made by co-deputy. *Smith v. Pope*, 5 B. Mon. (Ky.) 337. But see *Wyatt v. Clepper*, 5 Ala. 703, holding that the deputy who levied the writ may purchase on sale by the sheriff.

[b] Deputy who is execution plaintiff may bid in order to secure his money even though the statute prohibit sheriff or his deputies purchasing. *Jackson ex dem. Seofield v. Collins*, 3 Cow. (N. Y.) 89.

[c] Turnkey or jailer not within statute forbidding sheriff or his deputies from purchasing. *Jackson ex dem. Anderson v. Anderson*, 4 Wend. (N. Y.) 474.

80. *Leger v. Doyle*, 11 Rich. L. (S. C.) 109, 70 Am. Dec. 240.

81. *Woodbury v. Parker*, 19 Vt. 353, 47 Am. Dec. 695.

82. *Dexter v. Strobach*, 56 Ala. 233.

83. *Ga.*—*Kilgo v. Castleberry*, 38 Ga. 512, 95 Am. Dec. 406. *Ill.*—*Mathis v. Stufflebeam*, 94 Ill. 481. *Miss.*—*Robinson v. Parker*, 3 Smed. & M. 114, 41 Am. Dec. 614. *N. Y.*—*Neilson v. Neilson*, 5 Barb. 565. *Pa.*—*Gibson v. Winslow*, 38 Pa. 49. *Tex.*—*Grimes v. Hobson*, 46 Tex. 416.

[a] Surety may purchase property of principal where the latter's property is sold on a judgment against both. *Atlee v. Bullard*, 123 Iowa 274, 98 N. W. 889.

84. *Flowers v. Sproule*, 2 A. K. Marsh. (Ky.) 54.

[a] Fraudulent as to Creditors. Where an agreement was made between

a father and his sons, that they should purchase his land at execution sale at an under value, for his use and for the purpose of keeping off other creditors, a purchase by the sons under such circumstances was fraudulent and void against creditors, whether the money was furnished by the father or paid out of their own means. *Morris v. Allen*, 32 N. C. 203.

[b] Purchase as Gift to Defendant. A purchaser at an execution sale, may lawfully buy the property of the insolvent debtor, with the intent of afterwards giving the whole or a part thereof to such debtor, or his family. *Thorpe v. Beavans*, 73 N. C. 241.

85. *Lee v. Lee*, 19 Mo. 420.

[a] Attorney for defendant may bid on his behalf in absence of fraud. *Cavender v. Smith's Heirs*, 1 Iowa 306; *Foster v. Pugh*, 12 Smed. & M. (Miss.) 416.

86. *Bracken v. Milner*, 99 Mo. App. 187, 73 S. W. 225.

87. *Sharpe v. Williams*, 76 N. C. 87.

[a] Fraudulent Purpose.—Where A, with intent to defraud his creditors, furnished money to his daughters (being indebted to them at the time) with which to purchase his land at execution sale, but they were not parties to his fraudulent purpose and purchased the land for a fair value for their own use, they obtained a good title. *Sharpe v. Williams*, 76 N. C. 87. Compare, *Morris v. Allen*, 32 N. C. 203.

88. *Fleming v. Foran*, 12 Ga. 594.

89. *N. J.*—*Rickey v. Hillman*, 7 N. J. L. 180. *N. C.*—*Blount v. Davis*, 13 N. C. 19. *Pa.*—*Oeslager v. Fisher*, 2 Pa. 467.

(V.) **Judgment Creditor, His Representative, etc.**—In the absence of fraud the judgment creditor may purchase.<sup>90</sup>

f. **Memorandum.**—A written memorandum has been held unnecessary to bind the sale.<sup>91</sup>

g. **Proceedings To Compel Compliance With Bids.**—(I.) **In General.** Where the purchaser refuses to pay the amount of his bid two possible courses are recognized as open to the sheriff. One is to proceed against the purchaser for the amount of his bid. This is done in some states by independent suit,<sup>92</sup> while in others a statutory proceeding is provided for by which judgment may on motion be rendered against the purchaser for the amount of his bid.<sup>93</sup> The other course is to re-sell the property and recover the loss, if any, thereby occasioned. Where such a re-sale is had, according to the practice in some states, a motion may be made to compel the bidder to pay the loss occasioned by the re-sale,<sup>94</sup> while in others an action to recover such loss is the proper course.<sup>95</sup> In a few states the officer may, at his option, pursue either course.<sup>96</sup> Some statutes provide that the court, upon motion of the officer or an interested party, shall punish for contempt a purchaser

90. *Roberts v. Hughes*, 81 Ill. 130, 25 Am. Rep. 270; *Jones v. Webb*, 22 Ky. L. Rep. 1100, 59 S. W. 858.

[a] The fact that the demand on which judgment is rendered arose out of the relation of attorney and client will not prevent the attorney, the execution plaintiff, from purchasing at the sale. *Patterson v. Drake*, 126 Ga. 478, 55 S. E. 175.

91. *Lockridge v. Baldwin*, 20 Tex. 303.

[a] **Contra.**—Some note or memorandum of sale must be made. *Evans v. Ashley*, 8 Mo. 177.

[b] **The return bearing date of the day of sale is a sufficient memorandum in writing, and it will be presumed that it was made at the proper time until the contrary is shown.** *Jones v. Kokomo Bldg. Assn.*, 77 Ind. 340. See Ala. Civ. Code, 1907, §4126.

92. **Ala.**—See Civ. Code, §4129. **Ga.** See Code, 1911, §6071; *Glenn v. Black*, 31 Ga. 393. **Ill.**—*Perkins v. Webb*, 169 Ill. 86, 84 N. E. 322. **Ia.**—Code, 1897, §4033. **Kan.**—*Walker v. Braden*, 34 Kan. 660, 9 Pac. 613. **N. C.**—*Wilson v. Oswalt*, 51 N. C. 566.

[a] **Waiver.**—If the officer agrees to resell and takes from the bidder the costs of re-advertising, he thereby waives any right he has to compel a compliance with the bid. *Bradley v. Geo. Challoner's Sons Co.*, 103 Ill. App. 618.

93. *Burns' Ann. St. (Ind.)*, 1914, §804; *Steele v. Hanna*, 8 Blackf. (Ind.) 326.

[a] **Notice should be given to the purchaser of the motion.** *Steele v. Hanna*, 8 Blackf. (Ind.) 326.

94. **Ark.**—Dig. St., 1904, §3283. **Cal.** *Johns v. Trick*, 22 Cal. 511, under Pr. Act, §224. Present California practice is to sell again and recover loss, if any, from defaulting bidder by suit in proper court. Code Civ. Proc., 1915, §695. **Ga.**—Code, 1911, §6071. **Ind.** *Burns' Ann. St.*, 1914, §804. **Mo.**—Rev. St., 1909, §2223. **Nev.**—Rev. Laws, 1912, §5294. **N. J.**—See Comp. St., p. 4685. **Tex.**—*Lockridge v. Baldwin*, 20 Tex. 303, 70 Am. Dec. 385.

[a] **No memorandum is necessary to sustain the motion.** *Lockridge v. Baldwin*, 20 Tex. 303, 70 Am. Dec. 385.

[b] **Defendant files answer to the motion and issue is thus raised.** *Johns v. Trick*, 22 Cal. 511.

95. **Ala.**—Civ. Code, §4129; *Lamkin v. Crawford*, 8 Ala. 153. **Ariz.**—Rev. Sts., 1913, §1370. **Pa.**—*Hughes v. Miller*, 186 Pa. 375, 40 Atl. 492, 42 W. N. C. 302; *Whitaker v. Thompson*, 2 Kulp 250. **R. I.**—*Gerardi v. Carnolo*, 27 R. I. 214, 61 Atl. 599. **S. C.**—See Code, 1902, §2621. **Utah.**—Comp. Laws, 1907, §3255. **Va.**—See Code, 1904, §3592.

96. **Ala.**—Civ. Code, 1907, §4129. **Ga.**—Code, 1911, §6071. **Ind.**—*Burns' Ann. St.*, 1914, §804.

failing to pay the purchase money in accordance with his bid.<sup>97</sup>

(II.) **Conditions Precedent.**—Demand should first be made on the purchaser.<sup>98</sup> According to some authorities a deed should first be offered the purchaser provided he pay the purchase price,<sup>99</sup> though it has been held that a tender of a certificate of sale is not necessary before commencing suit to recover the purchase money.<sup>1</sup> A return of the sale need not be first made.<sup>2</sup>

(III.) **Parties.**—As a general rule the action against the purchaser should be brought by the sheriff in his own name.<sup>3</sup> If the execution defendant is to receive part of the money he may sue.<sup>4</sup> The execution plaintiff cannot sue,<sup>5</sup> or move for judgment against the purchaser.<sup>6</sup>

97. **Mont.**—Rev. Codes, 1907, §6831 **Ohio.**—Gen. Codes, 1900, §11,687. **Utah.** Comp. Laws, 1907, §3255, if he refuses to pay costs incurred by his failure to pay his bid. **Wyo.**—St., 1910, §4704.

98. *Cureton v. Wright*, 73 Ga. 8.

99. *Hunt v. Gregg*, 8 Blackf. (Ind.) 105; *McKee v. Lineberger*, 69 N. C. 217. See *Dickson v. McCartney*, 226 Pa. 552, 75 Atl. 735.

[a] **Proper evidence of title** should be tendered. *Williams v. Lines*, 7 Blackf. (Ind.) 46; *State v. Lines*, 4 Ind. 351.

1. *Harvey v. Fisk*, 9 Cal. 93; *People v. Hays*, 5 Cal. 66; *Williams v. Smith*, 6 Cal. 91.

2. *McKee v. Lineberger*, 69 N. C. 217.

3. **Ala.**—*Bell v. Owen*, 8 Ala. 312; *Robinson v. Garth*, 6 Ala. 204, 41 Am. Dec. 47. **Ill.**—*People v. Stelle*, 103 Ill. 467; *Webb v. Perkins*, 60 Ill. App. 91. **Minn.**—*Armstrong v. Vroman*, 11 Minn. 220, 88 Am. Dec. 81. **Mo.**—*Wiley v. Robert*, 27 Mo. 388. **N. C.**—*McKee v. Lineberger*, 69 N. C. 217. **Ore.**—*Burbank v. Dodd*, 4 Pac. 303. **Pa.**—*Freeman v. Husband*, 77 Pa. 389; *Holdship v. Doran*, 2 Pen. & W. 9; *Gaskell v. Morris*, 7 Watts & S. 32; *Adams v. Adams*, 4 Watts 160; *Hutchinson v. Allen*, 1 W. N. C. 123; *Hartman v. Pemberton*, 24 Pa. Super. 222.

[a] **Where a sale bond is executed** (1) for the price in favor of the sheriff he is the one to bring suit thereon. *Bell v. Keefe*, 12 La. Ann. 340. (2) Sheriff may bring suit on such a bond executed in favor of his predecessor. *Bell v. Keefe*, 12 La. Ann. 340.

[b] **In the name of sheriff or of some one injured** by the sale. *Holdship v. Doran*, 2 Pen. & W. (Pa.) 9.

[c] **Unless sheriff has become liable** or suffers damage he cannot maintain

an action against the bidder. *Adams v. Griffin*, 3 Smed. & M. (Miss.) 556.

[d] **"A sheriff whose term of office has expired** has a right to maintain an action against a defaulting bidder at a sale held during his term of office to recover the difference between the amount of his bid and the amount realized at a subsequent sale of the property." *Dickson v. McCartney*, 226 Pa. 552, 75 Atl. 735.

[e] **Execution plaintiffs may be joined** as parties with the sheriff. *Glenn v. Black*, 31 Ga. 393.

[f] **In Texas** the statute provides for relief to both plaintiff and defendant in execution. See *Sayles' Tex. Civ. St.*, art. 2381, and *Borden v. Fahey*, 56 Tex. Civ. App. 218, 120 S. W. 564; *Shanley v. York*, 54 Tex. Civ. App. 214, 118 S. W. 146; *Towell v. Smith* (Tex. Civ. App.), 55 S. W. 186.

4. *Towles v. Turner*, 3 Hill L. (S. C.) 178, otherwise sheriff is one to bring suit. And see *Adams v. Aycock*, 11 Ga. App. 793, 76 S. E 161, holding that suit may be brought in name of the defendant in execution as usee, without reference to whether the amount of the bid was greater than that due on the execution.

5. **Ill.**—*People v. Stelle*, 103 Ill. 467. **Ohio.**—*Galpin v. Lamb*, 29 Ohio St. 529. **Ore.**—*Burbank v. Dodd*, 4 Pac. 303. **Pa.**—*Hutchinson v. Allen*, 1 W. N. C. 123.

[a] **In Iowa** no one but a judgment holder or his attorney can proceed under the statute against a bidder at an execution sale to enforce payment of his bid. If they do not so proceed the sheriff is to resell the property. *State Bank v. Brown*, 128 Iowa 665, 105 N. W. 49.

6. *Laverty v. Chamberlain*, 7 Blackf. (Ind.) 556.

Creditors who claim an interest in the proceeds of the sale cannot compel specific performance on the part of the purchaser.<sup>7</sup>

(IV.) Pleadings.—It is not necessary to set out the judgment and execution at length,<sup>8</sup> nor the officer's return.<sup>8½</sup>

h. *Proceedings To Compel Execution of Deed*.—Where the officer fails or refuses to execute the deed, in some states a separate action to compel the execution is the remedy,<sup>9</sup> while in other jurisdictions a motion in the cause for an order compelling the officer to execute the deed is the remedy.<sup>10</sup> According to some authorities the right to a deed is enforceable by mandamus.<sup>11</sup>

i. *Confirmation of Sale*.—(I.) *General Statement*.—Although gen-

7. *Cureton v. Wright*, 73 Ga. 8.

8. *Walker v. Braden*, 34 Kan. 660, 9 Pac. 613. But see *Ennis v. Waller*, 3 Blackf. (Ind.) 472, that the judgment and proceedings on which the execution issued must be averred in the declaration as the purchaser is a stranger to them and is not presumed to be cognizant in any way of them.

[a] *Action is on contract* arising from the bid and not on the judgment. *Walker v. Braden*, 34 Kan. 660, 9 Pac. 613.

8½. *Sanborn v. Chamberlin*, 101 Mass. 409, where the court says: "It was not necessary to set out the return; for it was not the instrument on which the action was brought, but only a piece of evidence to be introduced at the trial; and neither party is required in pleading to state evidence or disclose the means by which he intends to prove his case." But see *contra*, *Ennis v. Waller*, 3 Blackf. (Ind.) 472.

9. *Conklin v. Smith*, 7 Ind. 107, 63 Am. Dec. 416; *Branner v. Hardy*, 18 La. Ann. 537.

[a] *Purchaser must comply with terms of sale or offer to comply with them before he can maintain action*. *Conklin v. Smith*, 7 Ind. 107, 63 Am. Dec. 416; *Branner v. Hardy*, 18 La. Ann. 537.

[b] *Notice should be given of the proceeding to parties claiming adversely*. *Blodgett v. Perry*, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307.

[c] *Parties*.—(1) Subsequent purchaser of property at a sale made by sheriff on the ground that plaintiff defaulted in the terms of the sale, is a proper party. *Branner v. Hardy*, 18 La. Ann. 537. (2) One who as an agent holds a deed to a purchase at

sheriff's sale, and also money equitably belonging to the purchaser, under agreement made at the time of the sale, and applicable under that agreement to the payment of the purchase money, is a proper, if not a necessary party, to a suit by the purchaser to compel the delivery of the deed. *Whitney v. Kirtland*, 27 N. J. Eq. 333.

10. Ark.—*Whiting v. Lawson*, 6 Ark. 425. Del.—See *In re Carpenter*, 2 Marv. 149, 42 Atl. 423. Neb.—*Phillips v. Dawley*, 1 Neb. 320. N. C.—*Fox v. Kline*, 85 N. C. 173; *Isler v. Andrews*, 66 N. C. 552; *Patrick v. Carr*, 60 N. C. 633, 86 Am. Dec. 454. Ohio.—*Buckingham v. Granville Alexandria Soc.*, 2 Ohio 366. S. C.—*In re Voorhies*, 46 S. C. 114, 24 S. E. 170.

[a] *When a long period of time elapses between the confirmation of a sale and the execution of the sheriff's deed, the debtor should be notified of the application for an order requiring the then sheriff to execute a deed to the purchaser*. *Applegate v. Kingman*, 17 Neb. 338, 22 N. W. 765.

[b] *Order directing sheriff to issue a deed to purchaser may be made in vacation*. *Hawkeye Ins. Co. v. Maxwell*, 119 Iowa 672, 94 N. W. 207. And see Iowa Code, §3843.

11. Ind.—*Jessup v. Carey*, 61 Ind. 584. La.—See *Losee v. De Lacey*, 23 La. Ann. 287. Mich.—*Whiting v. Butler*, 29 Mich. 122.

[a] *The only matter in controversy, on mandamus by the assignee of a sheriff's certificate of sale to compel the execution of a deed is the right to the deed; the question whether such certificate is not merged in a deed made to the assignee by the execution debtor after the sale cannot be tried*. *People v. Irwin*, 14 Cal. 428.

erally confirmation of execution sales is not required,<sup>12</sup> the statutes of some states provide for confirmation and directions to the sheriff as to the deed or certificate.<sup>13</sup> According to some authorities a confirmation may be by the parties themselves and is as valid as if by the court.<sup>14</sup>

(II.) **Proceeding for.**—(A.) **NATURE OF PROCEEDING.**—Confirmation is secured by a motion made for that purpose,<sup>15</sup> by the purchaser,<sup>16</sup> or the assignee of the purchaser.<sup>17</sup> It has been held unnecessary that a notice be given of a motion to have the sale confirmed.<sup>18</sup>

(B.) **OBJECTIONS.**—Objection to confirmation may be made by those injuriously affected.<sup>19</sup> Objection may be for irregularities in the sale,<sup>20</sup> fraud on the part of the execution creditor,<sup>21</sup> such an inadequacy of price as to prejudice other creditors,<sup>22</sup> or it is held defects in the judgment on which the execution was based.<sup>23</sup>

(C.) **DETERMINATION.**—The merits of the cause in which judgment was rendered cannot be inquired into on proceedings for confirmation,<sup>24</sup> but matters relating to the ownership of the property are not

12. See the statutes, and *Webster v. Daniel*, 47 Ark. 131, 14 S. W. 550; *Hershey v. Latham*, 42 Ark. 307.

As to confirmation of judicial sales, see the title "Judicial Sales."

13. See the statutes and the following: *Ia.*—*Hendryx v. Evans*, 120 Iowa 310, 94 N. W. 853. *Kan.*—*Johnson v. Lindsay*, 27 Kan. 514. *Neb.* *Yeazel v. White*, 40 Neb. 432, 58 N. W. 1020; *McMurtry v. Tuttle*, 13 Neb. 232, 13 N. W. 213. *S. D.*—*Baxter v. O'Leary*, 10 S. D. 150, 72 N. W. 91.

[a] The order of confirmation should describe the property, though an incomplete description may be aided by reference to the return which contains a full and complete description. *Wilcox v. Raben*, 24 Neb. 368, 38 N. W. 844, 8 Am. St. Rep. 207.

14. *Tooley v. Gridley*, 3 Smed. & M. (Miss.) 493, 41 Am. Dec. 628.

15. *Cowdin v. Cowdin*, 31 Kan. 528, 3 Pac. 369; *Koehler v. Ball*, 2 Kan. 160, 83 Am. Dec. 451.

16. *Cowdin v. Cowdin*, 31 Kan. 528, 2 Pac. 369; *Payne v. Long-Bell Lumber Co.*, 9 Okla. 683, 60 Pac. 235.

17. *Payne v. Long-Bell Lumber Co.*, 9 Okla. 683, 60 Pac. 235.

18. *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046.

[a] **Failure (1) to ask for confirmation** of the sale is not alone sufficient to have it set aside. *Warren v. Stimson*, 6 N. D. 293, 70 N. W. 279. (2) Where the proceedings are shown to be regular in other respects, mere failure

to have the sale confirmed will not defeat the purchaser's title, especially on collateral attack by one who does not claim through or under the judgment debtor. *Baxter v. O'Leary*, 10 S. D. 150, 72 N. W. 91.

[b] **Title does not pass** to the purchaser, in Nebraska, until confirmation. *Westerfield v. South Omaha L. & B. Assn.*, 75 Neb. 53, 105 N. W. 1087, 107 N. W. 1010; *Yeazel v. White*, 40 Neb. 432, 58 N. W. 1020, 24 L. R. A. 449.

19. *Miller Bros. v. Bank of British Columbia*, 2 Ore. 291.

[a] **One who is not a party** to the action, though a judgment creditor of the execution defendant, cannot oppose the confirmation. *Miller v. Oregon City Paper Mfg. Co.*, 3 Ore. 24.

[b] **In Washington.**—*Krutz v. Batts*, 18 Wash. 460, 51 Pac. 1054.

20. *Miller Bros. v. Bank of British Columbia*, 2 Ore. 291.

21. *Rose v. Bates*, 12 Mo. 30, inducing persons not to bid.

22. *Smith v. Vreeland*, 16 N. J. Eq. 198.

23. *Miller Bros. v. Bank of British Columbia*, 2 Ore. 291.

24. *Kan.*—*Koehler v. Ball*, 2 Kan. 160, 83 Am. Dec. 451. *Neb.*—*Hoover v. Hale*, 56 Neb. 67, 76 N. W. 457. *S. D.*—*Crouch v. Dakota, W. & M. R. Co.*, 18 S. D. 540, 101 N. W. 722.

[a] The court proceeds *ex parte*, and the utmost scope of its inquiry is to ascertain whether the report of the

conclusively settled by confirmation.<sup>25</sup> The court cannot impose conditions in confirming an execution sale,<sup>26</sup> and confirmation will not be denied because of irregularities not prejudicial to the rights of the parties.<sup>27</sup> But a sale upon a judgment which has been paid should not be confirmed.<sup>28</sup>

(III.) *Cure of Defects.*—In the absence of fraud the order of confirmation cures all defects and irregularities in the sale,<sup>29</sup> but matters which are not mere irregularities, or which form no part of the proceedings connected with the sale,<sup>30</sup> as for example fraudulent acts or combinations preventing a fair sale,<sup>31</sup> or defects of jurisdiction,<sup>32</sup> are not cured.

(IV.) *Appeal and Collateral Attack.*—The order confirming the sale cannot be collaterally attacked,<sup>33</sup> but is appealable.<sup>34</sup>

j. *Proceedings Affecting Disposition of Proceeds.*—(I.) *Notice of Preferred Claims.*—One who has a preferred claim against the judg-

sheriff shows upon its face that the sale has in all respects been made in conformity to the provisions of the statute. *Warren v. Stinson*, 6 N. D. 293, 70 N. W. 279.

25. *Kan.*—*Capital Bank v. Huntoon*, 35 Kan. 577, 11 Pac. 369. *N. D.*—*Warren v. Stinson*, 6 N. D. 293, 70 N. W. 279. *S. D.*—*Crouch v. Dakota*, W. & M. R. R. Co., 18 S. D. 540, 101 N. W. 722.

See also *Dexter, Horton & Co. v. Sayward*, 78 Fed. 275.

26. *Fitch v. Minshall*, 15 Neb. 328, 18 N. W. 80.

27. *Thompson v. Higginbotham*, 18 Kan. 42; *Stull v. Seymour*, 63 Neb. 87, 88 N. W. 174.

[a] The fact that a higher bid is submitted after sale of lands on execution is not ground for refusing to confirm the sale, under Wash. Laws, 1899, p. 88, §6, subd. 2, requiring a confirmation unless there appear "substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting." *Merritt v. Graves*, 52 Wash. 57, 100 Pac. 164.

28. *Moore v. Boyer*, 52 Neb. 446, 72 N. W. 586.

29. *U. S.*—*Hilton v. National Bank*, 26 Fed. 202. *Kan.*—*Capital Bank v. Huntoon*, 35 Kan. 577, 11 Pac. 369. *La.*—*D'Arensbourg v. Chauvin*, 9 La. Ann. 98. *Neb.*—*O'Brien v. Gaslin*, 20 Neb. 347, 30 N. W. 274. *N. D.*—*Dakota Inv. Co. v. Sullivan*, 9 N. D. 303, 83 N. W. 233, 81 Am. St. Rep. 584. *Ore.*—*Leinenweber v. Brown*, 24 Ore.

548, 34 Pac. 475, 38 Pac. 4; *Mathews v. Eddy*, 4 Ore. 225. *Wash.*—*Otis Bros. & Co. v. Nash*, 26 Wash. 39, 66 Pac. 111; *Krutz v. Batts*, 18 Wash. 460, 51 Pac. 1054.

[a] *Failure to give notice for the required time cured by confirmation.* *Wyant v. Tuthill*, 17 Neb. 495, 23 N. W. 342.

[b] *Defective Description.*—Under a statute which makes the ratification conclusive evidence "only of the notice of sale required to be given, and the manner of making the sale," a want of sufficient description or designation of the property in the seizure and subsequent proceedings is not cured by an order of confirmation containing a precise description of the property. *Dorsey's Lessee v. Dorsey*, 28 Md. 388.

30. *Capital Bank v. Huntoon*, 35 Kan. 577, 11 Pac. 369.

[a] *Fraud or surprise in the rendition of the judgment is not cured by confirmation.* *Koechlept v. Hook's Lessee*, 10 Md. 173, 69 Am. Dec. 133.

31. *Capital Bank v. Huntoon*, 35 Kan. 577, 11 Pac. 369; *Benz v. Hines*, 3 Kan. 390, 89 Am. Dec. 594; *Dawson's Lessee v. Morris*, 4 Yeates (Pa.) 341.

32. *Kan.*—*Norton v. Reardon*, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459. *Neb.*—*Wilcox v. Raben*, 24 Neb. 368, 38 N. W. 844, 8 Am. St. Rep. 207. *Ore.*—*Willamette Real Estate Co. v. Hendrix*, 28 Ore. 485, 42 Pac. 514, 52 Am. St. Rep. 800.

33. *Phillips v. Dawley*, 1 Neb. 320.

34. *Koehler v. Ball*, 2 Kan. 160, 83 Am. Dec. 451; *Dakota Inv. Co. v. Sul-*

ment debtor must file a written notice thereof with the sheriff prior to the execution sale,<sup>35</sup> and a failure to do so waives the right to preference in distribution.<sup>36</sup> The notice should set forth the facts showing the case to be one within the statute.<sup>37</sup>

(II.) **Distribution by Sheriff.**—(A.) **GENERALLY.**—Generally the sheriff may pay the proceeds of the sale over to the parties entitled thereto,<sup>38</sup> but when the sheriff has notice of conflicting claims he should hold the money until the claims are settled,<sup>39</sup> or pay the same into court pending determination of the claims.<sup>40</sup> Neither the plaintiff nor defendant can direct the application of money received by the sheriff on an execution.<sup>41</sup> Distribution may be prevented by any party by a proper and seasonable application to the court.<sup>42</sup>

(B.) **INSTRUCTIONS BY COURT.**—If the sheriff be in doubt as to the proper disposition of the proceeds he may apply to the court for ad-

livan, 9 N. D. 303, 83 N. W. 233, 81 Am. St. Rep. 584.

35. **Cal.**—Taylor v. Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922. **Ky.** Burkett v. Boude, 3 Dana 209. **N. Y.** Miller v. Johnson, 12 Wend. 197; Bussing v. Bushnell, 6 Hill 382, *distinguishing* Beekman v. Lansing, 3 Wend. 446, 20 Am. Dec. 707, as based on earlier repealed statute. **Pa.**—Timmes v. Metz, 156 Pa. 384, 27 Atl. 248; Adamson's Appeal, 110 Pa. 459, 1 Atl. 327; Borlin v. Com., 110 Pa. 454, 1 Atl. 404; Stichler v. Malley, 94 Pa. 82; Allison v. Johnson, 92 Pa. 314; Crater v. Deemer, 4 Pa. Co. Ct. 375; Corry First Nat. Bank v. Childs, 10 Phila. 452.

[a] **Sworn Claim.**—While not necessary, the better practice is to swear to such notices. Brown v. McFadden, 5 Pa. Co. Ct. 9.

[b] **In California** notice should be given to the judgment creditor and the judgment debtor. Taylor v. Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922.

[c] Notice after the sale but while the proceeds are still in the hands of the officer is too late. Allison v. Johnson, 92 Pa. 314. See also Ege v. Ege, 5 Watts (Pa.) 134.

[d] **Need Not Be in Writing.**—Burkett v. Boude, 3 Dana (Ky.) 209.

[e] **Notice of landlord's claim** is in time if made before all goods are removed from premises. Margart v. Swift, 3 McCord (S. C.) 378.

36. Stichler v. Malley, 94 Pa. 82.

37. Allison v. Johnson, 92 Pa. 314.

[a] **Labor Claim.**—That the labor was performed within the time limited by statute, the business defined there-

by, the sum due, and the property subject to preferred claim is included in the levy. Allentown Nat. Bank v. Helios Dry Color, etc. Co., 9 Pa. Super. 275; Coates v. Wright, 3 Pa. Dist. 392; Garretson v. Harris, 13 Pa. Co. Ct. 333.

[b] **Certainty to a reasonable intent** is all that is required in such notices. Shives v. Clouser, 4 Pa. Co. Ct. 149.

38. **Ill.**—Lindauer v. Lang, 29 Ill. App. 118. **Neb.**—Luce v. Foster, 42 Neb. 818, 60 N. W. 1027. **N. Y.**—Hodgman v. Barker, 63 Hun 631, 17 N. Y. Supp. 911. **N. C.**—Washington v. Sanders, 13 N. C. 343, 21 Am. Dec. 336; Yarborough v. State Bank, 12 N. C. 23. **Ore.**—See Richards v. Nye, 5 Ore. 382.

[a] **Unless ordered to be paid into court** the sheriff should distribute the proceeds of the execution sale. Gannon v. Desh, 11 W. N. C. (Pa.) 20.

39. **La.**—Citizens' Bank v. Payne, 21 La. Ann. 380. **N. J.**—See Stebbins, Brown & Co. v. Walker, 14 N. J. L. 90, 25 Am. Dec. 499. **S. C.**—Cooper v. Scott, 2 McMull. 150; Greenwood v. Colcock's Exrs., 2 Bay 67.

[a] **At his own peril the sheriff may apply** the proceeds of execution. Isler v. Colgrove, 75 N. C. 334; Washington v. Sanders, 13 N. C. 343, 21 Am. Dec. 336; Yarborough v. State Bank, 12 N. C. 23.

40. Linton v. Pollock, 5 Pa. Co. Ct. 243; McDonald v. Allen, 37 Wis. 108, 19 Am. Rep. 754.

41. Child v. Dwight & Co., 21 N. C. 171.

42. *In re* Bastian, 90 Pa. 472.

[a] **Application long after return**

vice.<sup>45</sup> The court will in a summary manner advise how the proceeds should be distributed.<sup>44</sup> This practice extends only to cases where the sheriff has raised the money and holds the same subject to the order of the court.<sup>45</sup>

(III.) **Interpleader by Sheriff.**—This matter is treated elsewhere in this work.<sup>46</sup>

(IV.) **Distribution by Court.**—(A.) **GENERALLY.**—In the distribution of the proceeds of an execution the court acts upon equitable principles.<sup>47</sup> As to money in the hands of the sheriff, one claimant cannot proceed against another by rule or order to show cause why the money should not be paid to him.<sup>48</sup>

(B.) **PAYMENT INTO COURT.**—The proceeds may be ordered brought into court,<sup>49</sup> and the court will not pass upon the rights of those who claim the proceeds of an execution until the money is paid into court.<sup>50</sup> According to some decisions the sheriff's proper course is to pay the money into court for disposition.<sup>51</sup>

(V.) **Rule Against Sheriff.**—In some states, where there are adverse claims to the proceeds the proper procedure is for each of the claim-

day of the writ is too late. *In re Bastian*, 90 Pa. 472.

[b] **Where sheriff has applied the proceeds in good faith**, an application made long after the return day comes too late. *Tisch v. Raisch*, 7 Kulp (Pa.) 131.

43. *Bates v. Lilly*, 65 N. C. 232. But see *Ramsour v. Young*, 26 N. C. 133; *Wiley v. Bridgman*, 1 Head (Tenn.) 68.

[a] **In New York** (1) the supreme court will not interfere summarily and direct how money levied on execution by a constable, or other person not their own officer, shall be applied. But it is otherwise as to their own officers. *Marsh v. Lawrence*, 4 Cow. (N. Y.) 461. (2) A sheriff having several executions issued upon judgments rendered in counties outside the judicial district in which he resides, may make a motion in his own county for directions as to the disposition of moneys collected by him, under the executions. *Phillips v. Wheeler*, 67 N. Y. 104.

[b] **Basis of Practice.**—This proceeding is not derived from the common law and it is not regulated by statute, but has been established by the practice of the courts. *Bates v. Lilly*, 65 N. C. 232.

44. *Wiley v. Bridgman*, 1 Head (Tenn.) 68, the court will decide on the facts stated in the return.

45. *Millikan v. Fox*, 84 N. C. 107.

46. See 14 STANDARD PROC. 229.

47. *Coleman v. Slade*, 75 Ga. 61;

*Lowe v. Moore*, 8 Ga. 194; *Bank of Auburn v. Throop*, 18 Johns. (N. Y.) 505.

[a] **As between equitable claims**, principles of equity apply. *Kohl v. Harting*, 8 Watts (Pa.) 329.

48. *Willis' Exr. v. Shepard*, 2 Fla. 397, the sheriff not being a party there would be no method of enforcing the order.

49. *Stebbins, Brower & Co. v. Walker*, 14 N. J. L. 90; *Gifford v. McGuinness*, 63 N. J. Eq. 834, 53 Atl. 87.

50. **U. S.**—*Wortman v. Conyngham*, Fet. C. C. 241, 30 Fed. Cas. No. 18,056. **Fla.**—See *Willis' Exr. v. Shepard*, 2 Fla. 397. **Ga.**—*Lowe v. Moore*, 8 Ga. 194. **Pa.**—*Freytag v. Bamford*, 9 Phila. 211; *Tisch v. Raisch*, 7 Kulp 131. See Appeal of *Atkins*, 58 Pa. 86.

[a] **Without the consent of all creditors** proceeds of executions cannot be distributed until paid into court. Appeal of *Kauffman*, 70 Pa. 261.

[b] **Scope of Examination.**—On distribution of proceeds the court may examine the title to the land to ascertain what interest was sold, and what judgments were liens upon it, but not to investigate alleged fraud in the title. Appeal of *Beekman*, 38 Pa. 385. See also *Devereux v. Nichols*, 3 Pa. Co. Ct. 439.

51. *State v. Taylor*, 56 Mo. 492; *Woodruff v. Chapin*, 23 N. J. L. 566; *Stebbins, Brower & Co. v. Walker*, 14 N. J. L. 90, 25 Am. Dec. 499.

ants to take a rule against the sheriff,<sup>52</sup> or for one of the claimants to take his rule against the sheriff and give written notice to all others who have a claim upon the fund.<sup>53</sup> Upon the answer of the sheriff the court proceeds to adjudicate the rights of the parties.<sup>54</sup> But it has been held that this remedy is not proper where the rights of the claimants are doubtful but they must determine their rights by suit.<sup>55</sup>

(VI.) **Reference to Auditor.** — In some states it is the practice to refer the determination of conflicting claims to an auditor.<sup>56</sup>

(VII.) **Actions To Compel Refund of Proceeds.** — Where the proceeds of a sale have been paid to junior lien holders the senior lien holders entitled thereto may proceed in equity to compel restoration,<sup>57</sup> or they may sue the sheriff,<sup>58</sup> or the latter, where he has through mistake paid the proceeds to the junior creditor, may recover them in equity.<sup>59</sup>

(VIII.) **Proceedings To Recover Surplus.** — The court from which the execution issued may order the surplus proceeds applied to other executions, if any, next in priority,<sup>60</sup> or to the judgment debtor's

52. *Willis' Exr. v. Shepard*, 2 Fla. 397.

[a] Allowance of one claim would be a refusal of the others and thus settle the question and by an order of consolidation all can be tried together. *Willis' Exr. v. Shepard*, 2 Fla. 397.

53. *Ga.*—*Crawford v. Williams*, 76 Ga. 792; *Williams, Birnie & Co. v. Brown*, 57 Ga. 304; *Foster v. Rutherford*, 20 Ga. 668. *La.*—*Buckner v. Gordy*, 28 La. Ann. 619. See *Conrad v. Patzelt*, 29 La. Ann. 465. *N. C.* *Dewey v. White*, 65 N. C. 225.

[a] Such persons may or may not come in at their option, but whether they do or do not come in, they will, in such case, be bound by the judgment. *Foster v. Rutherford*, 20 Ga. 668.

54. *Dewey v. White*, 65 N. C. 225.

[a] The court is not bound by the returns of the sheriff previously made where there is a contest between creditors for the proceeds of sales under several executions. *Dewey v. White*, 65 N. C. 225. But see *Palmer v. Clarke*, 13 N. C. 354, 21 Am. Dec. 340.

[b] **Decision Discretionary and Not Reviewable.**—*Mills v. Davis*, 53 N. Y. 349.

55. *Oliver v. Sale*, 19 S. C. 17; *Dawkins v. Pearson*, 2 Bailey (S. C.) 619.

[a] This remedy is proper only against a recusant sheriff, who in contempt of the process committed to him, refuses or neglects to appropriate money collected on execution, to one clearly

entitled thereto. It cannot be used to decide the rights of contending parties to such proceeds. *Caskey v. McMullen*, 3 S. C. 196; *Payne v. Kershaw*, Harp. (S. C.) 275; *Bruton v. Cannon*, Harp. (S. C.) 389.

56. See the following cases: *Semple v. Semple*, 193 Pa. 630, 44 Atl. 1077; *People's Sav. Bank v. Mosier*, 190 Pa. 375, 49 Atl. 132; *Andrews v. Fishing Creek Lumb. Co.*, 161 Pa. 204, 28 Atl. 1018; *Dermond's Appeal*, 153 Pa. 238, 25 Atl. 1133; *Ford's Appeal*, 152 Pa. 641, 25 Atl. 884; *Meckley's Appeal*, 102 Pa. 536; *Titusville Second Nat. Bank's Appeal*, 96 Pa. 460; *Souder's Appeal*, 57 Pa. 498; *Benson's Appeal*, 48 Pa. 159; *Logue's Appeal*, 22 Pa. 50; *Brant's Appeal*, 20 Pa. 141; *In re Myer's Appeal*, 2 Pa. 463; *Schrader v. Burr*, 10 Phila. (Pa.) 620; *Thompson v. Kelly*, 6 Phila. (Pa.) 218; *Smith's Appeal*, 11 W. N. C. (Pa.) 378; *Dunn v. McGarge*, 6 W. N. C. (Pa.) 204; *In re Kindig's Appeal*, 2 W. N. C. (Pa.) 680; *In re Harris' Est.*, 6 Kulp (Pa.) 409; and generally the title "References."

57. *III.*—*Ridenour v. Shideler*, 5 Ill. App. 180. *Miss.*—*Gay v. Edwards & Co.*, 30 Miss. 218. *N. Y.*—*Gillig v. Grant*, 23 App. Div. 596, 49 N. Y. Supp. 78. *S. C.*—*Furman v. Christie*, 3 Rich. L. 1.

58. *Furman v. Christie*, 3 Rich. L. (S. C.) 1.

59. *Stokes v. Cane*, 6 Rich. L. (S. C.) 513.

60. *Stebbins, Brower & Co. v. Wal-*

grantee, upon his motion.<sup>61</sup> But where the rights of the parties are doubtful or complicated they should not be determined on a summary proceeding but only by an appropriate action.<sup>62</sup>

k. *Proceedings To Set Aside or Vacate Sale*.<sup>63</sup> — (I.) **Jurisdiction and Remedies.**—A motion in the original action is the proper procedure for setting an execution sale aside,<sup>64</sup> though in some states a suit in equity to set aside the sale is proper,<sup>65</sup> and generally where conflicting claims and equities must be adjusted a suit in equity is the remedy.<sup>66</sup>

ker, 14 N. J. L. 90, 25 Am. Dec. 499; Ball v. Ryers, 3 Caines (N. Y.) 84, Colem. & C. Cas. 435.

61. Ross v. Ross, 10 Daly (N. Y.) 314.

[a] **Notice to the judgment debtor** who has absconded and whose whereabouts is unknown, is not necessary when it is not disputed that the debtor conveyed the property. Ross v. Ross, 10 Daly (N. Y.) 314.

62. Stebbins, Brower & Co. v. Walker, 14 N. J. L. 90, 25 Am. Dec. 499, in equity.

[a] Where defendant has put himself on record as not owning the property, the surplus proceeds should not be ordered to him on summary application, but he should be left to proceed by action. Frankel v. Elias, 60 How. Pr. (N. Y.) 74.

63. **Setting aside judicial sales**, see the title "Judicial Sales."

64. **U. S.**—McPherson v. Foster, 4 Wash. C. C. 45, 16 Fed. Cas. No. 8,921. **Ark.**—Anthony v. Shannon, 8 Ark. 52. **Idaho.**—Woody v. Jameson, 5 Idaho 466, 50 Pac. 1008. **Ill.**—International Packing Co. v. Cichowicz, 114 Ill. App. 121; Grundy County Nat. Bank v. Rulison, 61 Ill. App. 388. **Kan.**—Wheatley v. Terry, 6 Kan. 427; White-Crow v. White-Wing, 3 Kan. 276. **Ky.**—Hope v. Hollis, 5 Ky. L. Rep. 319. **Mo.**—Aurora v. Lindsay, 146 Mo. 509, 48 S. W. 642; Harrison v. Cachelin, 35 Mo. 79; American Wine Co. v. Scholer, 13 Mo. App. 345, affirmed, 85 Mo. 496. **N. Y.**—Morgan v. Holladay, 48 How. Pr. 86. **Pa.**—Hoefflich v. Hoefflich, 12 Pa. Co. Ct. 370. **Tex.**—Wilson v. Aultman (Tex. Civ. App.), 39 S. W. 1103.

[a] **Motion may be oral** in absence of rule of court. White-Crow v. White-Wing, 3 Kan. 276.

[b] **If execution plaintiff is purchaser** and has not conveyed motion is remedy; if purchased by third party

remedy in equity. Day v. Graham, 6 Ill. 435; Meacham v. Sunderland, 10 Ill. App. 123.

65. **Ala.**—Aderholt v. Henry, 82 Ala. 541, 3 So. 114. *Compare* Holly v. Bass' Admr., 68 Ala. 206. **Ind.**—Reed v. Carter, 1 Blackf. 410. **Ky.**—Wolford v. Phelps, 2 J. J. Marsh. 31. And see Estill v. Miller, 3 Bibb 177.

[a] **Motion Improper.**—The plaintiffs seeking to set aside a sheriff's deed may proceed at law or in equity; but they must sue the purchaser regularly and he must have all the defenses and modes of defense as in other suits. A trial, on motion, on affidavits taken ex parte, without the right to cross-examine, is too summary, and altogether at war with the spirit and policy of the laws, whether at law or in equity, entitling the defendant to a fair trial on every issue of fact before a jury of his vicinage. Harrell v. Word, 54 Ga. 649.

[b] **In cases of fraud and illegality** chancery has jurisdiction. Wolford v. Phelps, 2 J. J. Marsh. (Ky.) 31.

[c] **After the return term relief** can be had only in a court of chancery. Hall v. Moore, 68 Miss. 527, 10 So. 74; Hopton v. Swan, 50 Miss. 545; Force v. Van Patton, 149 Mo. 446, 50 S. W. 906. See also Cook v. Toumbs, 36 Miss. 685; Gridley v. Duncan, 8 Smed. & M. (Miss.) 456.

66. **U. S.**—McPherson v. Foster, 4 Wash. C. C. 45, 16 Fed. Cas. No. 8,921. **Ala.**—Anniston Pipe-Works v. Williams, 106 Ala. 324, 18 So. 111, 54 Am. St. Rep. 51. **Ill.**—Day v. Graham, 6 Ill. 435; Meacham v. Sunderland, 10 Ill. App. 123.

[a] **Where the purchaser has gone into possession and paid off taxes and other liens**, which should rightfully be refunded to him, a motion cannot be granted, since the court of law is not competent to give the relief justice de-

**Authority of Clerk.**—The duties of a clerk are ministerial and not judicial, and he has no authority to set aside a levy or sale.<sup>67</sup>

**(II.) Motion or Other Application.**—(A.) **PARTIES.**—Generally, it seems, any person who is a party to the suit, or connected with the title to the property, whether his interest be legal or equitable, may move to set aside a sale which has been injurious to his rights,<sup>68</sup> but a sale of lands under execution will not be set aside, on motion, at the instance of a person whose rights cannot be injuriously affected by the irregularity.<sup>69</sup> There is no settled rule, as to who are the necessary parties defendant to a motion to set aside the sale of lands under execution. Generally, those persons only who have an interest in the sale, or who will be prejudiced by setting it aside, need be made defendants of the motion,<sup>70</sup> thus the defendant is held a necessary party to the proceeding.<sup>71</sup>

mands in setting aside the sale, by annulling the deed and refunding to the purchaser his rightful expenditures, and the movant can only obtain relief in a court of equity. *Anniston Pipe-Works v. Williams*, 106 Ala. 224, 18 So. 111, 54 Am. St. Rep. 51.

[b] **Where Third Persons Purchase.** Where there is no irregularity or defect in the judgment or in the execution issued thereon, and persons not parties to the action purchase at the sale, the sale will not be set aside on motion, but the remedy is by an action in the proper court; but where the plaintiff in the action is one of the purchasers at the sale, it may be set aside, as to him, on motion. *McCarthy v. Speed*, 16 S. D. 584, 94 N. W. 411.

67. *Hughes v. Streeter*, 24 Ill. 648; *St. Louis v. Brooks*, 107 Mo. 380, 18 S. W. 22. But see *Williams v. Dunn*, 158 N. C. 399, 74 S. E. 99.

68. Ala.—*Henderson v. Subett*, 21 Ala. 626. Kan.—*White-Crow v. White-Wing*, 3 Kan. 276. Okla.—*Sparks v. City Nat. Bank of Lawton*, 21 Okla. 827, 97 Pac. 575. Tex.—*Taylor v. Snow*, 47 Tex. 462.

[a] **Whether Party to Suit or Not.** *White-Crow v. White-Wing*, 3 Kan. 276; *Sparks v. City Nat. Bank*, 21 Okla. 827, 97 Pac. 575.

[b] **A plaintiff at whose instance an execution issues, or any other party interested, may move to set aside the sale on the ground of inadequacy of price.** *Beckwith v. Mining Co.*, 87 N. C. 155.

[c] **Subsequent mortgagee (1) who has tendered the amount of the judgment may have an execution sale set**

aside, in equity, where such sale was for less than the value of the property. *James v. Markham*, 128 N. C. 380, 38 S. E. 917. (2) But in *Raymond v. Pauli*, 21 Wis. 531, it was held to be doubtful whether a subsequent mortgagee could have the sale set aside on the grounds of an erroneous sale en masse.

[d] **Judgment and execution creditors of a defendant in execution may proceed to set aside the sale.** *Merwin v. Smith*, 2 N. J. Eq. 182.

69. *McLaughlin v. Bradford*, 82 Ala. 431, 2 So. 515.

[a] **Only defendant in execution can question mere irregularities in sale.** *Shirk v. Metropolis, etc. Gravel Road Co.*, 110 Ill. 661; *Sherrard's Exrs. v. Johnson*, 193 Pa. 166, 44 Atl. 252, 74 Am. St. Rep. 680.

70. *Beach v. Dennis*, 47 Ala. 262.

[a] **Plaintiff in execution proper party.** *Wilson v. Percival*, 1 Dana (Ky.) 419; *Knight v. Applegate's Heirs*, 3 T. B. Mon. (Ky.) 335.

[b] **Omission to make a subsequent mortgagee in good faith, of the property sold, a party to the motion to set aside of itself prevents granting the relief asked for.** *Ceburre v. Pearson*, 27 App. Div. 621, 50 N. Y. Supp. 112.

[c] **A surety on the replevy bond on which the execution issued is not a necessary party to a motion by the principal to set aside the sale.** *Bronston v. Robinson*, 4 B. Mon. (Ky.) 142.

**To whom notice must be given, see** *infra*, II, B, 7, k, (II), (D).

71. *Chambers' Admr. v. Hays*, 6 B. Mon. (Ky.) 115.

(B.) TIME FOR MOTION.—The motion should be made within a reasonable time,<sup>72</sup> though there is no inflexible rule as to the time within which it must be made, the seasonableness of such a motion being determinable by the facts and circumstances of each particular case.<sup>73</sup>

[a] *Contra*, when proceeding is on ground that the real estate sold was the property of a third party. *Baldwin v. Thompson*, 15 Iowa 504.

[b] Proper but not necessary party. *Farmers' Nat. Bank v. Sperling*, 113 Ill. 273.

[c] Where the original defendant and his assignee are joined in the motion, such joinder will not work a denial of the application as to the assignee. *State v. Yancy*, 61 Mo. 397.

72. **Ala.**—*Francis v. Sheats*, 153 Ala. 468, 45 So. 241, 127 Am. St. Rep. 61; *Bolling v. Garrett*, 93 Ala. 89, 9 So. 604; *Cowan & Co. v. Sapp*, 74 Ala. 44; *Holly v. Bass' Admr.*, 68 Ala. 206. **Cal.** *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459. **Ill.**—*Clark v. Glos*, 180 Ill. 556, 54 N. E. 631; *Dobbins v. Wilson*, 107 Ill. 17; *Gardner v. Eberhart*, 82 Ill. 316; *Rigney v. Small*, 60 Ill. 416; *Prather v. Hill*, 36 Ill. 402. **Ind.**—*Nelson v. Bronnenburg*, 81 Ind. 193. **Ia.**—*Hansen's Empire Fur Fact. v. Teabout*, 104 Iowa 360, 73 N. W. 875; *Stewart v. Marshall*, 4 G. Gr. 75. **Kan.**—*Capital Bank v. Huntoon*, 35 Kan. 577, 11 Pac. 369. **Ky.**—*Bent v. Maupin*, 86 Ky. 271, 5 S. W. 425; *Bristow v. Payton's Admx.*, 2 Mon. 91, 15 Am. Dec. 134. **La.**—*Brosnahan v. Turner*, 16 La. 433. **N. Y.**—*Bowman v. Tallman*, 19 Abb. Pr. 84; *Wood v. Moorhouse*, 1 Lans. 405 (*affirmed*, 45 N. Y. 368); *Dixon v. Dixon*, 38 Misc. 652, 78 N. Y. Supp. 255. **N. C.**—*Wilson v. Twitty*, 10 N. C. 44, 14 Am. Dec. 569. **Pa.**—*McQuillan v. Hunter*, 1 Phila. 49; *Young v. Wall*, 1 Phila. 69, 7 Leg. Int. 98. **R. I.**—*Howland v. Pettet*, 15 R. I. 603, 10 Atl. 650. **Vt.**—*Hapgood v. Goddard*, 26 Vt. 401. **Wis.**—*Bunker v. Rand*, 19 Wis. 253, 88 Am. Dec. 684.

[a] Before proceedings commenced by purchaser to enforce lien acquired by sale is sufficient. *Cotton's Exx. v. Cotton*, 136 Ky. 54, 123 S. W. 331.

[b] Before the end of the term at which the sale occurs. *Force v. Van Patton*, 149 Mo. 446, 50 S. W. 906; *Aurora v. Lindsey*, 146 Mo. 509, 48 S. W. 642.

[c] After possession has been given

to the purchaser of personal property the sale cannot be set aside. *Lawrence v. Gallagher*, 2 W. N. C. (Pa.) 261.

[d] Examples of fatal delay, see the following: **Ala.**—*Steele v. Tutwiler*, 68 Ala. 107 (eight years); *McCaskell v. Lee*, 39 Ala. 131 (four years); *Daniel v. Modawell*, 22 Ala. 365, four years. **Del.**—*Penn Mut. Life Ins. Co. v. Walton*, 1 Marv. 328, 40 Atl. 1124, three weeks where ground inadequacy of price. **Ill.**—*Clark v. Glos*, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223 (twenty years); *Roberts v. Fleming*, 53 Ill. 196, seven years. **Kan.**—*Hill v. Gatliff*, 69 Kan. 179, 76 Pac. 428, two years. **La.**—*Riddell v. Ebinger*, 6 La. Ann. 407, five years. **Mich.**—*Spafford v. Beach*, 2 Doug. 150, five years. **Mo.** *Block v. Morrison*, 112 Mo. 343, 20 S. W. 340, fifty years. **N. Y.**—*Dixon v. Dixon*, 38 Misc. 652, 78 N. Y. Supp. 255. **S. C.**—*Ingram v. Belk*, 2 Strobb. 207, 47 Am. Dec. 591. **Wis.**—*Foster v. Hall*, 44 Wis. 568, twenty months.

[e] Delays not fatal, see the following: **Ala.**—*Anniston Pipe Works v. Houser*, 106 Ala. 324, 18 So. 111 (within two years where property remains unchanged). See also *Hurt v. Nave's Admr.*, 49 Ala. 459. **Ill.**—*Berry v. Lovi*, 107 Ill. 612, five years under peculiar facts and fraud of purchaser. **Minn.**—*Plummer v. Whitney*, 33 Minn. 427, 23 N. W. 841, ten months, defendant not being prejudiced.

73. *Anniston Pipe Works v. Houser*, 106 Ala. 324, 18 So. 111; *Holly v. Bass' Admr.*, 68 Ala. 206.

[a] Fraud will excuse delay. *Sioux City & I. F. Town Lot & Land Co. v. Walker*, 78 Iowa 476, 43 N. W. 294.

[b] Where execution defendant was a non-resident of the state, was cited by publication and had no legal notice of the sale under execution, delay excused. *Moore v. Miller* (Tex. Civ. App.), 155 S. W. 573.

[c] If the sale be void there is no limit to the time in which an application to vacate may be made. *Brooks v. Lewis*, 22 Wash. 192, 60 Pac. 121.

Ordinarily a sale will not be set aside unless proceedings to that end are commenced within the period allowed by law for redemption,<sup>74</sup> or in some states before the sale is confirmed.<sup>75</sup> In some states after delivery of the deed the sale may be opened,<sup>76</sup> though in other jurisdictions after delivery,<sup>77</sup> or acknowledgment and delivery,<sup>78</sup> or after the term at which deed was acknowledged,<sup>79</sup> the sale cannot be set aside.

(C.) FORM AND CONTENTS. — The motion or other application should state the grounds and essential facts on which it is sought to have the sale set aside.<sup>80</sup> The motion may be supported by affidavit,<sup>81</sup> but

74. **Ill.**—*Clark v. Glos*, 180 Ill. 556, 54 N. E. 631; *International Packing Co. v. Cichowicz*, 114 Ill. App. 121. **Ind.**—*Fletcher v. McGill*, 110 Ind. 395, 10 N. E. 651, 11 N. E. 779; *Nelson v. Bronrenburg*, 81 Ind. 193. **Mich.**—*Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133. **N. D.**—*Power v. Larabee*, 3 N. D. 502, 57 N. W. 789. **Ore.**—*Griswold v. Stoughton*, 2 Ore. 61, 84 Am. Dec. 409. **Wis.**—*Raymond v. Holborn*, 23 Wis. 57, 99 Am. Dec. 105; *Raymond v. Pauli*, 21 Wis. 531.

75. *Dickens v. Crane*, 33 Kan. 344, 6 Pac. 630; *State Bank v. Noland*, 13 Ark. 299. But see *Jenkins v. Green*, 24 Kan. 493, that sale may under certain circumstances be set aside after confirmation, the party making the motion being required to pay costs accruing after issuance of the execution.

**Effect of confirmation**, see *supra*, II, B, 7, i.

76. *Mobile Cotton, etc. Co. v. Moore*, 9 Port. (Ala.) 679; *Campbell v. Gardner*, 11 N. J. Eq. 423, 69 Am. Dec. 598.

[a] May be set aside on the return day of the execution even though the sheriff may have executed the deed to the purchaser. *Ray v. Stobbs*, 28 Mo. 25.

[b] Though deed has been acknowledged and money paid application may still be made to set aside if deed has not been recorded and there has been no laches. *Shakespeare v. Fisher*, 11 Phila. (Pa.) 251.

77. *State Bank v. Noland*, 13 Ark. 299.

78. *Chadwick v. Patterson*, 2 Phila. (Pa.) 275; *Carr v. O'Neill*, 1 W. N. C. (Pa.) 41; *Fahinger v. Fahinger*, 14 Phila. (Pa.) 622.

79. *In re McCulloch*, 1 Yeates (Pa.) 40.

[a] After acknowledgment of deed

if at same term may apply. *Connelly v. Philadelphia*, 86 Pa. 110.

80. **Ind.**—*Lynch v. Reese*, 97 Ind. 360. **Kan.**—*Livingston v. Lamb*, 1 Kan. 221. **Neb.**—*State Bank v. Green*, 11 Neb. 303, 9 N. W. 36. **Wis.**—*Lane v. White*, 14 Wis. 585.

[a] The facts should be set out as in a bill in equity. *American Wine Co. v. Scholer*, 13 Mo. App. 345, affirmed 85 Mo. 496.

[b] **Sale En Masse.**—It is not sufficient to allege merely that several separate tracts were sold in the lump by the sheriff. Such sales are voidable, not void; and one who seeks to have a sale en masse set aside should show that none of the conditions which would authorize the sale of all the parcels together existed at the time of the sale. *Hudepohl v. Liberty Hill Water & Min. Co.*, 94 Cal. 588, 29 Pac. 1025.

[c] **Fraud** need not be alleged where motion is based on want of title. *Ritter v. Henshaw*, 7 Iowa 97.

[d] If the facts showing the irregularity and the fraud attending the sale are substantially alleged this will be sufficient, at least on general demurrer. *Garvin v. Hall*, 83 Tex. 295, 18 S. W. 731.

[e] Where sheriff has levied on real property when there is sufficient personality to satisfy the execution, the application to set aside should state the character of the property, whether tangible or intangible, whether it was so situated as to be found by the officer, whether the officer or plaintiff knew or ought to have known of its existence, and any facts tending to show that levy and sale were not in good faith. *Cunningham v. Water-Power Sandstone*, 74 Minn. 282, 77 N. W. 137.

81. *Blair v. Compton*, 33 Mich. 414, the facts, if not appearing on the face

an affidavit alone without motion or other application is not sufficient.<sup>82</sup>

(D.) NOTICE OF MOTION.—Notice of the proceeding should be given to the purchaser,<sup>83</sup> and, it is held, to the execution debtor,<sup>84</sup> and the execution creditor.<sup>85</sup> When the officer who made the sale has no direct interest in its maintenance, it would seem notice to him is not necessary.<sup>86</sup> Notice may be waived by appearance.<sup>87</sup> The notice should state the grounds upon which the motion is to be made.<sup>88</sup>

of the papers may properly be shown by affidavit.

[a] **Inadequacy of Price.**—Affidavits which state simply that the lands "sold for greatly less than their value," not stating the value and price, or other facts from which these can be ascertained, being merely the statement of opinions are not sufficient to set aside the sale. *Holly v. Bass' Admr.*, 68 Ala. 206.

82. *Penn Mut. Life Ins. Co. v. Walton*, 1 Marv. (Del.) 328, 40 Atl. 1124, 2 Hardesty (Del.) 69.

83. *Ark.*—*Bently v. Cummins*, 8 Ark. 490. *Cal.*—*Eckstein v. Calderwood*, 34 Cal. 658. *Ga.*—*Harrell v. Word*, 54 Ga. 649. *Idaho.*—*Woody v. Jameson*, 5 Idaho 466, 50 Pac. 1008. *Ill.*—*International Packing Co. v. Cichowicz*, 114 Ill. App. 121. *Ia.*—*Osborn v. Cloud*, 21 Iowa 238. *Ky.*—*Williams v. Cummins*, 4 J. J. Marsh. 637. *Mich.*—*Wilkie v. Ingham Circuit Judge*, 52 Mich. 641, 18 N. W. 397. *Mo.*—*McKee v. Logan*, 82 Mo. 524; *Clamorgan v. O'Fallon*, 10 Mo. 112.

[a] **Absence of purchaser from state** does not excuse failure to serve him with notice. *Eckstein v. Calderwood*, 34 Cal. 658.

[b] **Assignee of certificate of purchase** need not be given notice when notice has been given to purchaser. *Hays v. Cassell*, 70 Ill. 669. But see *Clamorgan v. O'Fallon*, 10 Mo. 112 (that notice must be given to purchaser and those claiming under him); *Molloy v. Batchelder*, 69 Mo. 503, that notice to vendee of purchaser is necessary.

[c] **Process need not be served on purchaser**, as notice of the proceeding, is the proper practice without issuance and service of process. *American Wine Co. v. Scholer*, 13 Mo. App. 345, *affirmed*, 85 Mo. 496.

[d] **Where purchaser has assigned** all his interest to one who appears and contests the application to vacate, notice of motion need not be served on

the purchaser. *Bank v. Doherty*, 37 Wash. 32, 79 Pac. 486.

84. *Woody v. Jameson*, 5 Idaho 466, 50 Pac. 1008; *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388; *Sears v. Low*, 7 Ill. 281; *International Packing Co. v. Cichowicz*, 114 Ill. App. 121.

[a] **Where the defendant cannot be notified** without great inconvenience and delay, the sale may be set aside without notice to him. *Overton v. Gorham*, 2 McLean 509, 18 Fed. Cas. No. 10,626.

[b] **Where the execution creditor is the purchaser** and himself moves to set aside the sale because the execution is void for want of the clerk's signature, no notice to the defendant in execution is necessary, the whole proceeding being a nullity. If a stranger purchases, the rule may be different as to notice to him. *Hernandez v. Drake*, 81 Ill. 34.

85. *Idaho.*—*Woody v. Jameson*, 5 Idaho 466, 50 Pac. 1008. *Ill.*—*Turney v. Saunders*, 8 Ill. 239; *International Packing Co. v. Cichowicz*, 114 Ill. App. 121. *Ia.*—*Lyster v. Brewer*, 13 Iowa 461.

[a] **Unless error is apparent** on face of the execution, notice to plaintiff in execution is necessary, unless waived. *Iron's Exx. v. Callard*, 1 A. K. Marsh. (Ky.) 423.

[b] **Notice to One Insufficient.**—If judgment under which sale is had was in favor of two persons, notice to one of them will not suffice. *Turney v. Saunders*, 8 Ill. 239.

[c] **Where the purchasers at the execution sale are present and resist the motion** to set the same aside, they cannot be heard to complain of want of notice to the sheriff and the plaintiff in the execution. *McKee v. Logan*, 82 Mo. 524.

86. *McKee v. Logan*, 82 Mo. 524.

87. *Iron's Exx. v. Callard*, 1 A. K. Marsh. (Ky.) 423.

88. *Payne v. Payne's Exr.*, 8 B. Mon. (Ky.) 391.

(III.) **Actions To Set Aside.** — (A.) **CONDITIONS PRECEDENT.** — A tender of the purchase price is not a condition precedent to the commencement of a suit to set aside the sale,<sup>89</sup> though in some jurisdictions restoration of the purchase price with interest by the debtor is necessary before he can so proceed.<sup>90</sup>

(B.) **PARTIES.** — The plaintiff in execution should be a party to the proceeding,<sup>91</sup> as should the purchaser,<sup>92</sup> though a mortgagee of the property need not be.<sup>93</sup>

(C.) **PLEADINGS.** — The petition or complaint to set aside an execution sale should state the facts upon which relief is sought.<sup>94</sup>

89. *Seller v. Lingerman*, 24 Ind. 264; *Banks v. Bales*, 16 Ind. 423. See *Fitzgerald v. Kelso*, 71 Iowa 731, 29 N. W. 943.

**Refunding purchase money, taxes, etc., on setting aside sale, see *infra*, II, B, 7, k, (V), (D).**

[a] Where the sale was procured by purchaser's fraud, tender is unnecessary. *Marshall v. Marshall* (Tex. Civ. App.), 150 S. W. 755.

[b] Where plaintiff has received no proceeds or benefit from the sale. *McLean v. Stith*, 50 Tex. Civ. App. 323, 112 S. W. 355.

90. *Webb v. Coons*, 11 La. Ann. 252.

91. *Marshall v. Marshall* (Tex. Civ. App.), 150 S. W. 755.

[a] "Failure to make the plaintiff in execution a party to the suit is ground for special exception to the petition." *Marshall v. Marshall* (Tex. Civ. App.), 150 S. W. 755.

[b] The tender of the purchase money obviates the necessity of the presence of the execution plaintiff as a party to the action to set aside. *Weaver v. Nugent*, 72 Tex. 272, 10 S. W. 458.

92. **Kan.**—*Cowdin v. Cowdin*, 31 Kan. 528, 3 Pac. 369. **Ky.**—*Jewitt v. Marshall*, 3 A. K. Marsh. 153. **Tex.** *Marshall v. Marshall* (Tex. Civ. App.), 150 S. W. 755.

[a] After assignment (1) by the purchaser the assignee is a necessary party (*Pardee v. Leitch*, 6 Lans. (N. Y.) 303), (2) and the original purchaser is not a proper party. *Bank v. Doherty*, 37 Wash. 32, 79 Pac. 486.

93. *Frink v. Morrison*, 13 Abb. Pr. (N. Y.) 80.

94. *Shelton v. Franklin*, 68 Ill. 333.

[a] **Mistake Preventing Redemption.**—A debtor cannot set aside a deed on execution sale because of mistake preventing redemption, where there was another execution sale of the prop-

erty on a later date, and no averment in his petition that he was misled as to the time for redemption from such late sale, or that he offered to redeem therefrom prior to issuance of a deed. *Tharp v. Kerr*, 141 Iowa 26, 119 N. W. 267.

[b] Where prevention of bidding is the ground claimed the complaint must show that the land was sold for less than its value, or that more land was sold than was necessary. *Lynch v. Reese*, 97 Ind. 360.

[c] **Failure To Exhaust Personalty.** A complaint to set aside a sheriff's sale against a vendee of the purchaser, on this ground and that the real estate sold should have been subdivided and a part only sold, is bad on demurrer, if it does not show that the sheriff had knowledge of the personal property or by reasonable diligence could have discovered it, and that it was within reach of the execution, and was so unencumbered that its sale would have yielded something, and that the vendee had notice of the irregularities. *Nelson v. Bronnenburg*, 81 Ind. 193.

[d] **Partnership Property.**—Where a bill, filed by a firm to set aside a sale of land under an execution in favor of an individual creditor of the surviving partner, alleged that the land was partnership property, that the firm was heavily indebted to complainant when dissolved by the death of one partner, that the land was conveyed to complainant to apply on its partnership debt, and that the defendant had notice of these facts, it was sufficient, and a general demurrer thereto overruled. *First Nat. Bank v. State Sav. Bank*, 123 Mich. 321, 82 N. W. 125.

[e] **Fraud and conspiracy** held sufficiently alleged. *Moore v. Miller* (Tex. Civ. App.), 155 S. W. 573.

[f] **Deed Made Before Expiration**

(IV.) **Grounds.**—(A.) **GENERALLY.**—The general rule is that mere irregularities not affecting the title of the purchaser do not afford a sufficient reason for setting aside the sale,<sup>95</sup> though they may if it appear that the rights of one of the parties have been injuriously affected thereby.<sup>96</sup> Want of knowledge by the defendant that the judgment was rendered does not authorize setting the sale aside.<sup>97</sup> If the sheriff at the time of sale had money in his hands belonging to the debtor sufficient to satisfy the execution the sale will be set aside.<sup>98</sup>

(B.) **MISTAKE.**—The sale may be set aside on the equitable ground of mistake where such mistake works an injury to the party complaining.<sup>99</sup>

**of Redemption Period.**—Complaint to set aside on this ground does not state a cause of action when it nowhere alleges how long it was after the execution sale when the deed was made, and there is no sufficient allegation as to any offer to redeem within the time provided by statute after the confirmation of sale. *Bryant v. Stetson & Post Mill Co.*, 13 Wash. 692, 43 Pac. 931.

[g] **Complaint by a wife to set aside a sheriff's deed of community property,** must contain allegation showing that indebtedness upon which judgment had been rendered was that of the husband alone and enforceable only against his separate estate. *Bryant v. Stetson & Post Mill Co.*, 13 Wash. 692, 43 Pac. 931.

[h] **Inadequate Price.**—A violation of the statute requiring the sale to be for not less than two-thirds of the appraised value of the land must be set forth when relied upon. *Brown v. Butters*, 40 Iowa 544.

95. *Ala.*—*Ray's Admr. v. Womble*, 56 Ala. 32. *Ia.*—*Brown v. Butters*, 40 Iowa 544. *Ky.*—*Young v. Smith*, 10 B. Mon. 293; *Daviess v. Womack*, 8 B. Mon. 383. *La.*—*Gusman v. Le Blanc*, 27 La. Ann. 280.

[a] "Against mere irregularities, it is the policy of the law to sustain execution sales." *Slagel v. Murdock*, 65 Mo. 522. But see *Rogers v. Wilson*, 220 Mo. 213, 119 S. W. 369.

[b] **Errors in the mandate of an execution** are mere irregularities incapable of injury to the defendant in execution, and, because of such irregularities, a court of equity will not interfere to vacate a sale made by a sheriff under such executions. *Gardner v. Mobile & N. W. R. R. Co.*, 102 Ala. 635, 15 So. 271.

[c] **Failure to deliver surplus of proceeds** to judgment debtors, not ground for setting aside. *Gusman v. Le Blanc*, 27 La. Ann. 280.

[d] **Under the Kentucky statute** an execution sale cannot be set aside upon motion unless it was made by fraud, covin, or collusion. *Bach v. Whittaker*, 109 Ky. 612, 60 S. W. 410.

[e] **Because of strict and unusual conditions of sale** it will not be set aside where they are such as the circumstances of the particular case demand, and are not made with a view to injure the defendants. *Coxe v. Halsted*, 2 N. J. Eq. 311.

96. *McKee v. Logan*, 82 Mo. 524; *Pell v. Vreeland*, 35 N. J. Eq. 22.

[a] Where the judgment creditor without fault on his part, because of the weather and early hour of sale, was unable to be present and the property sold at a sacrifice to his injury, the sale was set aside. *Johnson v. Crawl*, 55 Tex. 571.

97. *McGeorge v. Sease*, 32 Kan. 387, 4 Pac. 846.

98. *Zylstra v. Keith*, 2 Desaus. (S. C.) 140.

99. *U. S.*—*Rocksell v. Allen*, 3 McLean 357, 20 Fed. Cas. No. 11,983. *Ala.*—*Mobile Cotton Press & Bldg. Co. v. Moore*, 9 Port. 679. *Ia.*—*Bay v. Harnett*, 58 Iowa 344, 12 N. W. 336; *Lathrop v. Brown*, 23 Iowa 40. *Ky.*—*Bent v. Maupin*, 86 Ky. 271, 5 S. W. 425. *Minn.*—*Lay v. Shaubhut*, 6 Minn. 273, 80 Am. Dec. 446. *Neb.*—*Frasher v. Ingham*, 4 Neb. 531. *N. Y.*—*Tinker v. Irvin*, 1 How. Pr. 112; *Stahl v. Charles*, 5 Abb. Pr. 348.

[a] **A failure or mistake in value** of the property purchased is not ground for setting it aside. *Clarke v. Cooper*, 148 Mo. App. 230, 128 S. W. 47.

(C.) **IRREGULARITIES IN THE ISSUANCE OR FORM OF THE WRIT.**—Any fraud or irregularity in the issuance or form of the writ is proper ground for setting aside the sale.<sup>1</sup> Thus it has been held that a sale will be set aside where the execution issued for a sum less than the judgment,<sup>2</sup> or for a sum materially in excess of the judgment and a sale is had to satisfy such excess.<sup>3</sup> So too, where the writ has been levied on property brought into the jurisdiction by means of fraud,<sup>4</sup> where the execution issued on a transcript from another county,<sup>5</sup> or the transcript from the justice court was insufficient,<sup>6</sup> or the execution issued on a dormant judgment,<sup>7</sup> or on a judgment which had been satisfied,<sup>8</sup> it is held, the sale will be set aside. Where the writ fails to conform to the judgment,<sup>9</sup> where the seal was omitted from the writ,<sup>10</sup> or the writ is not endorsed by the party issuing it,<sup>11</sup> the sale may be set aside. A description of the land which is so defective as to prevent the location of the property is ground for setting the sale aside.<sup>12</sup> Mistake in the name of a party is not ground for setting aside the sale,<sup>13</sup> nor mere defects in the officer's signature.<sup>14</sup> A failure

[b] **Mistake as to the incumbrances** on the property is not ground for setting aside the sale though the sheriff made a mistake in stating the incumbrances, where the witnesses who were bidders testified that they understood the condition. *Bullock's Exrs. v. Woodward*, 25 N. J. Eq. 279.

1. *McKee v. Logan*, 82 Mo. 524.

[a] The sale will be set aside where the writ issued on a judgment of a lower court pending an appeal from the same. *Shirk v. Metropolitan, etc. Gravel Road Co.*, 110 Ill. 661.

[b] **A mere general description** in the writ, however, is not sufficient to justify setting the sale aside. *Swayze v. McCrossin*, 13 Smed. & M. (Miss.) 317.

**Quashing the Writ.**—See *infra*, IV, A.

2. *Newman v. Willitts*, 60 Ill. 519. But see *Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404, that in such case the court would allow an amendment to conform to the judgment.

3. *Hastings v. Johnson*, 1 Nev. 613.

4. *Williams v. Steenrod*, 11 Pa. Dist. 22.

5. *Shattuck v. Cox*, 97 Ind. 242.

6. *Wedel v. Green*, 70 Mich. 642, 38 N. W. 638.

7. *Lytle v. Cincinnati Mfg. Co.*, 4 Ohio 459.

8. *Russell v. Hugunin*, 2 Ill. 562.

9. *Flint v. Phipps*, 20 Ore. 340, 25 Pac. 725.

[a] **Where the judgment was against one of two defendants and execution**

has issued against both. *Breidenthal v. McKenna*, 14 Pa. 160; *Kimmel v. Kimmel*, 5 Serg. & R. (Pa.) 294.

10. *Weaver v. Peasley*, 163 Ill. 251, 45 N. E. 119.

[a] **Sale under a special execution** not under the seal of court or signed by clerk, or directed to the proper officer, will be set aside. *Sidwell v. Schumacher*, 99 Ill. 426.

[b] **If the writ by mistake issues without the seal of the court** being affixed the writ may be amended by affixing the seal, and a sale under the writ before such amendment will not be set aside because of such defect. *Corwith v. State Bank*, 18 Wis. 560, 86 Am. Dec. 793.

11. *Allen v. Clark*, 36 Wis. 101.

12. *Hughes v. Streeter*, 24 Ill. 647, 76 Am. Dec. 777; *Johnson v. Rowe*, 1 Ky. L. Rep. 274.

13. *Griffith v. Milwaukee Harvester Co.*, 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573 (plaintiff); *Kuhn v. Kilmer*, 16 Neb. 699, 21 N. W. 443, defendant.

[a] **Where it appears he was equally well known by the name used** and his real name, even though that fact not alleged in original action, misnomer of the defendant is not sufficient to require setting aside the sale. *Isaacs v. Mintz*, 16 Daly 468, 12 N. Y. Supp. 276.

14. *Van Gelder v. Van Gelder*, 26 Hun (N. Y.) 356.

[a] **Because some notices of the**

to specify in the writ where and when the judgment was docketed is amendable, and is not ground for setting the sale aside.<sup>15</sup>

(D.) **IRREGULARITIES IN LEVY OR APPRAISEMENT.**—Sales have been set aside because of excessive levies,<sup>16</sup> because the levy was made on property not properly subject,<sup>17</sup> or where there was no sufficient description of the property levied on.<sup>18</sup> To justify the setting aside of a sale on the ground that the property was appraised too low, the actual value of the property must so greatly exceed its appraised value as of itself to raise a presumption of fraud in the making of the appraisement.<sup>19</sup> Want of qualification of one appraiser is not sufficient to warrant setting the sale aside.<sup>20</sup>

(E.) **IRREGULARITIES IN THE VERDICT, JUDGMENT, OR DECREE.**—Irregularities in the judgment or decree, on which the execution was issued, can only be taken advantage of by the appeal from the decree itself, and cannot be made the ground of an application to set aside the sale,<sup>21</sup> and clerical mistakes in entering verdict are not ground for setting aside.<sup>22</sup>

(F.) **FAILURE OR DEFECTS IN GIVING NOTICE OF SALE.**—According to some authorities, where there is a failure to give the statutory notice the sale should be set aside,<sup>23</sup> while other courts recognize a contrary

levy were signed "sheriff," instead of "late sheriff." *Van Gelder v. Van Gelder*, 26 Hun (N. Y.) 356.

15. *Sabin v. Austin*, 19 Wis. 421.

16. **Ia.**—*Fortin v. Sedgwick*, 133 Iowa 233, 110 N. W. 460; *Cook v. Jenkins & Co.*, 30 Iowa 452. **Me.**—*Coffin v. Freeman*, 84 Me. 535, 24 Atl. 986. **Mich.** *Blair v. Compton*, 33 Mich. 414. **Mo.** *Cantwell v. Johnson*, 236 Mo. 575, 139 S. W. 365. **N. H.**—*Avery v. Bowman*, 40 N. H. 453.

[a] **Remedy by Motion and Not in Equity.**—*Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133.

17. *Lathrop v. Brown*, 23 Iowa 40.

[a] **Levy on property in another county** when defendant has property in the county where he resides. *Hamilton v. Quinby*, 46 Ill. 90.

[b] **A sale of realty** (1) will not be set aside merely because the debtor has available personalty if it does not appear that the plaintiff or the sheriff knew, or ought to have known, of the existence of such personal property. *Cunningham v. Water-Power Sandstone Co.*, 74 Minn. 282, 77 N. W. 137. See *Clark v. Fell*, 139 Pa. 469, 22 Atl. 649. (2) But if the existence of such personalty is known to the creditor, sale may be set aside. *Jakobsen v. Wigen*, 52 Minn. 6, 53 N. W. 1016.

18. *Johnson v. Rowe*, 1 Ky. L. Rep. 274.

19. *Kearney Land & Inv. Co. v. Aspinwall*, 45 Neb. 601, 63 N. W. 827, citing and following *Vought v. Foxworthy*, 38 Neb. 790, 57 N. W. 538.

20. *Hill v. Baker*, 32 Iowa 302, 7 Am. Rep. 193. See also *Gapen v. Stephenson*, 17 Kan. 613.

21. *Holly v. Bass' Admr.*, 68 Ala. 206; *Piatt v. Piatt*, 9 Ohio 37.

22. *Updergroff v. Judges*, 3 Cow. (N. Y.) 31.

23. **U. S.**—*McPherson v. Foster*, 4 Wash. C. C. 45, 16 Fed. Cas. No. 8,921.

**Del.**—*Reed v. Tiddeman*, 2 Houst. 408.

**Ind.**—*Keen v. Preston*, 24 Ind. 395. **Ia.**

*Jensen v. Woodbury*, 16 Iowa 515.

**Kan.**—*Watkins v. Williams*, 33 Kan. 149, 5 Pac. 771; *Wheatley v. Terry*, 6

**Kan.** 427. **Ky.**—*Cotton's Exrx. v. Cotton*, 136 Ky. 54, 123 S. W. 331; *Lawrence v. Speed*, 2 Bibb 401; *Scott v. Powers*, Little & Co., 25 Ky. L. Rep. 1640, 78 S. W. 408. But see *Kilby v. Haggin*, 3 J. J. Marsh. 208.

**La.**—See *Freeman v. Stacy*, 2 La. Ann. 615. **Md.**

*Moreland v. Bowling*, 3 Gill 500. See *Nesbitt v. Dallam*, 7 Gill & J. 494, 28

**Am. Dec.** 236. **Mo.**—*Evans v. Robber-*

*son*, 92 Mo. 192, 4 S. W. 941; *Hobein v. Murphy*, 20 Mo. 447, 64 Am. Dec. 194.

**Neb.**—*Comp. St.*, 1911, §7068. **N. C.**

*Skinner v. Warren*, 81 N. C. 373. **S. C.**

*Farr v. Sims*, Rich. Eq. Cas. 122, 24

**Am. Dec.** 396. **Tenn.**—*Trott v. McGav-*

*ock*, 1 Yerg. 469.

rule.<sup>24</sup> Mere defects in the advertisement of the sale, and in notice to the defendant in execution are regarded as irregularities not sufficient to warrant setting aside the sale,<sup>25</sup> though in some cases sales have been set aside for erroneous description of the property in the notice.<sup>26</sup>

[a] **Where sale adjourned without instructions** from week to week and sold without further advertisement, the owner being unaware of the sale, it should be set aside. *Chamberlain v. Larned*, 32 N. J. Eq. 295.

[b] **Wrong Property Advertised.** Where one parcel has been advertised but another sold, the sale may be set aside. *Mason v. Thomas*, 24 Ill. 285.

[c] **Return Not Showing Length of Notice.**—Where the return of a sheriff on an execution or order of sale under which he has sold real estate does not show when or how long he caused the notice of sale to be published, the sale is voidable, and should be set aside on motion. *Hazen v. Webb*, 68 Kan. 308, 74 Pac. 1111.

[d] **The sheriff's deed is void** if no notice is given. *Memphis & Little Rock R. Co. v. Organ*, 67 Ark. 84, 55 S. W. 952. But see *Youngblood v. Cunningham*, 38 Ark. 571; *Hobein v. Murphy*, 20 Mo. 447.

24. **Cal.**—*Frink v. Roe*, 70 Cal. 296, 11 Pac. 820. **N. J.**—*Boylan v. Kelly*, 36 N. J. Eq. 331. **N. Y.**—*Code Civ. Proc.*, 1908, §1386. See *Groff v. Jones*, 6 Wend. 522, 22 Am. Dec. 545; *Husted v. Dakin*, 17 Abb. Pr. 137. **N. C.** *Brodie v. Seagroves*, 3 N. C. 237. **Pa.** *Donaldson v. Bank of Danville*, 20 Pa. 245. **Tex.**—*Crabtree v. Whiteselle*, 65 Tex. 111; *Jones v. Martin*, 26 Tex. 57, 80 Am. Dec. 641. **Wis.**—*St.*, 1898, §2998.

[a] **Notice One Day Short.**—Where lands had been advertised only twenty days instead of twenty-one days as required by the statute, this was here merely an irregularity which did not vitiate the sale. *Maddox v. Sullivan*, 2 Rich. Eq. (S. C.) 4, 44 Am. Dec. 234.

[b] **Statute Directory.**—Directions of statute as to giving notice held to be merely directory. *Koch v. Bridges*, 45 Miss. 247.

[c] **By express statutory provision** an execution sale is not rendered void by the failure of the officer to give notice as provided. *Bowden v. Hadley*, 138 Iowa 711, 116 N. W. 689.

[d] **In Montana**, if the officer fails to give the required notice he forfeits \$500 to the aggrieved party and pays such damages as may be actually suffered; this remedy is held adequate and exclusive, and a failure to give the notice as required is not ground for setting the sale aside. *Burton v. Kipp*, 36 Mont. 275, 76 Pac. 563.

25. **U. S.**—*Bigelow v. Chatterton*, 51 Fed. 614, 2 C. C. A. 402, Minnesota statute. **Ala.**—*Holly v. Bass' Admr.*, 68 Ala. 206; *Ray's Admr. v. Womble*, 56 Ala. 32. **Ark.**—*Steward v. Pettigrew*, 28 Ark. 372. **Cal.**—*Harvey v. Fisk*, 9 Cal. 93. **Ill.**—*Pollard v. King*, 63 Ill. 26; *Grundy County Nat. Bank v. Rulison*, 61 Ill. App. 388. **Ind.**—*Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732. **Mo.**—*Bradley v. Heffernan*, 156 Mo. 653, 57 S. W. 763; *Clarke v. Cooper*, 148 Mo. App. 230, 128 S. W. 47. **R. I.**—*Barrows v. Nat. Rubber Co.*, 12 R. I. 173. **Tex.**—See *Morris v. Hastings*, 70 Tex. 26, 7 S. W. 649, 8 Am. St. Rep. 570.

[a] **Use of pale ink** in writing the notice which becomes nearly illegible before sale not sufficient to set aside sale. *Holly v. Bass' Admr.*, 68 Ala. 206.

[b] A sale at public auction, otherwise fairly made, should not be set aside upon the ground that the notice of sale did not describe the property with great particularity. *Stevens v. Bond*, 44 Md. 506.

[c] The description of a stone slaughter house as a frame one is not such a material misdescription as will warrant setting the sale aside. *Landis v. Lewis*, 3 Pa. Dist. 241.

26. **U. S.**—*McPherson v. Foster*, 4 Wash. C. C. 45, 16 Fed. Cas. No. 8,921. **Del.**—*Oldham v. Hossenger*, 5 Houst. 434. **Ia.**—*Parks v. Davis*, 16 Iowa 20. **Neb.**—*Helmer v. Rehm*, 14 Neb. 219, 15 N. W. 344. **Pa.**—*Meanor v. Hamilton*, 27 Pa. 137; *Houghtaling v. Megahey*, 36 Pa. Co. Ct. 212; *Hoeflich v. Hoeflich*, 12 Pa. Co. Ct. 370; *Kingston v. Hoffman*, 3 Kulp 331.

[a] **Description too vague and un-**

(G.) FRAUD.—Fraud or bad faith in the sale will justify the court in setting it aside.<sup>27</sup>

(H.) INADEQUACY OF PRICE.—The general rule is that inadequacy of consideration alone is not sufficient to vacate a sheriff's sale under an execution,<sup>28</sup> but when the inadequacy is so gross as to shock the under-

certain. *Mackall v. Richards*, 3 Mack. (D. C.) 271, reversing 124 U. S. 183, 8 Sup. Ct. 437, 31 L. ed. 396.

27. D. C.—*Horsley v. Beveridge*, 4 Mackey 291. Ga.—*Cumming v. Fryer*, Dud. 182. Ia.—*McWilliams v. Myers*, 10 Iowa 325. Miss.—*Reynolds v. Nye*, Freem. Ch. 462. Mo.—*Durfee v. Moran*, 57 Mo. 374; *Stewart v. Nelson*, 25 Mo. 309; *Neal v. Stone*, 20 Mo. 294. Pa. Appeal of *Millspaugh*, 1 Atl. 277. S. C. *Farr v. Sims*, 1 Rich. Eq. Cas. 122, 24 Am. Dec. 306.

[a] Preventing Bidding.—Where a purchaser induces others not to bid. *Lynch v. Reese*, 97 Ind. 360. See also *Stewart v. Severance*, 43 Mo. 322; *Currie v. Clark*, 90 N. C. 355.

[b] Where a commissioner of court has become the purchaser at a sale under an execution in his favor as commissioner. *Price's Admr. v. Thompson*, 84 Ky. 219.

[c] Fraud on the part of the sheriff is not ground for setting the sale aside, the remedy being against the sheriff. *Nixon v. Harrell*, 50 N. C. 76.

[d] But the fraud must result in the land selling for less than its value, or in more land being sold than necessary to pay the judgment. *Lynch v. Reese*, 97 Ind. 360.

28. U. S.—*Mason v. Bennett*, 52 Fed. 343; *Cooper v. Galbraith*, 3 Wash. C. C. 546, 6 Fed. Cas. No. 3,193. Ark.—*Carden v. Lane*, 48 Ark. 216, 2 S. W. 709, 3 Am. St. Rep. 228; *Miller v. Fraley*, 21 Ark. 22; *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Hardy v. Heard*, 15 Ark. 184. Cal.—*Odell v. Cox*, 151 Cal. 70, 90 Pac. 194; *Lacy v. Gunn*, 144 Cal. 511, 78 Pac. 30; *Anglo-Californian Bank v. Cerf*, 142 Cal. 303, 75 Pac. 902; *Connick v. Hill*, 127 Cal. 162, 59 Pac. 832; *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475. Colo.—*Herr v. Broadwell*, 5 Colo. App. 467, 39 Pac. 70. Del. *Booth's Exrs. v. Webster*, 5 Har. 129. Fla.—*Coker v. Dawkins*, 20 Fla. 141. Ga.—*Gunn v. Slaughter*, 83 Ga. 124, 9 S. E. 772. Ill.—*Skakel v. Cycle Trade Pub. Co.*, 237 Ill. 482, 86 N. E. 1058; *Clark v. Glos*, 180 Ill. 556, 54 N. W.

631; *Berry v. Lovi*, 107 Ill. 612; *Dobbins v. Wilson*, 107 Ill. 17. Ind.—*Dawson v. Jackson*, 62 Ind. 171. Ia.—*Copper v. Iowa Trust & Sav. Bk.*, 149 Iowa 336, 128 N. W. 373; *Tharp v. Kerr*, 141 Iowa 26, 119 N. W. 267; *Bowden v. Hadley*, 138 Iowa 711, 116 N. W. 689; *Fortin v. Sedgwick*, 133 Iowa 233, 110 N. W. 460; *Lehner v. Loomis*, 83 Iowa 416, 49 N. W. 1018; *Sioux City & I. F. Town Lot & Land Co. v. Walker*, 78 Iowa 476, 43 N. W. 294. Kan.—*Capital Bank v. Huntoon*, 35 Kan. 577, 11 Pac. 369. Ky.—*Scott's Exrs. v. Scott*, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423; *Craig v. Garnett's Admr.*, 9 Bush 97; *Stockton v. Owings*, Litt. Sel. Cas. 256, 12 Am. Dec. 302. Minn.—*Coolbaugh v. Roemer*, 32 Minn. 445, 21 N. W. 472. Miss.—*Delafield v. Anderson*, 7 Smed. & M. 630. Mo.—*Dougherty v. Gangloff*, 239 Mo. 649, 144 S. W. 434 (value \$900, sale for \$100); *Davis v. McCann*, 143 Mo. 172, 44 S. W. 795; *Knoop v. Kelsey*, 121 Mo. 642, 26 S. W. 683; *Whitman v. Taylor*, 60 Mo. 127; *Meir v. Zelle*, 31 Mo. 331. Nev.—*Dazet v. Landry*, 21 Nev. 291, 30 Pac. 1064. N. J. *Meyer v. Bishop*, 27 N. J. Eq. 141; *Weber v. Weiting*, 18 N. J. Eq. 441 (value \$1500, sale price \$100, being liens to amount of \$800); *Smith v. Duncan*, 16 N. J. Eq. 240; *Outcalt v. Disborough*, 3 N. J. Eq. 214; *Mercereau v. Prest*, 3 N. J. Eq. 460; *Newbrunswick Bank v. Hassert*, 1 N. J. Eq. 1. N. Y. *Livingston v. Byrne*, 11 Johns. 555. N. C.—*Beekwith v. King's Mountain Min. Co.*, 87 N. C. 155. N. D.—*Warren v. Stinson*, 6 N. D. 293, 70 N. W. 279; *Power v. Larabee*, 3 N. D. 502. Ore.—*Nodine v. Richmond*, 4 Ore. 527, 87 Pac. 775. Pa.—*Felton v. Felton*, 175 Pa. 44, 34 Atl. 312; *Hollister v. Vanderlin*, 165 Pa. 248, 30 Atl. 1002, 44 Am. St. Rep. 657; *Cake v. Cake*, 156 Pa. 47, 26 Atl. 781; *Cooper v. Wilson*, 96 Pa. 409; *In re Carson's Sale*, 6 Watts 140. S. C.—*Stockdale v. Yonque*, Rice Eq. 3; *Coleman v. Bank of Hamburg*, 2 Stro. Eq. 285, 49 Am. Dec. 671. S. D.—*First Nat. Bank v. Black Hills Fair Assn.*, 2 S. D. 145, 48 N. W. 852. Tex.—*Pear-*

standing and conscience of an honest and just man, it will, of itself, authorize the court to set aside the sale,<sup>29</sup> or, where such inadequacy is connected with or shown to result from any mistake, accident, surprise, misconduct, fraud or irregularity, the sale will generally be set aside.<sup>30</sup> And great inadequacy requires only slight circumstances of

son v. Flanagan, 52 Tex. 266, 280; Clark v. Bell, 40 Tex. Civ. App. 39, 89 S. W. 38. Wash.—Johnson v. Johnson, 66 Wash. 113, 119 Pac. 22.

[a] Purchase by the creditor for less than estimated value not evidence of a conspiracy to deprive the plaintiff of her rights therein. Phillips v. Rhodes, 2 Colo. App. 70, 29 Pac. 1011.

[b] Inadequacy is to be determined by the value of all the property sold and not that only of the property the sale of which is sought to be set aside. Moore v. Miller (Tex. Civ. App.), 155 S. W. 573.

[c] When Coupled With Offer of Payment by Debtor.—In Moore v. Miller (Tex. Civ. App.), 155 S. W. 573, the court said: "It has been held that where inadequacy of price stands alone, and the defendant makes a prompt offer to pay off the indebtedness, equity will set aside the sale. Martin v. Anderson, 4 Tex. Civ. App. 111, 23 S. W. 290; Steffens v. Jackson, 16 Tex. Civ. App. 280, 41 S. W. 520."

29. Ala.—Ray's Admr. v. Womble, 56 Ala. 32; Henderson v. Sublett, 21 Ala. 626. Ill.—Henderson v. Harness, 184 Ill. 520, 56 N. E. 786. Ind.—Fletcher v. McGill, 110 Ind. 395, 10 N. E. 651, 11 N. E. 779; Swope v. Ardery, 5 Ind. 213. Mo.—Dougherty v. Gangloff, 239 Mo. 649, 144 S. W. 434; Davis v. McCann, 143 Mo. 172, 44 S. W. 795; Knoop v. Kelsey, 121 Mo. 642, 26 S. W. 682; Brown v. Hannibal, etc. R. Co., 43 Mo. 294. Ore.—Nodine v. Richmond, 48 Ore. 527, 87 Pac. 775.

[a] Mere inadequacy of price alone is not sufficient to justify setting aside a sale of land, unless the difference between the value of the land and the price paid is so great as to shock the sense of justice and right. Simmons v. Sharpe, 138 Ala. 451, 35 So. 415; Branch v. Foust, 130 Ind. 538, 30 N. E. 631.

[b] Must Amount to Fraud.—Miller v. McAlister, 197 Ill. 72, 64 N. E. 254 (property worth \$3200 sold for \$145, grossly inadequate); Berry v. Lovi, 107 Ill. 612.

[c] Examples of Gross Inadequacy. Ala.—Lankford v. Jackson, 21 Ala. 650, land worth \$1000 sold for \$6. Fla. Lawyer's Co-operative Pub. Co. v. Bennett, 34 Fla. 302, 16 So. 185, value \$350, sale for \$15. Ill.—Berry v. Lovi, 107 Ill. 612, value \$8000, sold for \$65.38. Mo.—Mitchell v. Jones, 50 Mo. 438, value \$1600, sale for \$50.

30. U. S.—Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. ed. 721; Surget v. Byers, 1 Hempst. 715, 23 Fed. Cas. No. 13,629, affirmed, Byers v. Surget, 19 How. 303, 15 L. ed. 670. Ala.—Ray's Admr. v. Womble, 56 Ala. 32; Daniel v. Modawell, 22 Ala. 365, 58 Am. Dec. 260. Colo.—Herr v. Broadwell, 5 Colo. App. 467, 39 Pac. 70. Del.—Cowen v. Stevens & Co., 3 Har. 494; Oldham v. Hossenger, 5 Houst. 434. Fla.—Lawyer's Co-op. Pub. Co. v. Bennett, 34 Fla. 302, 16 So. 185. Ga. Parker v. Glenn, 72 Ga. 637. Ill. Skakel v. Cycle Trade Pub. Co., 237 Ill. 482, 86 N. E. 1058; Miller v. McAlister, 197 Ill. 72, 64 N. E. 254; Lurton v. Rodgers, 139 Ill. 554, 29 N. E. 866; Parker v. Shannon, 137 Ill. 376, 27 N. E. 525. Ind.—Stuart v. Brown, 135 Ind. 232, 34 N. E. 976; Branch v. Foust, 130 Ind. 538, 30 N. E. 631; Wright v. Dick, 116 Ind. 538, 19 N. E. 306. Ia. Copper v. Iowa Trust & Sav. Bk., 149 Iowa 336, 128 N. W. 373; Lehner v. Loomis, 83 Iowa 416, 49 N. W. 1018; Sioux City, etc. Land Co. v. Walker, 78 Iowa 476, 43 N. W. 294. Kan.—Capital Bank v. Huntoon, 35 Kan. 577, 11 Pac. 369. Ky.—Howell's Heirs v. McCreery's Heirs, 7 Dana 388; Gist v. Frazier, 2 Litt. 118; Mills v. Rogers, 2 Litt. 217, 13 Am. Dec. 263. Md.—Nesbitt v. Dallam, 7 Gill & J. 494, 28 Am. Dec. 236. Mich.—Aldrich v. Maitland, 4 Mich. 205. Miss.—Busick v. Watson, 72 Miss. 244, 16 So. 420. Mo.—Guinan v. Donnell, 201 Mo. 173, 98 S. W. 478; Rogers & Baldwin's Hdw. Co. v. Cleveland Bldg. Co., 132 Mo. 442, 34 S. W. 57; Gordon v. O'Neill, 96 Mo. 350, 9 S. W. 920; Massey v. Young, 73 Mo. 260, 270; Nelson v. Brown, 23 Mo. 13; State v. Innes, 137 Mo. App. 420, 118 S. W.

unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud.<sup>31</sup>

(I.) WANT OF TITLE OR LIEN.—The sale should be set aside if it appear that the defendant had no title to the land which it was attempted to sell, or different property was sold than that described or the judgment was not a lien thereon.<sup>32</sup>

(J.) FAILURE TO EXECUTE A PROPER DEED.—That a sheriff's deed was executed by a deputy does not constitute sufficient ground for setting it aside, at the instance of the execution defendant.<sup>33</sup>

(K.) WITHHOLDING RETURN FROM RECORDS.—Where the execution and return are retained by the plaintiff or his attorneys until after the time for redemption has expired, allowing the party having the right of redemption no opportunity to ascertain the amount necessary to

1168. **N. J.**—Flaherty v. Cramer, 41 Atl. 482; Lennon v. Heindel, 56 N. J. Eq. 8, 37 Atl. 147; Pell v. Vreeland, 35 N. J. Eq. 22; Kloepping v. Stellmacher, 21 N. J. Eq. 328. **N. C.**—Currie v. Clark, 90 N. C. 355; Beckwith v. Min. Co., 87 N. C. 155. **N. D.**—Warren v. Stinson, 6 N. D. 293, 70 N. W. 279. **Pa.**—Haspel v. Lyons, 41 Pa. Super. 285; Campbell v. Williams, 3 Kulp 92. **R. I.**—Aldrich v. Wileox, 10 R. I. 405. **S. D.**—First Nat. Bk. of Deadwood v. Black Hills Fair Assn., 2 S. D. 145, 48 N. W. 852. **Tex.**—House v. Robertson, 89 Tex. 681, 36 S. W. 251; Pearson v. Flanagan, 52 Tex. 266, 280; Taul v. Wright, 45 Tex. 388; Moore v. Miller (Tex. Civ. App.), 155 S. W. 573; Clark v. Bell, 40 Tex. Civ. App. 39, 89 S. W. 38; Carpenter v. Anderson, 33 Tex. Civ. App. 484, 77 S. W. 291; Day v. Johnson, 32 Tex. Civ. App. 107, 72 S. W. 426. **Utah.**—Young v. Schroeder, 10 Utah 155, 37 Pac. 252. **Wash.**—Bank v. Doherty, 37 Wash. 32, 79 Pac. 486. **Wis.**—Allen v. Clark, 36 Wis. 101.

[a] Where bystanders were deterred from bidding by irregularities committed by sheriff in conducting it, and the lands were knocked off at a grossly inadequate price. Hurt v. Nave's Admr., 49 Ala. 459.

[b] If undue advantage has been taken to the prejudice of the owner of property, or he has been lulled into a false security; or if the sale has been collusively or in any other manner conducted for the benefit of the purchaser. Odell v. Cox, 151 Cal. 70, 90 Pac. 194.

[c] Improper sale en masse, coupled with gross inadequacy. Henderson v. Harness, 184 Ill. 520, 56 N. E. 786;

Lurton v. Rodgers, 139 Ill. 554, 29 N. E. 866.

[d] Sale Without Right of Redemption.—Fitzgerald v. Kelso, 71 Iowa 731, 29 N. W. 943.

31. **U. S.**—Graffam v. Burgess, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. ed. 839. **Ill.**—Roseman v. Miller, 84 Ill. 297. **Ind.**—Fletcher v. McGill, 110 Ind. 395, 10 N. E. 651, 11 N. E. 779. **Kan.**—Savings Bank v. Blair, 56 Kan. 430, 43 Pac. 686. **Mo.**—Beedle v. Mead, 81 Mo. 297. **Tex.**—Kauffman v. Morris, 60 Tex. 119; Marshall v. Marshall (Tex. Civ. App.), 150 S. W. 755.

[a] "What those additional circumstances are, depends upon the facts of the particular case; but we think it safe to say that they should be such as are not attributable to the direct agency of the defendant in execution." Pearson v. Flanagan, 52 Tex. 266, 281.

32. **Ia.**—Parks v. Davis, 16 Iowa 20. **Ky.**—Bent v. Maupin, 86 Ky. 271, 5 S. W. 425. See also Conner v. Mason, 2 Litt. 254. **N. Y.**—Dwight's Case, 15 Abb. Pr. 259.

[a] Partial failure of title not sufficient to set aside. Weaver v. Guyer, 59 Ind. 195.

[b] Cloud on title by certain conveyances not sufficient to set sale aside, such conveyances being subsequently set aside, unless it can be shown that the defendant procured such conveyance to be made for the purpose of defrauding the judgment debtor. Dougherty v. Gangloff, 239 Mo. 649, 144 S. W. 434.

33. Carr v. Hunt, 14 Iowa 206.

Proceedings to compel execution of deed, see *supra*, II, B, 7, h.

redeem, the sale should be set aside because of this irregularity.<sup>34</sup>

(L.) ADVANCES ON BID. — Sales have been set aside because of higher bids subsequent to the sale,<sup>35</sup> but it has been held that this is not ground for setting aside the sale.<sup>36</sup>

(V.) HEARING AND DETERMINATION. — (A.) GENERALLY. — The setting aside of an execution sale is held to lie in the sound discretion of the court,<sup>37</sup> though a sale cannot be set aside in part and affirmed in part.<sup>38</sup> On a motion to set aside the court may allow or refuse to allow evidence to be introduced.<sup>39</sup>

(B.) PRESUMPTIONS AND BURDEN OF PROOF. — The burden of proof is on the party seeking to set the sale aside.<sup>40</sup> The connection between inadequacy of price and fraudulent or other improper conduct at the sale may be presumed.<sup>41</sup>

(C.) QUESTIONS OF LAW AND FACT. — A question of inadequacy of price may be so gross that it may be so determined as a matter of law.<sup>42</sup>

(D.) REFUNDING PURCHASE MONEY, TAXES, ETC. — When a sale of lands under execution is set aside in equity, at the instance of the defendant, the purchaser is entitled to be refunded his money, with interest, and if the bill does not offer to refund it, the court may decree a resale for his protection,<sup>43</sup> and generally the complainant will be required to do equity and reimburse those suffering from his conduct for moneys they may have expended.<sup>44</sup>

34. *Hammersham v. Fairall*, 44 Iowa 462.

35. *Broomall v. Reybold*, 5 Houst. (Del.) 435.

[a] A sale for \$17,500 set aside on proof that it was worth from \$25,000 to \$30,000, and that a gentleman of means was at the sale prepared to bid \$25,000 for it, but owing to his deafness and inability to hear the bidding and the failure of his agent to pursue his instructions on the occasion, it was struck off for the sum stated. *Broomall v. Reybold*, 5 Houst. (Del.) 435.

[b] In the discretion of the court. *State Bank v. Green*, 11 Neb. 303, 9 N. W. 36.

36. *Hollister v. Vanderlin*, 165 Pa. 248, 30 Atl. 1002, 44 Am. St. Rep. 657, 36 W. N. C. 41.

37. D. C.—*Hart v. Hines*, 10 App. Cas. 366. Ind.—*Case v. Colter*, 66 Ind. 336. Kan.—*Harrison v. Andrews*, 18 Kan. 535.

38. *Puterbaugh v. Moss* (Ill.), 11 N. E. 197.

39. *Aultman & Co. v. Humphrey*, 8 Kan. App. 2, 53 Pac. 789.

[a] Applicant not confined to matters set out in his affidavit. *Chadwick v. Patterson*, 2 Phila. (Pa.) 275.

40. Ark.—*Newton's Heirs v. State Bank*, 22 Ark. 19. Ind.—*Jones v. Kokomo Bldg. Assn.*, 77 Ind. 340; *Talbott v. Hale*, 72 Ind. 1. Ia.—*Barber v. Tryon*, 41 Iowa 349. Ky.—*Black v. Stefle*, 9 Ky. L. Rep. 610, 6 S. W. 23. Mo. *Stewart v. Severance*, 43 Mo. 322. See *Carpenter v. King*, 42 Mo. 219. N. J. *Coxe v. Halsted*, 2 N. J. Eq. 311.

41. *Weaver v. Nugent*, 72 Tex. 272, 10 S. W. 458; *McLean v. Stith*, 50 Tex. Civ. App. 323, 339, 112 S. W. 355.

42. *Moore v. Miller* (Tex. Civ. App.), 155 S. W. 573.

43. *Ray's Admr. v. Womble*, 56 Ala. 32.

44. *Flaherty v. Cramer* (N. J. Eq.), 41 Atl. 482; *Northcraft v. Oliver*, 74 Tex. 162, 11 S. W. 1121; *Burns v. Ledbetter*, 56 Tex. 282; *Shannon v. Hay* (Tex. Civ. App.), 153 S. W. 360.

[a] Amount bid, together with interest, costs and expenses on sale to be refunded as a condition to granting the order setting the sale aside. *Allen v. Clark*, 36 Wis. 101.

[b] Where by reason of long delay in setting aside the sale, the debt could not be collected on execution, the defendant may be required to pay the debt before he can have the sale

(VI.) **Appeal and Review.**—It has been held that an order setting aside a sale is not appealable.<sup>45</sup>

1. **Collateral Attack.**—Irregularities in the sale of property should be corrected by the court from which process issues, and where such court is not called upon to set the proceedings aside, it cannot be disturbed in a collateral proceeding,<sup>46</sup> but where the sale is entirely void it may be collaterally assailed.<sup>47</sup>

m. **Proceedings To Protect Rights of Purchaser.**—(I.) **To Recover Possession.**—(A.) **FORM OF ACTION.**—The purchaser's remedy to secure possession of real estate, if he have the legal title, is ejectment,<sup>48</sup> or, in some jurisdictions, forcible entry and detainer.<sup>49</sup> In a few states a

set aside. *Black v. Steele*, 9 Ky. L. Rep. 610, 6 S. W. 23.

[c] **Taxes.**—*Capital Bank v. Huntton*, 35 Kan. 577, 11 Pac. 369.

45. *Post v. Foote*, 18 Utah 235, 54 Pac. 975. See *Harrison v. Andrews*, 18 Kan. 535; *Aultman & Co. v. Humphrey*, 8 Kan. App. 2, 53 Pac. 789.

46. *Ala.*—*Francis v. Sheats*, 153 Ala. 468, 45 So. 241; *Worthington v. Miller*, 134 Ala. 420, 32 So. 748; *Howard v. Corey*, 126 Ala. 283, 28 So. 682; *De Loach v. Robbins*, 102 Ala. 288, 14 So. 777; *Waldrop v. Freedman*, 90 Ala. 157, 7 So. 510; *Brown, Toler & Phillips v. Hurt & Bro.*, 31 Ala. 146. *Cal.*—*Gregory v. Bovier*, 77 Cal. 121, 19 Pac. 232; *Boles v. Johnston*, 23 Cal. 226. *Ill.* *Clark v. Glos*, 180 Ill. 556, 54 N. E. 631; *Railsback v. Lovejoy*, 116 Ill. 442, 6 N. E. 504; *Oakes v. Williams*, 107 Ill. 154; *Schuck v. Gerlach*, 101 Ill. 338; *Sidwell v. Schumacher*, 99 Ill. 426; *Durham v. Heaton*, 28 Ill. 264; *Swiggart v. Harber*, 5 Ill. 364; *Shimp v. Hay*, 8 Ill. App. 66. *Ind.*—*Wells v. Bower*, 126 Ind. 115, 25 N. E. 603; *Holleraft v. Douglass*, 115 Ind. 139, 17 N. E. 275; *Jones v. Carnahan*, 63 Ind. 229; *Weaver v. Guyer*, 59 Ind. 195. *Ia.*—*Kilmer v. Gallaher*, 120 Iowa 575, 95 N. W. 180; *Harpham v. Worthington*, 100 Iowa 313, 69 N. W. 535; *Foley v. Kane*, 53 Iowa 64, 4 N. W. 821. *Kan.*—*Stetson v. Freeman*, 35 Kan. 523, 11 Pac. 431; *Fracht v. Pister*, 30 Kan. 568, 1 Pac. 638. *Ky.*—*Ringo v. Ward*, 2 B. Mon. 127. *Me.*—*Caldwell v. Blake*, 69 Me. 458. *Md.*—*Elliott & Wife's Lessee v. Knott*, 14 Md. 121; *Miles v. Knott's Lessee*, 12 Gill & J. 443. *Mich.*—*Hoffman v. Buschman*, 95 Mich. 538, 55 N. W. 458. *Miss.*—*Doe ex dem. Shelton v. Hamilton*, 23 Miss. 496; *Smith v. Winston*, 2 How. 601. *Mo.*—*Norman v. Eastburn*, 230 Mo. 168, 130 S. W. 276;

*Sachse v. Clingsmith*, 97 Mo. 406, 11 S. W. 69; *Lewis v. Coombs*, 60 Mo. 44; *Cabell v. Grubbs*, 48 Mo. 353; *Norton v. Quimby*, 45 Mo. 388. *N. H.*—*Butler v. Haynes*, 3 N. H. 21. *N. J.*—*Comp. St.*, 1910, p. 4679. *N. C.*—*Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884; *Oxley v. Mizle*, 7 N. C. 250. *Okla.* *Christy v. Springs*, 11 Okla. 710, 69 Pac. 864. *Pa.*—*Levan v. Millholland*, 114 Pa. 49, 7 Atl. 194; *Wilkinson's Appeal*, 65 Pa. 189. *Tenn.*—*Wells v. Griffin*, 2 Head 568. *Tex.*—*Taylor v. Snow*, 47 Tex. 462; *Taylor v. Doom*, 43 Tex. Civ. App. 59, 95 S. W. 4. *Va.*—*Fulkerson's Admr. v. Taylor*, 102 Va. 314, 46 S. E. 309. *Wash.*—*Diamond v. Turner*, 11 Wash. 189, 39 Pac. 379.

See generally the title "Judgments."

[a] **Objections to methods of appraisal** and other steps preliminary to a judicial sale may not be made in a collateral proceeding. *Trowbridge v. Cunningham*, 63 Kan. 847, 66 Pac. 1015.

47. *Ala.*—*Francis v. Sheats*, 153 Ala. 468, 45 So. 241. *Ky.*—*Spears v. Weddington*, 146 Ky. 434, 142 S. W. 679. *Mass.*—*Washington Nat. Bank v. Williams*, 188 Mass. 103, 74 N. E. 470.

48. *Ala.*—*Gunn v. Hardy*, 130 Ala. 642, 31 So. 443; *Heydenfeldt v. Mitchell*, 6 Ala. 70. *Conn.*—*Downing v. Sullivan*, 64 Conn. 1, 29 Atl. 130. *Del.* *Doe v. Roe*, 1 Har. 464. *Fla.*—*Donald v. McKinnon*, 17 Fla. 746; *Hartley v. Ferrell*, 9 Fla. 374. *Ga.*—*Skinner v. Willis*, 54 Ga. 192. *Ky.*—*Snowden v. McKinney*, 7 B. Mon. 258; *Martin v. Sheldon*, 2 B. Mon. 63; *Morton v. Sanders*, 2 J. J. Marsh. 192. *Mo.*—*Matney v. Graham*, 59 Mo. 190. *N. C.*—*Davis v. Evans*, 27 N. C. 525. *Tenn.*—*O'Donnell v. McMurdie*, 6 Humph. 134. *Vt.* *Mattocks v. Stearns*, 9 Vt. 326.

49. *Colo.*—*Liss v. Wilcoxon*, 2 Colo. 7. *Ill.*—*Carter v. Reynolds*, 106 Ill.

special statutory remedy, by which the purchaser can obtain possession summarily, is provided,<sup>50</sup> and in others a writ of possession may be obtained by the purchaser to place him in possession.<sup>51</sup> Where the property is personalty replevin is the remedy.<sup>52</sup> If the purchaser have but an equitable title his remedy is a bill in equity,<sup>53</sup> and equity may appoint a receiver to take care of the property until the purchaser can obtain possession through legal proceedings.<sup>54</sup>

**Writ of Assistance.**—In the absence of statute a writ of assistance will not issue to put a purchaser of real estate at an ordinary execution sale into possession.<sup>55</sup>

(B.) DEMAND AND NOTICE TO QUIT.—Generally demand for possession need not be made on the execution defendant,<sup>56</sup> nor need notice to quit be served on him,<sup>57</sup> or his vendee subsequent to the judgment,<sup>58</sup> before commencing suit for possession. Before action of forcible entry and detainer can be brought, however, demand for possession must be made.<sup>59</sup> And in some statutory proceedings for the recovery of possession of lands purchased at execution sales, notice of the proceeding must be given the defendant in execution:<sup>60</sup> or to the one in possession where he claims under a third party.<sup>61</sup> Where a demand on a debtor for the possession of real estate sold under execution is required, it may be made by the purchaser, or his agent.<sup>62</sup>

App. 444; *Barrett v. Trainor*, 50 Ill. App. 420; *Brackensieck v. Vahle*, 48 Ill. App. 312; *Sturtzman v. Sennott*, 41 Ill. App. 496. **Mich.**—*Royce v. Bradbarn*, 2 Doug. 377, but not if one in possession claims adversely to judgment debtor.

[a] In Illinois remedies of forcible entry and detainer and writ of assistance are concurrent. *Brackensieck v. Vahle*, 48 Ill. App. 312.

50. **Ark.**—*Ferguson v. Blakeney*, 6 Ark. 296. **N. Y.**—*Mawson v. Wermuth*, 182 N. Y. 234, 74 N. E. 829; *Spraker v. Cook*, 16 N. Y. 567. **Pa.**—*Appeal of Walbridge*, 95 Pa. 466; *Oakland Ry. Co. v. Keenan*, 56 Pa. 198.

51. **Ark.**—See *Ferguson v. Blakeney*, 6 Ark. 296. **Del.**—*Wright v. Rodney*, 5 Houst. 573. **Vt.**—*Tenney v. Smith*, 63 Vt. 520, 22 Atl. 659.

52. *Harlan v. Harlan*, 15 Pa. 507, 55 Am. Dec. 612.

53. **Md.**—*Hopkins v. Stump*, 2 Har. & J. 301. **Miss.**—*Wolfe v. Dowell*, 13 Smed. & M. 103. **N. C.**—See *Crews v. First Nat. Bank*, 77 N. C. 110.

[a] Writ of possession proper where purchaser has acquired equitable title. *Deakins v. Rex*, 60 Md. 593.

54. *McFadden v. Nolan*, 15 Phila. (Pa.) 187.

55. **Ind.**—*Emerick v. Miller*, 62 N. E. 284. **Kan.**—*Lundstrum v. Branson*,

92 Kan. 78, 139 Pac. 1172, 52 L. R. A. (N. S.) 697. **Wis.**—*Stanley v. Sullivan*, 71 Wis. 585, 37 N. W. 801, 5 Am. St. Rep. 245, since statute of 1878 may issue. See also *Schultz v. Schultz*, 133 Wis. 125, 113 N. W. 445, 126 Am. St. Rep. 934.

As to such writs generally, see the title "Assistance, Writs of."

56. *Hays v. Wilstach*, 82 Ind. 13; *Elston v. Piggott*, 94 Ind. 14.

[a] Demand is required in Alabama, see *Farley v. Nagle*, 119 Ala. 622, 24 So. 567; *De Vendell v. Hamilton*, 27 Ala. 156.

57. *Smith v. Allen*, 1 Blackf. (Ind.) 22.

58. *Smith v. Allen*, 1 Blackf. (Ind.) 22.

59. *Dickason v. Dawson*, 85 Ill. 53. See generally 8 STANDARD PROC. 1093, et seq.

60. *Phelps v. Jones*, 91 Ky. 244, 15 S. W. 668; *McGhee v. Sutherland*, 84 Ky. 198, 1 S. W. 5; *Curran v. Culf*, 13 Ky. L. Rep. 84, 15 S. W. 657.

61. *Bauer v. Angeny*, 100 Pa. 429; *Com. v. McClintock*, 36 Leg. Int. 412, 13 Phila. (Pa.) 26.

[a] Failure to give such notice vitiates proceeding. *Bauer v. Angeny*, 100 Pa. 429.

62. *Farley v. Nagle*, 119 Ala. 622, 24 So. 567.

(C.) DEFENSES.—Generally in an action by the purchaser for possession against the execution defendant in possession the latter cannot set up title in a third person.<sup>63</sup> Nor can the execution defendant,<sup>64</sup> or his grantor,<sup>65</sup> defend an action for possession because of irregularities in the sale. But the judgment debtor may defend on the ground that the property or his interest therein was not subject to levy and sale under execution.<sup>66</sup> A stranger in possession, not claiming under the execution debtor, cannot defend ejectment by the purchaser by seeking to impeach the judgment and execution under which the latter claims.<sup>67</sup>

(D.) PARTIES.—The purchaser or his successor may take advantage of the statutory proceeding,<sup>68</sup> and it may be against those claiming under the defendant in execution,<sup>69</sup> but not one claiming adversely.<sup>70</sup> Such proceeding may be had against a tenant in common before partition.<sup>71</sup> Where the interest of a joint tenant has been sold the other tenants cannot defend an action by the purchaser against the execution defendant to recover possession.<sup>72</sup>

63. Ala.—*Avent v. Read*, 2 Port. 480, 27 Am. Dec. 663. Cal.—*McDonald v. Badger*, 23 Cal. 393, 83 Am. Dec. 123. Ill.—*Keith v. Keith*, 104 Ill. 397; *Hayes v. Bernard*, 38 Ill. 297; *Ferguson v. Miles*, 8 Ill. 358, 44 Am. Dec. 702. Ind.—*Joyce v. First Nat. Bank*, 62 Ind. 188. Ky.—*Moore v. Simpson*, 3 Mete. 349; *Major v. Deer*, 4 J. J. Marsh. 585. N. J.—See *Den v. Winans*, 14 N. J. L. 1. N. C.—*Lyerly v. Wheeler*, 33 N. C. 288, 53 Am. Dec. 414; *Wade v. Sanders*, 70 N. C. 277. Pa.—*Dunlap v. Cook*, 18 Pa. 454; *Wetherill v. Curry*, 2 Phila. 98. S. C.—*O'Neal v. Duncan*, 4 McCord 246; *Stuckey v. Crosswell*, 12 Rich. L. 273; *Sumner v. Palmer*, 10 Rich. L. 38. Wis.—*Bunker v. Rand*, 19 Wis. 253, 88 Am. Dec. 684.

But see *Porter v. Seeley*, 13 Conn. 564; *Den ex dem. Falkenburgh v. Camp*, 3 N. J. L. 365, may show he had no title at time of sale.

[a] Subsequently acquired title may be set up by execution debtor, *i. e.*, title acquired subsequent to the levy, where the sale was of all his interest at the time of levy. *Emerson v. San- some*, 41 Cal. 552.

[b] Unless after abandoning premises he assert an outstanding title. *Gould v. Hendrickson*, 96 Ill. 599. *Contra*, see *Gritchell v. Kreidler*, 12 Mo. App. 497, *affirmed*, 84 Mo. 472.

64. *Hubbert v. McCollum*, 6 Ala. 221; *Boven v. Bowen*, 6 Watts & S. (Pa.) 504; *Dean v. Connelly*, 6 Pa. 239.

[a] If the sale was void (1) execution defendant may defend on that ground. *Lovely v. Speisshoffer*, 85 Ind. 454; *Howe v. Blanden*, 21 Vt. 315. (2) If execution under which plaintiff purchased conferred no power on the officer to sell, the defendant is not estopped to dispute title. *Peebles v. Pate*, 90 N. C. 348.

65. *Dodge v. Walley*, 22 Cal. 224, 83 Am. Dec. 61.

66. Ky.—*Major v. Deer*, 4 J. J. Marsh. 585. N. Y.—*Bigelow v. Finch*, 11 Barb. 498; *Dickinson v. Smith*, 25 Barb. 102. Pa.—*Snavely v. Wagner*, 3 Pa. 275, 45 Am. Dec. 640.

What property subject to execution, see *supra*, II, B, 3.

What property exempt, see *supra*, II, B, 5.

67. *Phelps v. Parks*, 4 Vt. 488.

Collateral attack on execution sale see *supra*, II, B, 7, 1.

68. *Brown v. Betts*, 13 Wend. (N. Y.) 29.

69. *Ferguson v. Blakeney*, 6 Ark. 296; *People ex rel. Higgins v. McAdam*, 60 How. Pr. (N. Y.) 444.

70. *Ferguson v. Blakeney*, 6 Ark. 296.

71. *Brown v. Betts*, 13 Wend. (N. Y.) 29.

72. *Davant v. Cabbage*, 2 Hill (S. C.) 311.

[a] Reason.—*Davant v. Cabbage*, 2 Hill L. (S. C.) 311.

(E.) PLEADINGS.<sup>73</sup> — A petition in a summary proceeding for possession need not follow the form of a complaint in ejectment, it is sufficient to state the complete proceedings on which plaintiff's title is based, together with a description of the property.<sup>74</sup> Under some statutes, written pleadings are not necessary.<sup>75</sup>

(F.) QUESTIONS OF LAW AND FACT. — In some statutory proceedings to determine the right to possession of the property the questions are of law for the court,<sup>76</sup> though in a suit for possession, the identity of the property sought to be shown by parol is a question for the jury,<sup>77</sup> as is the question of collusion and fraud in making the sale.<sup>78</sup>

(II.) On Failure of Title. — Where there is a complete failure of title the purchaser is entitled to relief. In some states the judgment will be revived in his favor so that he is subrogated to the rights of the creditor,<sup>79</sup> or in other jurisdictions he may recover his debt from the judgment creditor,<sup>80</sup> or from the defendant.<sup>81</sup> If the failure of title be due to irregularities in the proceedings, in several states, the purchaser may recover the purchase price from the officer in a suit for that purpose;<sup>82</sup> in other jurisdictions the purchase price may be recovered if it still be in the hands of the sheriff.<sup>83</sup>

73. See generally the titles "Ejectment;" "Forcible Entry and Detainer;" "Replevin;" and numerous titles dealing with particular phases of pleading.

74. *Mooar v. Covington City Nat. Bank*, 80 Ky. 305; *Sharpe v. Roe*, 13 Bush (Ky.) 461.

[a] In Pennsylvania the plaintiff files statement of his claim and the defendant a statement of his defense, in the proceeding to determine the right to possession, and the issue so raised is tried without further pleading. *Minier v. Saltmarsh*, 5 Watts 293. See also *Brownfield v. Braddee*, 9 Watts 149; *Dean v. Connelly*, 6 Pa. 239.

75. *Kennedy v. Weber*, 23 Ky. L. Rep. 879, 64 S. W. 514.

76. *Mooar v. Covington City Nat. Bank*, 80 Ky. 305. See also *Ireland v. Pugh*, 4 Ky. L. Rep. 252.

77. *Morrissey v. Love*, 26 N. C. 38.

78. *Dean v. Connelly*, 6 Pa. 239; *Manning v. Dove*, 10 Rich. L. (S. C.) 395.

79. See the statutes of the several states and the following: U. S.—*McWilliams v. Withington*, 7 Fed. 326. Cal.—*Merguire v. O'Donnell*, 139 Cal. 6, 72 Pac. 337, 96 Am. St. Rep. 91; *Hitchcock v. Caruthers*, 100 Cal. 100, 34 Pac. 627; *Cross v. Zane*, 47 Cal. 602. Ind.—*Paxton v. Sterne*, 127 Ind. 289, 26 N. E. 557. Miss.—*Lambeth v.*

*Elder*, 44 Miss. 80. Tex.—*Jones v. Smith*, 55 Tex. 383.

[a] Where there is a partial failure of title the purchaser has no remedy, the rule of caveat emptor applying. *Weaver v. Guyer*, 59 Ind. 195.

80. Ill.—*Warner v. Helm*, 6 Ill. 220. Ind.—*Hawkins v. Miller*, 26 Ind. 173.

Ky.—*Moore's Exrs. v. Allen*, 4 Bibb 41.

La.—*Lambeth v. New Orleans*, 6 La. 73.

[a] In Louisiana, he must first exhaust his remedy against judgment debtor before proceeding against creditor. *Haynes v. Courtney*, 15 La. Ann. 630.

81. Ia.—*Reed & Co. v. Crosthwait*, 6 Iowa 219, 71 Am. Dec. 406. Ky.—*Geoghegan v. Ditto*, 2 Mete. 433, 74 Am. Dec. 413. Va.—See *Penn's Adms. v. Spencer*, 17 Gratt. (58 Va.) 85, 91 Am. Dec. 375.

82. Ark.—*Hightower v. Handlin*, 27 Ark. 20. Ky.—*McGhee v. Ellis*, 4 Litt. 244, 14 Am. Dec. 124, where property sold belonged to third person. La.—*Friedlander v. Bell*, 17 La. Ann. 42. Mo.—*Thurley v. O'Connell*, 48 Mo. 27, where officer was guilty of fraud.

83. Conn.—*Bartholomew v. Warner*, 32 Conn. 98, 85 Am. Dec. 251, action for money had and received. N. Y.—*Bowne v. O'Brien*, 5 Daly 474. Pa.—*Jacoby's Estate*, 9 Phila. 311. S. C.—*Bragg v. Thompson*, 19 S. C. 572.

(III.) *Miscellaneous Proceedings.*—The purchaser of the interests of an individual in partnership property is entitled to bring a suit for accounting against the other members of the firm.<sup>84</sup>

n. *Redemption.*—(I.) *General Statement.*—Generally statutes provide for redemption from execution sales.<sup>85</sup> This right of redemption is purely a statutory right and does not exist without the statute;<sup>86</sup> therefore the mode prescribed by the statute must be pursued to make a valid redemption.<sup>87</sup>

(II.) *Notice of Intention To Apply for.*—In some jurisdictions notice of intention to apply for redemption is required,<sup>88</sup> but one who has had actual notice cannot complain of the defects in the service made on him.<sup>89</sup>

(III.) *Time and Place for Redemption.*—The time within which redemption may be had and the place where redemption should be made, are governed by the various statutes.<sup>90</sup> In computing the time of redemption the first, or day of sale, is to be excluded,<sup>91</sup> and where a cer-

84. *Cogswell v. Wilson*, 17 Ore. 31, 21 Pac. 388.

85. See the statutes and the following: *Commerce Vault Co. v. Barrett*, 222 Ill. 169, 78 N. E. 47, 113 Am. St. Rep. 382, 6 Ann. Cas. 652; *Watson v. Reissig*, 24 Ill. 281, 76 Am. Dec. 746; *Merry v. Bostwick*, 13 Ill. 398, 54 Am. Dec. 434; *Ewing v. Cook*, 85 Tenn. 332, 3 S. W. 507, 4 Am. St. Rep. 765.

86. *Colo.*—*Paddock v. Staley*, 13 Colo. App. 363, 58 Pac. 363. *D. C.* *Shipley v. Shamwell*, 41 App. Cas. 267, Ann. Cas. 1915A, 1148. *Ill.*—*Commerce Vault Co. v. Barrett*, 222 Ill. 169, 78 N. E. 47, 113 Am. St. Rep. 382, 6 Ann. Cas. 652; *Wilson v. Schneider*, 124 Ill. 628, 17 N. E. 8; *West v. Flemming*, 18 Ill. 248, 68 Am. Dec. 539. *Ind.*—*Anderson v. Anderson*, 129 Ind. 573, 29 N. E. 35, 28 Am. St. Rep. 211; *Hervey v. Krost*, 116 Ind. 268, 19 N. E. 125. *Neb.*—*Gosmunt v. Gloe*, 55 Neb. 709, 76 N. W. 424.

87. *Ala.*—*Spoor v. Phillips*, 27 Ala. 193. *Ark.*—*Edgewood Distilling Co. v. Rugg*, 98 Ark. 589, 136 S. W. 977. *Cal.* *Wilcoxon v. Miller*, 49 Cal. 193; *Haskell v. Manlove*, 14 Cal. 54. *Ill.*—*Oldfield v. Eulert*, 148 Ill. 614, 36 N. E. 615; *Wooters v. Joseph*, 137 Ill. 113, 27 N. E. 80; *Wilson v. Schneider*, 124 Ill. 628, 17 N. E. 8; *Chiles v. Davis*, 58 Ill. 411; *Littler v. People ex rel. Hargadine*, 43 Ill. 188. *Ia.*—*Howard v. Kelly*, 137 Iowa 76, 114 N. W. 544. *Minn.*—*Davis v. Seymour*, 16 Minn. 210; *Horton v. Maffitt*, 14 Minn. 289. *N. Y.*—*Gilchrist v. Comfort*, 34 N. Y.

235; *Silliman v. Wing*, 7 Hill 159; *People v. Sheriff of Broome*, 19 Wend. 87; *Waller v. Harris*, 20 Wend. 555. *Tenn.*—*Hill v. Walker*, 6 Coldw. 424; *Farnsworth v. Howard*, 1 Coldw. 215; *Lowry v. McGhee*, 8 Yerg. 242.

[a] While the redemption law is remedial in its character, and should not therefore be defeated on merely technical grounds in cases fairly brought within its provisions, yet the right of redemption is purely statutory and the courts are not warranted in extending it to a class of cases which the legislature has not seen proper to provide for. *Thornley v. Moore*, 106 Ill. 496.

88. *Lord's Ore. Laws*, §250; *Scott v. Patterson*, 1 Wash. 487, 20 Pac. 593.

89. *Baggot v. Turner*, 21 Wash. 339, 58 Pac. 212.

90. See the statutes of the several states and the following: *Ill.*—*Ross v. Mead*, 10 Ill. 171. *Ia.*—*Hansen's Empire Fur Factory v. Teabout*, 104 Iowa 360, 73 N. W. 875; *Robertson v. Moline M. & S. Co.*, 88 Iowa 463, 55 N. W. 495; *George v. Hart*, 56 Iowa 706, 10 N. W. 265; *Webb v. Watson*, 18 Iowa 537; *Harvey v. Spalding*, 16 Iowa 397, 85 Am. Dec. 526. *Neb.*—*Gosmunt v. Gloe*, 55 Neb. 709, 76 N. W. 424. *N. Y.*—*People ex rel. McAllister v. Lynch*, 68 N. Y. 473; *Morss v. Purvis*, 68 N. Y. 225; *Gilchrist v. Comfort*, 34 N. Y. 235.

91. *Cal.*—*Perham v. Kuper*, 61 Cal. 331. *Ill.*—*Roan v. Rohrer*, 72 Ill. 582. *Ind.*—*Backer v. Pyne*, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231. *Ia.*

tain number of months is given, calendar months, not lunar months, are intended.<sup>92</sup> Where the last day of the redemption year falls on Sunday, the land may be redeemed on the following Monday,<sup>93</sup> and redemption may be at the last moment of the last day, business hours not being regarded.<sup>94</sup> The general rule is that the statutory right to redeem from a sheriff's sale on execution must be exercised within the time prescribed; the courts have no discretion or power to extend the time as an act of mercy.<sup>95</sup> But it has been held that for good cause, the time of redeeming land from the levy of an execution can be extended by a court of equity;<sup>96</sup> and the redemption period may be extended by an agreement between the parties,<sup>97</sup> or fraud and miscon-

Teucher v. Hiatt, 23 Iowa 527, 92 Am. Dec. 440. **Mass.**—Bigelow v. Wilson, 1 Pick. 485. **Mich.**—Gorham v. Wing, 10 Mich. 486. **N. Y.**—Snyder v. Warren, 2 Cow. 518. **Tenn.**—Jones v. Planters Bank, 5 Humph. 619, 42 Am. Dec. 471.

92. **Cal.**—Gross v. Fowler, 21 Cal. 392. **Conn.**—Strong v. Birchard, 5 Conn. 357. **N. Y.**—Snyder v. Warren, 2 Cow. 518, 14 Am. Dec. 519. **Va.**—Brewer v. Harris, 5 Gratt. (46 Va.) 285.

93. Backer v. Pyne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231; Porter v. Pierce, 120 N. Y. 217, 24 N. E. 281, 7 L. R. A. 847, affirming 43 Hun 11.

94. Teucher v. Hiatt, 23 Iowa 527, 92 Am. Dec. 440; *Ex parte* Bank of Monroe, 7 Hill (N. Y.) 177, 42 Am. Dec. 61; People v. Perrin, 1 How. Pr. (N. Y.) 75.

95. Tharp v. Kerr, 141 Iowa 26, 119 N. W. 267; Ettenheimer v. Northgraves, 75 Iowa 28, 39 N. W. 120.

[a] The fact that a creditor has been delayed in reducing his claim to judgment until after the expiration of the redemption period does not entitle him to equitable relief, though the delay was due to a succession of holidays declared by the governor. Summers v. Hammell, 17 Cal. App. 493, 120 Pac. 63.

[b] Physical or mental debility is not sufficient ground for extending the statutory period. Wallace v. Monroe, 22 Ill. App. 602.

[c] Misinformation by clerk as to time left for redemption is not ground for extending time where there is no fraud. Casey v. Gregory, 13 B. Mon. (Ky.) 505, 56 Am. Dec. 581.

96. **U. S.**—Burgess v. Graffam, 10 Fed. 216. **Ill.**—Henderson v. Harness,

184 Ill. 520, 56 N. E. 786. **N. H.**—Carroll v. McCullough, 63 N. H. 95.

[a] "It is well settled, however, that courts of equity may, upon a proper showing of fraud, mistake or other circumstances appealing to the discretion of the chancellor, relieve judgment debtors whose property has been sold on execution from a failure to redeem within the statutory period. In such cases equity 'in its discretion will grant relief on a proper bill, and allow the judgment debtor to redeem after the expiration of the redemption period.' " Bunting v. Haskell, 152 Cal. 426, 93 Pac. 110.

[b] Mere inadequacy of price is not ground for interference by a court of equity with the statute limiting the time of redemption from an execution sale, but relief may be granted against a sheriff's deed in such cause because of mistake in preventing redemption within the statutory time. Tharp v. Kerr, 141 Iowa 26, 119 N. W. 267.

[c] **Accounting Necessary.**—Where the amount required to redeem can only be ascertained by an accounting, and the debtor seeks the information on the last day of the time for redemption, such time will be extended until an accounting may be had. Halsted v. Tyng, 18 N. J. Eq. 375.

97. **Ill.**—Palmer v. Douglas, 107 Ill. 204; Lucas v. Nichols, 66 Ill. 41; Kaufman v. Smallwood, 36 Ill. 504, 87 Am. Dec. 230; Honnihan v. Friedman, 13 Ill. App. 226. **Ind.**—Turpie v. Lowe, 153 Ind. 314, 62 N. E. 484, 92 Am. St. Rep. 310; Butt v. Butt, 91 Ind. 305. **Ia.**—Campbell v. Jones, 40 Iowa 691. **Ky.**—Griffin v. Coffey, 9 B. Mon. 452, 50 Am. Dec. 519. **Me.**—Mayo v. Hamlin, 73 Me. 182. **N. J.**—Marlatt v. Warwick, 18 N. J. Eq. 108; Combs v. Little, 4 N. J. Eq. 310, 40 Am. Dec.

duct on the part of the sheriff may operate to extend the period.<sup>98</sup> If after appeal the redemption time has expired, and the case has been remanded and the sale confirmed, the trial court may, in some jurisdictions, allow an additional time for redemption.<sup>99</sup> In some states, under certain circumstances the court has power to shorten the term.<sup>1</sup>

(IV.) **By Whom Made.**—(A.) **EXECUTION DEBTOR.**—The debtor may redeem;<sup>2</sup> though he may have conveyed the property,<sup>3</sup> or may not have had title to the property.<sup>4</sup>

(B.) **SUCCESSOR OF EXECUTION DEBTOR.**—The debtor's grantee or vendee is entitled to the right of redemption possessed by the debtor,<sup>5</sup> though the conveyance by the debtor may be voidable as against creditors.<sup>6</sup> So, too, the heirs or devisees of a deceased debtor may redeem.<sup>7</sup>

(C.) **EXECUTION CREDITOR.**—Generally the execution creditor cannot redeem.<sup>8</sup>

207. **N. Y.**—*Miller v. Lewis*, 4 N. Y. 554. **N. C.**—*Turner v. King*, 37 N. C. 132. **Tenn.**—*Lock v. Edmundson*, 1 Baxt. 282.

[a] Party may be estopped to object to an extension. *Hammersham v. Fairall*, 44 Iowa 462; *Holcomb v. Hays*, 23 Ky. L. Rep. 352, 62 S. W. 1028.

98. *Briscoe v. York*, 53 Ill. 484.

99. *Quinton v. Adams*, 87 Kan. 112, 123 Pac. 740.

1. *Rosenfield v. Cunningham*, 85 Kan. 835, 118 Pac. 878.

2. **Cal.**—*Southern California Lumb. Co. v. McDowell*, 105 Cal. 99, 38 Pac. 627; *Yoakum v. Bower*, 51 Cal. 539. **Colo.**—*Floyd v. Sellers*, 7 Colo. App. 491, 44 Pac. 371. **Ga.**—*Crawford v. Pritchard*, 81 Ga. 14, 6 S. E. 689. **Ill.**

*Merry v. Bostwick*, 13 Ill. 398, 54 Am. Dec. 434. **Ia.**—*Case v. Fry*, 91 Iowa 132, 59 N. W. 333; *Coriell v. Ham*, 4 G. Gr. 455, 61 Am. Dec. 134. **Mass.**

See *Da Silva v. Turner*, 166 Mass. 407, 44 N. E. 532. **Neb.**—*Pomeroy v. Bridge*, 1 Neb. 462. **N. Y.**—*Livingston v. Arnoux*, 56 N. Y. 507, *affirming* 15 Abb. Pr. (N. S.) 158. **N. C.**—*Wilcox's Heirs v. Morris*, 5 N. C. 116, 3 Am. Dec. 678. **Tenn.**—*Ewing v. Cook*, 85 Tenn. 332, 3 S. W. 507, 4 Am. St. Rep. 765.

[a] In Kentucky where the property sells for less than two-thirds of its value the debtor may redeem. *Lawrence v. Edelen*, 6 Bush 55; *Bondurant v. Owens*, 4 Bush 662; *Pollard's Heirs v. Lucas*, 7 Dana 454; *Blight's Heirs v. Tobin*, 7 Mon. 612, 18 Am. Dec. 219; *Hopkins v. Tarlton*, 4 Bibb 500.

[b] **Through an Agent.**—*Livingston v. Arnoux*, 56 N. Y. 507.

[c] **Redemption Under Two Sales at Same Time.**—Defendant's property was sold under execution, and about eleven months later it was sold under another execution issued upon a different judgment. Held that he was entitled to redeem from both sales by paying to the clerk, within a year from the date of the first one, the two amounts for which the property has been sold, with interest on each from the day of sale. *Harrison v. Wilmering*, 72 Iowa 727, 32 N. W. 279.

3. **Southern California Lumb. Co. v. McDowell, 105 Cal. 99, 38 Pac. 627; *Yoakum v. Bower*, 51 Cal. 539; *Livingston v. Arnoux*, 56 N. Y. 507, *affirming* 15 Abb. Pr. (N. S.) 158.**

4. **Southern California Lumb. Co. v. McDowell, 105 Cal. 99, 38 Pac. 627; *Floyd v. Sellers*, 7 Colo. App. 491, 44 Pac. 371.**

5. **Cal.**—*Southern California Lumb. Co. v. McDowell*, 105 Cal. 99, 38 Pac. 627. **Ia.**—*Thayer v. Coldren*, 57 Iowa 110, 10 N. W. 300; *Harvey v. Spaulding*, 16 Iowa 397, 85 Am. Dec. 526. **Mass.**—*Sewall v. Sewall*, 139 Mass. 157, 29 N. E. 648; *Tucker v. Buffum*, 16 Pick. 46. **Miss.**—*Watson v. Hannum*, 10 Smed. & M. 521. **N. H.**—*Russell v. Fabyan*, 34 N. H. 218. **N. Y.**—*Livingston v. Arnoux*, 56 N. Y. 507, *affirming* 15 Abb. Pr. (N. S.) 158. **Tenn.**—*Hepburn v. Kerr*, 9 Humph. 726, 51 Am. Dec. 685.

6. *Sewall v. Sewall*, 139 Mass. 157, 29 N. E. 648; *Russell v. Fabyan*, 34 N. H. 218.

7. *Smith v. Knoebel*, 82 Ill. 392.

8. **Ind.**—*Horn v. Indianapolis Nat.*

**Other Judgment Creditors.**—Generally a judgment creditor of the debtor may redeem the property sold from the purchaser within the statutory period.<sup>9</sup> An assignee of a judgment is a judgment creditor in contemplation of law and entitled to redeem.<sup>10</sup> A judgment creditor, by reason of a confessed judgment, on a bona fide debt may redeem from the sale.<sup>11</sup> The judgment, according to some authorities, must be a lien on the property sold to entitle the creditor to redeem,<sup>12</sup>

Bank, 125 Ind. 381, 25 N. E. 558; *Hervey v. Krost*, 116 Ind. 268, 19 N. E. 125. **Ia.**—*Hayden v. Smith*, 58 Iowa 285, 12 N. W. 289; *Clayton v. Ellis*, 50 Iowa 590. **N. Y.**—*Ex parte Padlock*, 4 Hill 544; *People v. Easton*, 2 Wend. 297.

*Contra*, *Posey v. Pressley*, 60 Ala. 243; *Freeman v. Jordan*, 17 Ala. 500.

[a] "In no case does the statute contemplate or provide for a redemption by the judgment creditor upon whose judgment the sale was made. On the contrary, it excludes the idea that at every point that one causing the sale to be made may redeem. We see no reason why such right should be given by construction, even if the court held the power or authority to give it." *Hervey v. Krost*, 116 Ind. 268, 19 N. E. 125.

**9. Ala.**—*Pollard v. Taylor*, 13 Ala. 604. **Ill.**—*Schuck v. Gerlach*, 101 Ill. 338; *McLagan v. Brown*, 11 Ill. 519. **Ind.**—*Jarrell v. Brubaker*, 150 Ind. 260, 49 N. E. 1050; *Hervey v. Krost*, 116 Ind. 268, 19 N. E. 125. **Ia.**—*Citizens' Sav. Bank v. Percival*, 62 Iowa 183, 16 N. W. 76. **Tenn.**—*McClellan v. Harris*, 14 Lea 510.

[a] Only judgment creditors are included in the terms of a statute permitting "creditors" to redeem. *Thomason v. Scales*, 12 Ala. 309; *Woods v. McGavock*, 10 Yerg. (Tenn.) 133.

[b] **Discharge in Bankruptcy.**—The right of judgment creditors to redeem is not affected by the discharge in bankruptcy of judgment debtor. *Pease v. Ritchie*, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566.

[c] A judgment creditor purchasing the land within the twelve months, takes his grantor's right of redemption, but loses his right to redeem as a creditor. *Martin v. Judd*, 60 Ill. 78.

[d] Only creditors in courts of record can exercise the right to redeem as judgment creditors. *Thornley v. Moore*, 106 Ill. 496.

[e] A judgment creditor need not bring an action to cancel a mortgage, though fraudulent as to creditors, before redeeming from an execution sale. *Kingman Plow Co. v. Knowlton*, 143 Iowa 25, 119 N. W. 754.

[f] Creditor who obtains judgment after death of debtor by allowance of claim in probate court, may redeem. *Wilson v. Schneider*, 124 Ill. 628, 17 N. E. 8.

[g] **Death of debtor after judgment is obtained** but before redemption, does not necessitate revival of judgment against heirs before holder of such judgment may redeem. *Bledsoe v. McCorry*, 9 Baxt. (Tenn.) 320.

Effect of death of party on right to enter judgment, see 14 STANDARD PROC. 782, 1025.

[h] **Statutes (1) Apply to Persons Becoming Creditors After Sale.**—*Falbe v. Caves*, 151 Wis. 54, 138 N. W. 87. See *Summers v. Hammell*, 17 Cal. App. 493, 120 Pac. 63. (2) *Contra.*—A creditor whose claim was not put in judgment until after the sale, at which time defendant's rights to the property were divested, and when no interest was left upon which the judgment could attach as a lien, would not be entitled to redeem. *Brown v. Markley*, 58 Iowa 689, 12 N. W. 721.

**10.** *Sweezey v. Chandler*, 11 Ill. 445; *Van Rensselaer v. Sheriff*, 1 Cow. (N. Y.) 443; *Ex parte Raymond*, 1 Denio (N. Y.) 272. *Contra*, *Chambers v. Polak*, 143 Ala. 438, 39 So. 316. But see *Sloss v. Steiner Bros.*, 146 Ala. 692, 40 So. 511, indicating that an action by assignor to redeem to which the assignee is a party, is for the sole benefit of the latter.

**11.** *Martin v. Judd*, 60 Ill. 78; *Karnes v. Lloyd*, 52 Ill. 113; *Phillips v. Demoss*, 14 Ill. 410; *Snyder v. Warren*, 2 Cow. (N. Y.) 518, 14 Am. Dec. 519.

**12.** *Brown v. Markley*, 58 Iowa 689, 12 N. W. 721; *Hurd v. Magee*, 3 Cow. (N. Y.) 135; *Marsh v. Wendover*, 3

though the right of a judgment creditor to redeem lands is not affected by reason of such judgment being a lien also on other lands of the judgment debtor,<sup>13</sup> or, it has been held, because he holds security for the debt.<sup>14</sup> A judgment creditor may redeem, though in fact he is redeeming from himself.<sup>15</sup> A judgment debtor will not be heard to object to a redemption as made by a judgment creditor. Whether the latter or the purchaser takes title, is a question between them alone.<sup>16</sup>

**Successive Redemptions.**—If property be redeemed by one judgment creditor, another judgment creditor may redeem from the redeeming creditor.<sup>17</sup>

(D.) **MORTGAGEE.**—In many jurisdictions a mortgagee whose mortgage has been duly recorded may redeem,<sup>18</sup> but the mortgagee under an

Cow. (N. Y.) 69; *People v. Easton*, 2 Wend. (N. Y.) 297; *Ex parte Wood*, 4 Hill (N. Y.) 542.

[a] *Contra.*—May redeem though judgment has ceased to be a lien on the property. *Pease v. Ritchie*, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566.

13. *Pease v. Ritchie*, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566; *Warford v. Sullivan*, 147 Ind. 14, 46 N. E. 27.

14. *Muir v. Leitch*, 7 Barb. (N. Y.) 341.

15. *Citizens' Sav. Bank v. Percival*, 61 Iowa 183, 16 N. W. 76.

[a] **Redeeming From Himself.**—Where a junior judgment creditor purchases property on which his judgment is a lien, at an execution sale for the satisfaction of a senior judgment, he may, like any other judgment creditor, redeem the property from such sale, though he thereby redeems from himself. *Citizens' Sav. Bank v. Percival*, 61 Iowa 183, 16 N. W. 76.

[b] **The purchaser at an execution sale cannot tack thereto subsequent liens held by him**, so as to compel the holder of a lien subsequent to his to pay them in redeeming from the execution sale, unless such purchaser puts himself in the line of redemptioners, by filing notice of intention to redeem from his own sale under his subsequent liens, and files at the proper time affidavits of the amount due on his subsequent liens. But in such case it is not necessary for such purchaser to pay himself the amount necessary to redeem from himself, or issue to himself any certificate of redemption, and he need not redeem from himself, through the sheriff. *Ritchie v. Ege*, 58 Minn. 291, 59 N. W. 1020; *Parke v. Hush*, 29 Minn. 434, 13 N. W. 668.

16. *West v. Krebaum*, 88 Ill. 263.

[a] **The fact that a judgment creditor has redeemed land before the year allowed to the debtor to redeem has expired, cannot be insisted upon as an irregularity by the debtor, nor by his grantee claiming under a prior unrecorded deed, when neither has sought to redeem within one year.** If such premature redemption be an irregularity, either the purchaser under the prior sale, or any other person seeking to redeem, may question it, but persons not injured thereby cannot complain. *Massey v. Westcott*, 40 Ill. 160. See also *Blair v. Chamblin*, 39 Ill. 521.

17. See the statutes and the following: *Ia.*—*Phelps v. Finn*, 45 Iowa 447. *N. Y.*—*Ex parte Peru Iron Co.*, 7 Cow. 540; *Ex parte Ives*, 1 Hill 639; *People v. Fleming*, 4 Denio 137; *Morss v. Purvis*, 5 Thomp. & C. 140, *affirmed*, 68 N. Y. 225. *Wis.*—*Sexton v. Rhames*, 13 Wis. 99.

[a] **Age of judgments gives no priority** in the right of redemption. A third judgment creditor may intercept a second in redeeming land from the execution sale of the first, and then the second can redeem only from the third. *Hare v. Hall*, 41 Ark. 372.

18. *Conn.*—*Lord v. Sill*, 23 Conn. 319, even though mortgage was fraudulent as to creditors. *Ind.*—*Hervey v. Krost*, 116 Ind. 268, 19 N. E. 125. *Ia.* *Crossen v. White*, 19 Iowa 109, 87 Am. Dec. 420. But see *Lysinger v. Haver*, 87 Iowa 335, 54 N. W. 145. *Mass.* *Bigelow v. Willson*, 1 Pick. 485. *N. Y.* *People v. Beebe*, 1 Barb. 379, but mortgage must be a lien on whole of premises sold. See also *Van Rensselaer v. Sheriff*, 1 Cow. 501 (that under

unrecorded mortgage, void as against a judgment creditor without notice, cannot redeem from a sale where the judgment creditor was purchaser.<sup>18</sup>

**(V.) Redemption in Parcels or in Toto.**—Persons entitled to redeem may redeem the whole or any part of the premises in like distinct parcels or quantities in which the same are sold;<sup>20</sup> thus where several parcels have been sold en masse they must be redeemed en masse and not in separate parcels,<sup>21</sup> even though the value of one is separately stated in the certificate of the appraisers.<sup>22</sup> When the interests of several tenants in common have been sold on execution, the undivided portion of any or either of them may be redeemed separately.<sup>23</sup>

**(VI.) Production of Papers.**—Generally a redemptioner must produce to the officer or person from whom he seeks to redeem a copy of the docket to the judgment under which he claims the right to redeem, certified by the clerk of the court, of the county where the judgment is docketed,<sup>24</sup> though the circumstances may be such as to dispense with this requirement,<sup>25</sup> or, where one redeems upon a mortgage or other

Act April 12, 1820, mortgagee cannot redeem); and *Hodge v. Gallup*, 3 Denio (N. Y.) 527, that assignee of a mortgage by one who purchased from execution defendant cannot redeem.

19. *Condit v. Wilson*, 36 N. J. Eq. 370.

20. See the statutes and the following: *Oldfield v. Eulert*, 148 Ill. 614, 36 N. E. 615; *Dickenson v. Gilliland*, 1 Cow. (N. Y.) 481.

[a] Any one of a number of lots, sold at one time and separately, to the same purchaser, may be redeemed. *Robertson v. Dennis*, 20 Ill. 313.

21. Ill.—*Oldfield v. Eulert*, 148 Ill. 614, 36 N. E. 615. Me.—*Foss v. Stickney*, 5 Me. 390. N. J.—*Combs v. Little*, 4 N. J. Eq. 310.

[a] **Redemption Cannot Be Effected by Piecemeal.**—(1) It must be of the entire tract sold regardless of the number of the sub-purchasers of the parts thereof (*Francis v. White*, 160 Ala. 523, 49 So. 334), (2) unless purchaser consent. *Francis v. White*, 166 Ala. 409, 52 So. 349.

[b] **Waiver.**—If after the execution sale the defendant in execution joins with the purchaser at the sale in the conveyance of a part of the property to a third person, such conveyance will be deemed a waiver of the right to redeem the part conveyed and also as a waiver on the part of the purchaser to deal with the redemptioner in toto

only. *Francis v. White*, 166 Ala. 409, 52 So. 349.

22. *Oldfield v. Eulert*, 148 Ill. 614, 36 N. E. 615.

23. See the statutes and *Schuck v. Gerlach*, 101 Ill. 338.

[a] **Where the parties hold as tenants by entireties** the land must be redeemed as a whole or not at all. *Sharpe v. Baker*, 51 Ind. App. 547, 96 N. E. 627, 99 N. E. 44.

24. See the statutes and the following: *Haskell v. Manlove*, 14 Cal. 54; *Waller v. Harris*, 20 Wend. (N. Y.) 555; *Woolsey v. Saunders*, 3 Barb. (N. Y.) 301.

[a] **To the Person to Whom the Redemption Money Is Paid.**—*People v. Ransom*, 2 N. Y. 490.

[b] **Omission of signature of clerk** to certified copy of docket renders it insufficient. *Brackett v. Miller*, 24 Hun (N. Y.) 560.

25. See cases following.

[a] **Where the money is paid to the clerk**, and the original records, files and papers are called to his attention and he has knowledge thereof. *Hunter v. Mauseau*, 91 Minn. 124, 97 N. W. 651.

[b] **Where sheriff's certificate of sale is produced** properly executed, not necessary to produce copies of judgment docket thereof and execution, where the same are recited in such certificate. *Ritchie v. Ege*, 58 Minn. 291, 59 N. W. 1020.

lien, a note of the record thereof, certified by the clerk or recorder,<sup>26</sup> together with an affidavit by himself or his agent, showing the amount then actually due on the lien,<sup>27</sup> and in the case of an assignee, a copy of the assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto.<sup>28</sup> The production of these papers may be waived,<sup>29</sup> and a mere tender of the papers is all that is required.<sup>30</sup> Where the purchase is made by parties for their joint benefit, a presentation of the requisite papers and tender of the requisite money to one, is sufficient, being equivalent to a tender to both.<sup>31</sup>

(VII.) **Tender and Payment.**—(A.) **SUFFICIENCY OF.**—Payment to the proper party of a sum less than the amount paid by the holder of the sheriff's certificate, with interest and costs, will not be effectual as a redemption.<sup>32</sup> The debtor on redeeming must pay the purchase price plus a statutory percentage,<sup>33</sup> but need not pay other liens held by the party from whom redemption is made,<sup>34</sup> nor a prior judgment held by a partnership of which the purchaser is a member.<sup>35</sup> It has been held that the purchaser is entitled, on redemption of lands pursuant to an agreement made at the time of the sale, to a fair allowance for his time, trouble, and expenses, in addition to the price agreed on,<sup>36</sup> and

26. See the statutes.

[a] No such note or affidavit is required where the person seeking to redeem holds the legal title under a deed which it is alleged was intended as a mortgage but under which no money has been paid. *Schumacher v. Langford*, 20 Cal. App. 61, 127 Pac. 1057.

27. See the statutes and the following: *Howard v. Kelly*, 137 Iowa 76, 114 N. W. 544, 126 Am. St. Rep. 274; *Hall v. Thomas*, 27 Barb. (N. Y.) 55; *Ex parte Newell*, 4 Hill (N. Y.) 608.

[a] If affidavit be made by an agent, it should show that he has the means of knowledge, and state the amount positively, not according to his belief merely. *Ex parte Bank of Monroe*, 7 Hill (N. Y.) 177, 42 Am. Dec. 61.

28. See the statutes and the following: *Williams v. Lash*, 8 Minn. 496; *Ex parte Newell*, 4 Hill (N. Y.) 608.

[a] A clerical mistake in the name of a party will not invalidate the assignment so as to affect the right of redemption. *Aylesworth v. Brown*, 10 Barb. (N. Y.) 167.

29. Cal.—*Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256. N. Y.—*Wood v. Morehouse*, 45 N. Y. 368; *Phillips v. Shiffer*, 14 Abb. Pr. (N. S.) 101; *Bank of Vergennes v. Warren*, 7 Hill

91. Wis.—*Sexton v. Rhames*, 13 Wis. 99.

30. *Prescott v. Everts*, 4 Wis. 314.

31. *Prescott v. Everts*, 4 Wis. 314.

32. Colo.—*Brown v. Bell*, 46 Colo. 163, 103 Pac. 380. Ia.—*Boggs v. Douglass*, 89 Iowa 150, 56 N. W. 412. N. Y. *Barker v. Gates*, 1 How. Pr. 77; *Silliman v. Wing*, 7 Hill 159; *Ex parte Ives*, 1 Hill 639.

[a] A mistake of thirty cents disregarded. *Hall v. Fisher*, 9 Barb. (N. Y.) 17.

33. See the statutes of the several states and the following: Cal.—*McMillan v. Vischer*, 14 Cal. 232. Ill.—*Seofield v. Bessenden*, 15 Ill. 78. N. H. *Rogers v. McDearmid*, 7 N. H. 506. N. Y.—*Van Rensselaer v. Sheriff*, 1 Cow. 443.

34. *Warren v. Fish*, 7 Minn. 432.

[a] Except where the statute permits the purchaser to increase his bid by the amount of his other claim or any part thereof and compels the debtor to pay this increase or leave the property in the hands of the purchaser. *Cooley v. Weeks*, 10 Yerg. (Tenn.) 141.

35. *Campbell v. Oaks*, 68 Cal. 222, 9 Pac. 77.

36. *Combs v. Little*, 4 N. J. Eq. 310, 40 Am. Dec. 207.

other lawful charges have been required to be paid in addition to the debt.<sup>37</sup>

Where a judgment creditor is the redemptioner, he must pay the amount of the liens of the owner of the certificate which are paramount to the lien under which he is seeking to redeem,<sup>38</sup> but need not pay off any liens inferior to his,<sup>39</sup> unless the property was sold at one time to satisfy several judgments, in which case the whole sum paid by the purchaser even though it was used to satisfy liens inferior to the redemptioner's must be paid the purchaser.<sup>40</sup> To constitute a good tender the money must not be withdrawn.<sup>41</sup> Where the purchaser denies the right of redemption no tender need be made.<sup>42</sup>

(B.) TO WHOM REDEMPTION MONEY TO BE PAID.—The statutes have variously provided that the party redeeming should pay the redemption money to the clerk,<sup>43</sup> to the purchaser, his representative,<sup>44</sup> or the sheriff.<sup>45</sup> A payment to a person unauthorized to receive it cannot be

37. *Richardson v. Dunn*, 79 Ala. 167.

[a] The "lawful charges" which judgment debtor, seeking to redeem, is required to pay or tender includes only claims and demands which are in the nature of a lien or incumbrance on the land; and neither insurance on the buildings paid by the purchaser, nor a judgment rendered by a justice of the peace, unless an execution thereon has been levied on the land, is embraced in such lawful charges. *Richardson v. Dunn*, 79 Ala. 167.

[b] When permanent valuable improvements have been erected on the land, by the purchaser at the execution sale, or other person holding possession under him, the creditor proposing to redeem must pay, or offer to pay, their value as a part of the "lawful charges," but if he makes a general offer to redeem, and his right to redeem is denied, he is excused from making any particular inquiry as to a claim for improvements. *Posey v. Pressley*, 60 Ala. 243.

38. Cal.—*Van Dyke v. Herman*, 3 Cal. 295. Ia.—*Wilson v. Conklin*, 22 Iowa 452. Mass.—*Loring v. Cooke*, 3 Pick. 48. Mich.—*People v. Fraick*, 12 Mich. 234. Minn.—See *Ritchie v. Ege*, 58 Minn. 291, 59 N. W. 1020.

39. *Jackson ex dem. Knapp v. Budd*, 7 Cow. (N. Y.) 658.

40. *Silliman v. Wing*, 7 Hill (N. Y.) 159; *Barker v. Gates*, 1 How. Pr. (N. Y.) 77.

41. *Wilkins v. Wilson*, 51 Cal. 212.

[a] Notice to Sheriff To Withhold Part of Deposit.—But the effect of payment to the sheriff of the amount

of the purchaser's bid, with interest, is not impaired by giving immediate notice to the sheriff not to pay over a portion of the money. *Spraker v. Cook*, 16 N. Y. 567.

42. *Rogers v. Tindall*, 99 Tenn. 356, 42 S. W. 86.

43. See the statutes and the following: *Howard v. Kelly*, 137 Iowa 76, 114 N. W. 544; *Webb v. Watson*, 18 Iowa 537.

[a] Payment to the county clerk who has no special authority to receive payment is insufficient although such clerk and the sheriff occupy the same office and the clerk is requested to deliver the money and papers to the sheriff. *People v. Rathbun*, 15 N. Y. 528, affirming *Griffin v. Chase*, 23 Barb. (N. Y.) 278.

44. *Hunter v. Mauseau*, 91 Minn. 124, 97 N. W. 651; *Ex parte Board*, 4 Cow. (N. Y.) 420.

[a] A subsequent redeeming creditor must make payment to the officer or the last redeeming creditor. A tender to the original purchaser is insufficient. *People v. Baker*, 20 Wend. (N. Y.) 602.

45. *Robertson v. Dennis*, 20 Ill. 313; *People ex rel. McAllister v. Lynch*, 68 N. Y. 473; *Livingston v. Arnoux*, 56 N. Y. 507.

[a] To Deputy who made the sale (1) where both the sheriff and the deputy are present in the office at the time. *People ex rel. McAllister v. Lynch*, 68 N. Y. 473. Payment (2) may be made to deputy although the term of office of his principal has terminated. *People ex rel. McAllister*

ratified by the sheriff so as to make it effective.<sup>46</sup> Where the person to whom redemption money should be paid is out of the state, the money should be paid into the court.<sup>47</sup>

(C.) MEDIUM OF PAYMENT. — The redemption payment should be made in money but the equivalent is frequently permitted.<sup>48</sup>

(VIII.) Actions To Redeem. — (A.) GENERAL STATEMENT. — In some states unlawful detainer may be brought where the tender to redeem is refused;<sup>49</sup> but generally, where a party entitled to redeem has fulfilled the statutory requirements, a bill in equity is the remedy to enforce redemption.<sup>50</sup>

(B.) CONDITIONS PRECEDENT. — Possession by the plaintiff of the lands sought to be redeemed is not necessary to the maintenance of a bill to secure redemption.<sup>51</sup> But until there has been a full performance by the plaintiff of all statutory requirements, or a valid and sufficient excuse for non-performance, redemption cannot be enforced by a bill in equity.<sup>52</sup> In some jurisdictions the redemption money must be paid

*v. Lynch*, 68 N. Y. 473; *People v. Baker*, 20 Wend. (N. Y.) 602.

[b] To one named by officer sufficient. *Roan v. Rohrer*, 72 Ill. 582.

46. *Little v. People*, 43 Ill. 188.

47. *Francis v. White*, 142 Ala. 590, 39 So. 174.

48. *Webb v. Watson*, 18 Iowa 537.

[a] Treasury notes made a legal tender by act of congress, sufficient. *People v. Mayhew*, 26 Cal. 655.

[b] The sheriff is the special agent of the purchaser of land, authorized to receive the redemption-money for him, and as such, may receive in redemption what is regarded as current money at the time and place, though not strictly a legal tender, unless the judgment under which the sale was made was rendered payable in a particular kind of money. *People v. Mayhew*, 26 Cal. 655.

[c] When Received by Clerk. — The clerk is authorized to receive money paid into court for the purpose of redemption, and is responsible for the same on his bond; and, if instead of receiving money for such purpose, he receives checks, notes or drafts, as money, and receipts for them as such, he must account for them as money; and, in such case, the redemption is as valid and complete as if money had been tendered and accepted for such purpose. *Bown v. Van Gundy*, 133 Ind. 670, 33 N. E. 687. See also *Jessup v. Carey*, 61 Ind. 584; *Webb v. Watson*, 18 Iowa 537.

[d] Check insufficient unless cashed

before the expiration of period for redemption. *People v. Baker*, 20 Wend. (N. Y.) 602. But compare cases *supra*, this note.

[e] Securities are sufficient if purchaser agrees to receive them. *Stone v. Smith*, 2 How. Pr. (N. Y.) 117.

[f] Current foreign coin accepted. *Ex parte Becker*, 4 Hill (N. Y.) 613.

[g] Bank notes permitted. *Ex parte Board*, 4 Cow. (N. Y.) 420; *Hall v. Fisher*, 1 Barb. Ch. (N. Y.) 53.

49. *Posey v. Pressley*, 60 Ala. 243; *Jonsen v. Nabring*, 50 Ala. 392.

50. U. S. — See *Evans v. Pike*, 118 U. S. 241, 6 Sup. Ct. 1090, 30 L. ed. 234, Louisiana. Ala. — *Vick v. Beverly*, 112 Ala. 458, 21 So. 325; *Aycock v. Adler*, 87 Ala. 190, 5 So. 794; *Walker, Mead & Co. v. Ball*, 39 Ala. 298; *Moore v. Gore*, 35 Ala. 701. Me. — *Morrill v. Everett*, 83 Me. 290, 22 Atl. 172. Tenn. *Ewing v. Cook*, 85 Tenn. 332, 3 S. W. 507, 4 Am. St. Rep. 765; *Mitchell v. Broun*, 6 Coldw. 505; *Paris v. Burger*, 4 Humph. 325; *Hawkins v. Jamison*, Mart. & Yerg. 83.

[a] Notwithstanding the statute gives him a summary remedy to recover the possession after he has acquired the legal title, a judgment creditor, having perfected his equitable right of redemption, may come into equity, to compel a conveyance by the purchaser. *Moore v. Gore*, 35 Ala. 701.

51. *Morrill v. Everett*, 83 Me. 290, 22 Atl. 172.

52. Ala. — *Spoor v. Phillips*, 27 Ala.

into court when the suit is commenced,<sup>53</sup> while in others, if the debtor has tendered the money within the redemption period which was refused, on action being brought to secure possession it is sufficient that the money be produced and lodged in court at any time before the rendition of judgment.<sup>54</sup>

(C.) PARTIES.—The purchaser is not a necessary party to an action by his redemptioner to determine the invalidity of a subsequent attempted redemption by another creditor.<sup>55</sup> But where the purchaser would have been a necessary party, if he be dead, his heirs must be made parties.<sup>56</sup> Where the right of a judgment creditor of the execution debtor to redeem does not pass to an assignee, the latter is nevertheless a necessary party to an action by his assignor to enforce redemption.<sup>57</sup>

(D.) PLEADINGS.—Full compliance with all conditions precedent should appear on the face of the bill.<sup>58</sup> It has been held that the exact amount of the tender of principal and interest need not be alleged.<sup>59</sup> A denial in the answer, of plaintiff's right to redeem, dispenses with the necessity of alleging compliance with conditions precedent.<sup>60</sup>

(E.) DEFENSES.—The purchaser, or those claiming under him, cannot interpose, on a bill to redeem, a title derived after the sale from another source.<sup>61</sup>

(F.) DECREE AND RELIEF.—(1.) *Generally*.—The decree on a bill in equity to redeem should specify a time certain within which redemption must be made.<sup>62</sup> Where a court of equity has acquired jurisdiction on a bill to redeem from an execution sale, as allowed by statute, it will determine the rights of the parties in the property, and enforce them by partition if necessary.<sup>63</sup>

(2.) *Accounting for Rents and Profits*.—Where the purchaser is entitled to possession of the premises and to the rents and profits thereof he must account to the redemptioner for what he has received,<sup>64</sup> though

193. **Cal.**—Wileoxson v. Miller, 49 Cal. 193. **Ill.**—Stone v. Gardner, 20 Ill. 304, 71 Am. Dec. 268. **Ind.**—Eiceman v. Finch, 79 Ind. 511.

53. Spoor v. Phillips, 27 Ala. 193; Stone v. Gardner, 20 Ill. 304, 71 Am. Dec. 268.

54. **Me.**—Foss v. Stickney, 5 Greenl. 390. **Minn.**—Ritchie v. Ege, 58 Minn. 291, 59 N. W. 1020. **Miss.**—See Watson v. Hannum, 10 Smed. & M. 521. **Tenn.**—Simmons v. Marable, 11 Humph. 436.

55. Bennet v. Wilson, 122 Cal. 509, 55 Pac. 390, 68 Am. St. Rep. 61.

56. Bondurant v. Sibley's Heirs, 37 Ala. 565.

57. Sloss v. Steiner Bros., 146 Ala. 692, 40 So. 511.

58. Farley v. Nagle, 119 Ala. 622, 24 So. 567; Richardson v. Dunn, 79 Ala. 167; Stocks v. Young, 67 Ala. 341;

Spoor v. Phillips, 27 Ala. 193; Paulling v. Meade, 23 Ala. 505; Dunn v. Dewey, 75 Minn. 153, 77 N. W. 793.

Conditions precedent, see II, B, 7, n, (VIII), (B).

59. Prescott v. Everts, 4 Wis. 314.

60. Richardson v. Dunn, 79 Ala. 167;

Ritchie v. Ege, 58 Minn. 291, 59 N. W. 1020.

61. Aycock v. Adler, 87 Ala. 190, 5 So. 794; Posey v. Pressley, 60 Ala. 243.

62. Waller v. Harris, 7 Paige (N. Y.) 167.

63. Vick v. Beverly, 112 Ala. 458, 21 So. 325.

64. **U. S.**—Balfour v. Rogers, 64 Fed. 925. **Ky.**—Adams v. Kable, 6 B. Mon. 384, 44 Am. Dec. 772. **Mass.**—Tucker

v. Buffum, 16 Pick. 46. **N. H.**—See

Mason v. Davis, 11 N. H. 383. **Ore.**—See Cartwright v. Savage, 5 Ore. 397.

in some states the purchaser cannot be required to account for the rents and profits until the redemptioner pays into court or otherwise properly tenders the money necessary to redeem.<sup>65</sup>

(G.) Costs. — Where the complainant failed to make tender before bringing suit and defendant's claim is groundless, neither party is entitled to costs.<sup>66</sup>

**8. Return of Writ.** — a. *Definition and Nature.* — The return of an execution is the statement by the officer, certified to the court under the sanction of his official oath and responsibility, of what he has done touching the execution of the writ according to its commands and the requirements of the law.<sup>67</sup> It consists of two things: first, taking the paper back to the office from which it issued;<sup>68</sup> second, showing by indorsement and signature what has been done under it.<sup>69</sup>

b. *Necessity for.* — A proper return should always be made,<sup>70</sup> and an officer is liable to the plaintiff for his failure to do so.<sup>71</sup> But, gen-

Tenn.—Cooley v. Weeks, 10 Yerg. 141; Mabry v. Churchwell, 6 Heisk. 417.

65. Spoor v. Phillips, 27 Ala. 193; Dakin v. Goddard, 32 Me. 138.

66. Sewall v. Sewall, 130 Mass. 201. Costs generally, see the title "Costs."

67. Hutton v. Campbell, 10 Lea (Tenn.) 170; Union Bank v. Barnes, 10 Humph. (Tenn.) 244; Harman v. Childress, 3 Yerg. (Tenn.) 327.

[a] "A return on a writ or process is the short official statement of the officer endorsed thereon of what he has done in obedience to the mandate of the writ, or why he has done nothing. He may have been prevented from obeying the mandate of the writ by an injunction, or by a *supersedeas*, or by the order of the plaintiff or his attorney directing him to hold it up, or to return it to the clerk's office without levying it. A return of any of these facts, endorsed upon the writ, is a sufficient return." Rowe's Admr. v. Hardy's Admr., 97 Va. 674, 34 S. E. 625, Riley, J.

68. Ill.—Nelson v. Cook, 19 Ill. 440. Mass.—Chesebro v. Barme, 163 Mass. 79, 39 N. E. 1033. Miss.—Beall v. Shattuck, 53 Miss. 358. Mo.—State v. Melton, 8 Mo. 417. Tenn.—Paine v. Hoskins, 3 Lea 284.

See *infra*, II, B, 8, e, (II).

69. Ill.—Nelson v. Cook, 19 Ill. 440. Mass.—Chesebro v. Barme, 163 Mass. 79, 39 N. E. 1033. Miss.—Beall v. Shattuck, 53 Miss. 358. Mo.—State v. Melton, 8 Mo. 417. Tenn.—Paine v. Hoskins, 3 Lea 284.

See *infra*, II, B, 8, f.

70. See the statutes, and Bryan v. Hubbs, 69 N. C. 423.

As to the necessity of making a return of an extent, see *infra*, II, B, 8, j, (I).

[a] **Writ Against Officer.**—Even if the officer accepts an execution against himself, he must make due return. Kinzer v. Helm, 7 Heisk. (Tenn.) 672; Cowan v. Sloan, 95 Tenn. 424, 32 S. W. 388.

[b] "The law makes it absolutely necessary that some return of an officer should be made to an execution, by which he may be charged, for until it is returned with a proper indorsement upon it, the plaintiff's hands are tied,—he is incapable of any other action toward the collection of his debt which the law affords. He cannot, in default of personal property, to be manifested by the return, file a transcript in the clerk's office of the circuit court, so as to bind the real estate of the defendant. He cannot issue an execution to another county—he cannot resort to garnishee process,—he cannot issue a capias against the body of the debtor; all of these advantages and privileges is the plaintiff in execution deprived, by the neglect or refusal of the constable to return the writ, with a proper indorsement thereon." County Court of Calhoun County v. Buck, 27 Ill. 440.

71. Ala.—Brown v. Baker, Sprouls & Co., 9 Port. 503. Ark.—Herr & Co. v. Atkinson, 40 Ark. 377. Ill.—People v. Johnson, 15 Ill. App. 153. Tenn.

erally, a return is not essential to the validity of the purchaser's title,<sup>72</sup> though in some states the opposite rule prevails.<sup>73</sup>

c. *By Whom Made.*—Generally the sheriff or constable in office at the time of the sale, or his successor, is the proper person to make the return,<sup>74</sup> but in those jurisdictions where an officer who has levied a writ, continues the proceedings under it although his term of office has ended, he rather than his successor should make the return.<sup>75</sup>

The return may be made by the officer's deputy,<sup>76</sup> in the name and under the authority of his principal.<sup>77</sup>

d. *Time for Making.*—(1.) **Generally.**—The time within which the

Chaffin & Bro. v. Stuart, 1 Baxt. 296; Bershears v. Warner, 5 Sneed 676.

As to action against officer for failure to make return or for false return, see the title "**Sheriffs, Constables and Marshals.**"

72. Cal.—Hunt v. Loucks, 38 Cal. 372, 99 Am. Dec. 404. Ill.—Holman v. Gill, 107 Ill. 467; Kinney v. Knoebel, 47 Ill. 417; Phillips v. Coffee, 17 Ill. 154, 63 Am. Dec. 357. Me.—Cutting v. Harrington, 104 Me. 96, 71 Atl. 374; True v. Emery, 67 Me. 28. Mich. Vroman v. Thompson, 51 Mich. 452, 16 N. W. 808. Minn.—Millis v. Lombard, 32 Minn. 259, 20 N. W. 187. Miss. Hamblen v. Hamblen, 33 Miss. 455, 69 Am. Dec. 358. Mo.—Bray v. Marshall, 75 Mo. 327; Buchanan v. Tracy, 45 Mo. 437. N. Y.—Jackson ex dem. Kane v. Sternbergh, 1 Johns. Cas. 153. Ohio. Lemert v. Clarke, 1 Ohio Cir. Dec. 318, 1 Ohio Cir. Ct. 569. Pa.—Gibson v. Winslow, 38 Pa. 49. R. I.—East Greenwich Inst. for Sav. v. Allen, 22 R. I. 337, 47 Atl. 885. S. C.—Ingram v. Belk, 2 Strobb. 207, 47 Am. Dec. 591. Va.—Baird v. Rice, 1 Call (5 Va.) 18.

[a] **The purchaser's title (1) depends on a "valid judgment, execution and levy, and a sheriff's deed appearing on its face to have been made by virtue of a sale under such judgment and execution."** Holman v. Gill, 107 Ill. 467. (2) When a sheriff levies upon real estate, and sells it for enough to pay the debt, receives the money, and makes the purchaser a deed, the judgment is extinguished, whether the sheriff make return to the execution or not, or although he make a false return. State v. Salyers, 19 Ind. 432.

73. Conn.—Gen. St., 1902, §923. Mass.—Firth v. Haskell, 148 Mass. 501, 20 N. E. 164; Hammatt v. Wyman, 9

Mass. 138. N. H.—Avery v. Bowman, 39 N. H. 393. Vt.—Russell v. Brooks, 27 Vt. 640.

74. Cal.—Joyce v. Joyce, 5 Cal. 449. Ga.—Duncan v. Webb, 7 Ga. 187. N. C. Lamier v. Stone, 8 N. C. 329.

[a] **It may be made by one who was competent when officer died.** Firth v. Haskell, 148 Mass. 501, 20 N. E. 164.

[b] **A return written by the court at the request of and in the presence of the officer is the officer's return.** Ellis v. Francis, 9 Ga. 325.

[c] **In Case of Death.**—A deputy sheriff having attached goods upon a writ, and sold them on the execution issued upon the judgment recovered in the suit, indorsing his doings thereon in his handwriting, but having deceased without affixing his signature thereto, it would seem that the sheriff might complete the return of his deputy, and that if so done, it would be valid. Lovett v. Pike, 41 Me. 340.

[d] **By Successor.**—If an officer fails to make a return, his successor should certify whatever he finds to have been done and add thereto a statement of his own acts. Mass. Rev. Laws, 1902, p. 1602; Richards v. Porter, 7 Johns. (N. Y.) 137.

75. State v. Parchmen, 3 Head (Tenn.) 609; Campbell v. Cobb, 2 Sneed (Tenn.) 18.

76. Miss.—Hand v. Grant, 5 Smed. & M. 508, 43 Am. Dec. 528. Pa.—Emley v. Drum, 36 Pa. 123; Beale v. Com., 7 Watts 183. Vt.—Eastman v. Curtis, 4 Vt. 616.

77. Joyce v. Joyce, 5 Cal. 449; Shirran v. Dallas, 21 Cal. App. 405, 132 Pac. 454, 462.

[a] **In His Own Name.**—A deputy may make a valid return in his own name. Towns v. Harris, 13 Tex. 507.

return should be made is regulated by statute,<sup>78</sup> but if the officer fails to make his return until after the day fixed for it, it is nevertheless a good return.<sup>79</sup> In some jurisdictions, however, the requirement of the statute is held to be mandatory.<sup>80</sup> In the computation of time, follow-

78. See generally the statutes, and the following: Fla.—*Mercer v. Hooker*, 5 Fla. 277. Mo.—*Butler v. Imhoff*, 238 Mo. 584, 591, 142 S. W. 287; *Huhn v. Lang*, 122 Mo. 600, 27 S. W. 345; *Blodgett v. Perry*, 97 Mo. 263, 10 S. W. 891. Neb.—*Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113.

[a] Time for return will be suspended as long as an injunction against the proceedings is in force. La. Code Prac., art. 700.

[b] Extending Time by Laws Changing Term.—The legislature has the power to change the term of courts, and to enact that all suits and process which had been made returnable to the term as fixed by the old law, shall be returnable to the term as fixed by the new law. *Carson v. Walker*, 16 Mo. 68.

As to return of an extent, see *infra*, II, B, 8, j, (II).

79. Mass.—*Welsh v. Joy*, 13 Pick. 477; *Prescott v. Pettee*, 3 Pick. 331. Miss.—*Garner v. Collins*, 1 Walk. 518. Okla.—*Price v. Citizens' State Bank*, 23 Okla. 723, 102 Pac. 800. Utah. Comp. Laws, 1907, §2253. Wis.—*Le Saulnier v. Kruger*, 85 Wis. 214, 54 N. W. 774.

[a] It is immaterial when the return is made, and when the officer makes a levy and sale under a fieri facias, the return may be made after the return day, in a case where the sale was made afterwards. *Remington v. Linthicum*, 14 Pet. (U. S.) 84, 10 L. ed. 364; *Aubert v. Buhler*, 3 Mart. N. S. (La.) 489.

[b] The validity of the return of an officer on a writ of fieri facias is not affected by the fact that the writ is not returned to the office till after the return day thereof. The record is incomplete till the writ is returned, but when returned, the return becomes competent evidence of the facts therein stated, and the parties are entitled to the benefit of their legal effect. *Rowe's Admr. v. Hardy's Admr.*, 97 Va. 674, 34 S. E. 625.

[c] Validity of sale not affected. See *Low v. Adams*, 6 Cal. 277; *Briant v. Hebert*, 30 (2d part) La. Ann. 1127.

But see *Billgery v. Ferguson*, 30 La. Ann. 84; *Rowe's Admr. v. Hardy's Admr.*, 97 Va. 674, 34 S. E. 625.

[d] The Fault May Be Cured.—If any fault be imputed to the officer by reason of the delay it is at best merely an irregularity which may be cured by an order of confirmation. *Price v. Citizens' State Bank*, 23 Okla. 723, 102 Pac. 800.

[e] Nunc Pro Tunc.—(1) When the officer cannot make his return on time, he may date it as of the day of the levy, since all proceedings thereafter have relation to that day. *Firth v. Haskell*, 148 Mass. 501, 20 N. E. 164; *Walsh v. Anderson*, 135 Mass. 65; *Heywood v. Hildreth*, 9 Mass. 393. (2) See also *Dysart v. Brandreth*, 118 N. C. 968, 23 S. E. 966, wherein the court, although vacating the return, says: "It is a matter of common knowledge that public officers, in the press of business, . . . do not make their returns at once, but do so as soon thereafter as it is convenient, and date them back to agree with the date of sale or transaction. And while it is best to make these returns at the time of the transaction, it is almost impossible always to do so."

[f] Return on Dormant Execution Void.—When the execution judgment becomes dormant the officer's authority under the writ ceases, and a return antedated is void. *Sprinz v. Frank*, 81 Ga. 162, 7 S. E. 177; *Groves v. Williams*, 68 Ga. 598.

80. *Buckley v. Mason*, 52 Neb. 639, 72 N. W. 1043; *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113.

[a] Unless authorized by the plaintiff to hold it up, an officer is bound to return an execution within the time prescribed by law. *Koger v. Donnell*, 1 Head (Tenn.) 377.

[b] The clerk cannot change the time for the return as fixed by statute, by his indorsement on the writ. *Cain v. Woodward*, 74 Tex. 549, 12 S. W. 319.

[c] Whether or Not Sale Has Been Made.—An officer holding an execution and having levied the same upon real estate, whether he has offered it for

ing the general rule of excluding one day and including another, the day of the teste of process is to be counted and the return day excluded, or vice versa.<sup>81</sup> Under some statutes, however, the time begins to run from the date the officer receives the writ.<sup>82</sup> On receiving notice of supersedeas, stay, quashal, etc., the usual practice is to return the writ at once.<sup>83</sup> When the property levied upon has been replevied, the officer should not make any return until after the disposition of the replevin suit.<sup>84</sup> Generally the officer may return the writ, either satisfied or *nulla bona*, before the return day,<sup>85</sup> but in some jurisdictions it is not proper to return the writ unsatisfied before the day fixed for such return.<sup>86</sup>

sale or not, and if he has it for sale, whether he has sold it or not, must return the execution within sixty days from its date, stating what he has done under it. *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113.

As to sale after return day, see *supra*, II, B, 7, d, (VII), (B).

81. *Ogden v. Redman*, 3 A. K. Marsh. (Ky.) 234; *Scharff v. McGaugh*, 205 Mo. 344, 354, 103 S. W. 550.

82. *Schroeder v. Pehling*, 20 S. D. 642, 108 N. W. 252.

83. *Bryan v. Hubbs*, 69 N. C. 423. See generally the statutes.

84. *Cox v. Currier*, 62 Iowa 551, 17 N. W. 767.

85. **U. S.**—*Tomlinson Mfg. Co. v. Shatto*, 34 Fed. 380. **Ala.**—*Woodward v. Harbin*, 4 Ala. 534, 37 Am. Dec. 753; *Reese v. White*, 2 Ala. 306. **Del.** *Lord v. Townsend*, 5 Harr. 457. **Ill.** *Bowen v. Parkhurst*, 24 Ill. 257; *Pecos Irr. & Imp. Co. v. Olson*, 63 Ill. App. 313. **Ind.**—*Middlehead v. Nevitt*, 7 Blackf. 51. **Kan.**—*Buist v. Citizens' Sav. Bank*, 4 Kan. App. 700, 46 Pac. 718. **N. C.**—*Whitehead v. Hellen*, 74 N. C. 679, *overruling Nesbitt v. Bal-  
lew*, 10 N. C. 57. **W. Va.**—*Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370. But see also *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244.

[a] Under a statute which provides that a *nulla bona* return may be made two days after the date of the execution, a return is bad which was made on the twenty-third of the month, the execution date being the twenty-first. *Graves v. Spry*, 4 Penne. (Del.) 396, 55 Atl. 334.

[b] **Premature return** is immaterial in the absence of collusion. *High Rock Knitting Co. v. Bronner*, 18 Misc. 631, 43 N. Y. Supp. 684.

[c] It has been held, however, that

a return against an insolvent corporation which has ceased to transact business before the expiration of the statutory period is not premature. *Guernsey v. Moore*, 131 Mo. 650, 32 S. W. 1132.

[d] **One Search.**—When the officer has made one full search for property of the debtor without effect he may return the writ *nulla bona*. *Wilcox v. Ratliff*, 5 Blackf. (Ind.) 561.

[e] **An early return may be ordered** where there is no property subject to the writ and injury may result from the delay until the regular return day. *National Exch. Bank of Boston v. Burkhalter*, 20 N. Y. Supp. 593.

[f] **Effect of Insolvency.**—A return on an execution "no effects known to me" is not vitiated by the fact that it is made before the return day of the writ, where, as in the case at bar, it is an agreed fact that at the time the writ was placed in the hands of the officer, the defendants were notoriously insolvent. *Slingluff v. Collins*, 109 Va. 717, 64 S. E. 1055.

86. **Mass.**—*Bull v. Clark*, 2 Metc. 587. **Mich.**—*First Nat. Bank v. Dwight*, 83 Mich. 189, 47 N. W. 111; *Smith v. Thompson*, 1 Walk. Ch. 1. **Mo.**—*Rogers v. Wilson*, 220 Mo. 213, 119 S. W. 369; *Huhn v. Lang*, 122 Mo. 600, 27 S. W. 345; *Marks v. Hardy*, 86 Mo. 232. **Tenn.**—*Bershears v. Warner*, 5 Sneed 676.

[a] **"Regularly an Execution Cannot Be Returned Before the Return Day.**—The defendant may have no property whereon to levy when the execution is returned, but he may acquire it after the return is made." *Dillon v. Rash*, 27 Mo. 243.

[b] **The retention of a writ of execution, after its return day by the sheriff, is not necessary in order to**

(II.) **Effect of Holiday.**—When the return day falls on a holiday the period in which the writ should be returned ends on the preceding day,<sup>87</sup> unless otherwise provided by statute.<sup>88</sup>

c. **How Made.**—(I.) **Generally.**—The statement of the action taken should be indorsed on the writ, or on a paper attached to it.<sup>89</sup> But a return on a separate piece of paper not attached to, but filed with, the writ, has been held sufficient.<sup>90</sup> An oral return is insufficient.<sup>91</sup>

The mere indorsement on the writ does not complete the return, but the writ must be filed as required by law.<sup>92</sup>

(II.) **Where Returned.**—Generally the officer must return the execution to the clerk of the court from whence it issued.<sup>93</sup>

(III.) **Return by Mail.**—A return may properly be made by mail when the writ is directed to an officer of a county other than that in which the court, from which the writ issues, is situated;<sup>94</sup> but unless specially instructed by the party entitled thereto money should not be so returned.<sup>95</sup>

enable him to make sale by virtue of it after the return day, and such retention is improper and unwarranted. *Kinmouth v. White*, 61 N. J. Eq. 358, 48 Atl. 952.

87. *Hawkins v. Taylor*, 56 Ark. 45, 19 S. W. 105. See the title "**Sunday and Holidays.**"

[a] A return made on a holiday is void. *Peck v. Cavell*, 16 Mich. 9.

88. *Williams v. State*, 5 Ind. 235.

89. III.—*Stanley v. Moynihan*, 45 Ill. App. 192. Ind.—*Waymire v. State*, 80 Ind. 67. N. C.—*Dickson v. Peppers*, 29 N. C. 429. S. D.—*Black Hills Brew. Co. v. Middle West Fire Ins. Co.*, 141 N. W. 358. Tenn.—*Paine v. Hoskins*, 3 Lea 284; *Harman v. Childress*, 3 Yerg. 327.

90. *Kennedy v. Roundtree*, 59 S. C. 324, 37 S. E. 942.

91. *Jones v. Goodbar*, 60 Ark. 182, 29 S. W. 462, holding under a statute which requires every officer to whom a writ shall be delivered to be executed to make his return thereof in writing and sign his name to such return, that a filing by a constable of an execution with the justice of the peace who issued it, with an oral report that it was still unsatisfied, does not constitute a valid return.

92. *Balkum v. Harper's Admr.*, 50 Ala. 429. Compare, *Mercer v. Hooker*, 5 Fla. 277.

[a] "Although the execution may have the officer's indorsement on it, and may be in his pocket or a deputy's,

or in the officer's desk in the court-room, it is not returned until it has passed from the custody and control of the officer to that of the clerk of the court from which it was issued." *Beall v. Shattuck*, 53 Miss. 358.

[b] A writ of execution may be "returned to the court" when in session, without passing, in fact, through the hands of the clerk, or being filed in his office. *Conkling v. Parker*, 10 Ohio St. 28.

[c] Return without indorsement, is not a return. *Nelson v. Brown*, 23 Mo. 13.

93. See generally the statutes, and the following: *Casky v. Haviland*, *Risley & Co.*, 13 Ala. 314; *Adams v. Goodwin*, 99 Ga. 138, 25 S. E. 24.

[a] The execution must be returned to the clerk with whom the judgment roll is filed. *Mulstein Co. v. New York*, 213 N. Y. 308, 107 N. E. 651.

94. See generally the statutes, and the following: *Cockerham v. Baker*, 52 N. C. 288; *Underwood v. Russell*, 4 Tex. 175.

[a] A marshal may not make a return by mail under a statute giving that privilege to a sheriff. *Smith v. Geraty*, 109 N. Y. Supp. 738.

[b] When the clerk's office and the officer's residence are in the same place, the return may not be made by mail. *Smith v. Geraty*, 112 N. Y. Supp. 1100.

95. See the statutes.

(IV.) Filing and Recording. — An execution, upon being returned should be filed or recorded.<sup>96</sup>

f. *Form and Sufficiency.* — (I.) *In General.* — No precise form of return is prescribed in some jurisdictions.<sup>97</sup> In such case, the return is sufficient if it shows that the officer has done what the writ commanded him to do, or gives some good reason why he has not done it.<sup>98</sup> But its statements should agree with those made in the certificate and deed.<sup>99</sup> All the material facts necessary to show that the law has been complied with, should be stated.<sup>1</sup> It is not necessary to use technical precision; it is sufficient if it appears by a reasonable construction of the whole return, or by necessary inference from the facts stated therein, that everything required by the statute to constitute a valid levy has been performed.<sup>2</sup> Literal conformity to the statute is not necessary.<sup>3</sup>

96. See generally the statutes, and the following: *Ind.*—*Newhouse v. Martin*, 68 Ind. 224. *N. H.*—*Riddle v. Fellows*, 42 N. H. 309. *Vt.*—*Perry v. Whipple*, 38 Vt. 278; *Ellison v. Wilson*, 36 Vt. 60; *Perrin v. Reed*, 33 Vt. 62.

As to the recording of a return of an extent, see *infra*, II, B, 8, (V).

97. *County Court v. Buck*, 27 Ill. 440; *Byer v. Etnyre*, 2 Gill (Md.) 150, 41 Am. Dec. 410.

As to the form and sufficiency of a return of extent, see *infra*, II, B, 8, j, (III).

98. *Wyer v. Andrews*, 13 Me. 168; *Wingfield v. Crosby*, 5 Coldw. (Tenn.) 241; *McCrary v. Chaffin*, 1 Swan (Tenn.) 307; *Union Bank v. Barnes*, 10 Humph. (Tenn.) 244.

99. *Miller v. McAlister*, 197 Ill. 72, 64 N. E. 254; *Johnson v. Adleman*, 35 Ill. 265; *Dickerman v. Burgess*, 20 Ill. 267.

1. *U. S.*—*Remington v. Linthicum*, 14 Pet. 84, 10 L. ed. 364; *Cambers v. First Nat. Bank*, 144 Fed. 717, *affirmed*, 156 Fed. 482, 84 C. C. A. 292. *Ill.*—*Douglas v. Whiting*, 28 Ill. 362. *Me.*—*Millett v. Blake*, 81 Me. 531, 18 Atl. 293. *Mass.*—*Rand v. Cutler*, 155 Mass. 451, 29 N. E. 1085; *Parker v. Abbott*, 130 Mass. 25. *Tenn.*—*Cowan v. Sloan*, 95 Tenn. 424, 32 S. W. 388; *Eaken & Co. v. Boyd*, 2 Sneed 204. *Vt.* *Sleeper v. Trustees, etc.*, 19 Vt. 451; *Henry v. Tilson*, 19 Vt. 447.

[a] *Legal Conclusion Insufficient.* A writ returned "fully satisfied" is not sufficient, being a legal conclusion where facts should be stated. *Cambers v. First Nat. Bank*, 144 Fed. 717, *af-*

*firmed*, 156 Fed. 482, 84 C. C. A. 292.

2. *Ala.*—*Casky v. Haviland*, *Risley & Co.*, 13 Ala. 314. *Ark.*—*Bettison v. Budd*, 17 Ark. 546, 65 Am. Dec. 442. *Conn.*—*Bissell v. Nooney*, 33 Conn. 411; *Booth v. Booth*, 7 Conn. 350. *Mass.* *Blake v. Rogers*, 210 Mass. 588, 97 N. E. 68.

[a] A general return of "executed" on original process from the circuit court, is insufficient; the sheriff must state in his return all that he did in the execution of the process, so that the court may determine whether it was legally and properly executed, or not. *Merritt v. White*, 37 Miss. 438.

[b] *Necessary Inference.*—A levy upon real estate will be sustained so far as the return of the officer upon the back of the execution is concerned, if it import by necessary intendment the actual performance of all the statutory requisites. *Brackett v. McKenney*, 55 Me. 504.

[c] *Where Property Held by Interpleaders.*—If the interpleaders in an attachment fail to surrender the property to the sheriff holding the execution on the original judgment, it is the duty of the sheriff to show such fact in his return. *Faulkner v. Cook*, 83 Ark. 205, 103 S. W. 384.

[d] *Showing Property To Belong to Defendant.*—The return is an affirmation by the officer that the property levied on belongs to the defendant, and a return is sufficient although it fails to state expressly that the property seized belonged to the defendant. *Thornton v. Winter*, 9 Ala. 613.

3. *Poineer v. Bagnall*, 49 N. J. L. 226, 7 Atl. 858, *reversing Matthews v.*

In construing an officer's return on a writ of execution, the general rule of construction which gives effect to every clause and word, if possible, in order to ascertain the intended meaning, should be followed.<sup>4</sup> If the return can be fairly construed to be sufficient in law, it is the duty of the court so to construe it.<sup>5</sup> Where personalty must be taken before realty, the return must show no personal property could be found before a levy and sale of real estate will be confirmed.<sup>6</sup>

**Writ Partially or Wholly Unexecuted.**—If the writ be not executed or only executed in part, such fact and the reason therefor should be stated.<sup>7</sup> If the officer has been unable to obey the mandate of the writ, his return should show on its face a sufficient legal excuse to free him from the imputation of wilful neglect or disregard of official duty.<sup>8</sup>

Miller, 47 N. J. L. 414, 1 Atl. 464.

4. Cal.—Moore v. Martin, 38 Cal. 428. Ind.—Dawson v. Jackson, 62 Ind. 171. Me.—Bailey v. Myrick, 50 Me. 171; Franklin Bank v. Blossom, 23 Me. 546. Mass.—Chase v. Merrimaek Bank, 19 Pick. 564, 31 Am. Dec. 163. N. C. Patton v. Marr, 44 N. C. 377. Vt. Collins v. Perkins, 31 Vt. 624.

[a] **Illustrations.**—(1) A return which names the purchaser as the plaintiff's attorney may be shown to mean that the plaintiff was the purchaser when other statements in the return indicate that this is the right construction. Moore v. Martin, 38 Cal. 428. (2) Payment of the purchase price is an essential requisite of the sale, and if the return shows the purchase price unpaid but recites a sale the property remains unsold. Dawson v. Jackson, 62 Ind. 171. (3) When the word "defendant" is used in an indorsement, there being several defendants, it will be construed to be *nomen collectivum* and to mean all defendants. Heffly v. Hall, 5 Humph. (Tenn.) 581.

5. Cogswell v. Warren, 1 Curt. C. C. 223, 6 Fed. Cas. No. 2,958; Reinhardt v. Kennedy, 106 Ill. App. 96.

6. See the statutes and Koehler v. Ball, 2 Kan. 160, 83 Am. Dec. 451; Conway v. Jones, 17 La. 413; Gayoso v. Hickey, 4 La. 301, the officer must show in his return that he has done all that the statute commands him to do.

As to the order of levying upon debtor's property in general see *supra*, II, B. 4, g.

7. Ark.—Dig. St., 1904, §3209. Ia. Code, 1897, §3968. Ky.—St., 1909, §1651. N. D.—Comp. Laws, 1913, §7722. Tenn.—Harman v. Childress, 3 Yerg.

327. Va.—Code, 1904, §3591. W. Va. Code, 1906, §§2096, 4162.

[a] **Sufficient.**—Although not strictly formal, a return "not levied for want of sufficient goods and chattels," is not a nullity, but may be a sufficient return. *Prima facie*, it is sufficient. State v. Steel, 11 Mo. 553.

[b] **Insufficient.**—Where the sheriff's return shows that the property levied on is not sufficient to satisfy the execution, and fails to show why a further levy is not made, the return is clearly insufficient. Brown v. Brown, Thomp. Cas. (Tenn.) 41, 1 Shann. Cas. 25.

8. Ark.—Jones v. Goodbar, 60 Ark. 182, 29 S. W. 462. La.—Hill v. Labarre, 12 La. Ann. 419. Tenn.—Eaken & Co. v. Boyd, 2 Sneed 204.

[a] **An irregularity in the execution is not a valid excuse for failing to make a return.** Jett v. Shinn, 47 Ark. 373, 1 S. W. 693.

[b] **Holding for Sale.**—The officer cannot excuse his failure to make return in time on the ground that he was waiting for the completion of the sale, the writ not being necessary for that purpose. Neale v. Caldwell, 3 Stew. (Ala.) 134.

[c] **Acts of Parties.**—He may not excuse his failure to return by alleging that he was misled by one of the parties, positive instructions alone being sufficient to justify him in holding the writ after the return day. Jett v. Shinn, 47 Ark. 373, 1 S. W. 693.

[d] **Writ Must Be Void.**—The sheriff is to execute all writs placed in his hands, without inquiry into the regularity of the proceedings upon which they are founded. Although the process in his hands be voidable, or er-

**Nulla Bona.**—The sheriff may return the writ, nulla bona, under the instruction of the plaintiff,<sup>9</sup> or upon finding no property of the plaintiff subject to execution.<sup>10</sup>

(II.) **The Levy.**—(A.) **IN GENERAL.**—Generally the officer should endorse upon the execution the fact of making the levy.<sup>11</sup>

(B.) **APPRAISEMENT.**—The return should contain a reference to and explain the essential facts of the appraisement proceedings.<sup>12</sup> It should

ronaceous, he is nevertheless bound to execute it. He is only excused from doing so when the process is absolutely void. A sheriff, therefore, cannot excuse his refusal to levy by the plea that the judgment had been satisfied by the defendant to the plaintiff's instate during the latter's lifetime. *Abercrombie's Admr. v. Chandler*, 9 Ala. 625.

9. *Pottery Co. v. Levi & Co.*, 48 La Ann. 777, 19 So. 752.

[a] "Stopped by order of plaintiff" is a good return. *State v. McDonald*, 9 Humph. (Tenn.) 606.

10. *Ga.*—*Thornton v. Lane*, 11 Ga. 459. *Ill.*—*Merrick v. Carter*, 205 Ill. 73, 68 N. E. 750. *N. Y.*—*Card v. Groesbeck*, 124 N. Y. Supp. 372.

[a] **Sufficient Return of Nulla Bona.**

(1) "I have made search and can find no property of the defendants in my bailiwick whereon to levy," is a sufficient return. *Goshorn v. Alexander*, 2 Bond 158, 10 Fed. Cas. No. 5,630.

(2) An officer's return that he knows of no property subject to the fieri facias is equivalent to the general return of nulla bona. *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484. (3)

"No goods or chattels found" is sufficient under a statute which provides that the officer should state "he could not find any personal property of the defendant in execution on which to levy." *Pioneer v. Bagnall*, 49 N. J. L. 226, 7 Atl. 858; *Matthews v. Miller*, 47 N. J. L. 414, 1 Atl. 464. (4) But a return is insufficient which states that one defendant, when there are several, has no property subject to execution. *Hassell v. Southern Bank of Ky.*, 2 Head (Tenn.) 381.

[b] **Insufficient.**—(1) The return "finding no property whereon to levy to make the amount of this execution, I now return this writ," held, not to be a return nulla bona. *Beers v. Panker*, 6 Kan. App. 697, 50 Pac. 505. (2) But the return "wholly unsatis-

fied," is not sufficient, as it does not conclusively appear thereby that no goods were to be found. *McDowell v. Clark*, 68 N. C. 118.

11. See fully *supra*, II, B, 4, i.

12. See the statutes and *Bedford v. Kesler*, 15 Ky. L. Rep. 31.

As to recitals concerning the appraisement in the return of an extent, see *infra*, II, B, 8, j, (III), (C).

[a] **Error in Name of Appraiser.** A clerical error in the initial letter of the name of an appraiser is not fatal. *Hall v. Staples*, 74 Me. 178.

[b] **By Reference.**—In a levy of real estate, the officer may sufficiently return that the appraisers were sworn, by referring to indorsements, made upon the execution by the magistrate and the appraisers, containing certificates that the requisite oath was taken. *Fitch v. Tyler*, 34 Me. 463.

[c] **Error Not Fatal.**—Where it appears by the return of an execution that the plaintiff appointed one appraiser of the property, and the sheriff one, a failure of the sheriff to return that the defendant was absent, or that he refused to appoint an appraiser, will not render the sale void. *Preston v. Wright*, 60 Iowa 351, 14 N. W. 352, following the principles of *Hill v. Baker*, 32 Iowa 302; *Cavender v. Heirs of Smith*, 1 Iowa 306.

[d] **Appointment of Appraisers.**—A return by the officer that the debtor "refused" to appoint an appraiser, is a sufficient substitute for an allegation that any notice was given to the debtor. It implies that the debtor made no objection to the time given. *Fitch v. Tyler*, 34 Me. 463.

[e] **Signature to Certificate.**—Where the return states that two of the appraisers signed the certificate, "the other declining to sign the same," it is not necessary that it should state the cause of the refusal of such appraiser to affix his signature. *McLellan v. Nelson*, 27 Me. 129.

be consistent with the appraiser's return.<sup>13</sup> But it has been held that the appraisement is no part of the return.<sup>14</sup>

(C.) NOTICE.—The return should set out the essential facts relative to the notice or advertisement of the levy and sale.<sup>15</sup>

(D.) SALE.—The return should recite the facts relative to the place and conduct of the sale, the property sold and the amount paid therefor.<sup>16</sup>

**Failure To Sell.**—Where no sale has been made for want of bidders, the officer should state in his return the fact of his failure and the cause thereof, and the place at which he has advertised and offered the property for sale.<sup>17</sup>

**Adjournments.**—When the sale has been adjourned, the return in some jurisdictions, should show that the adjournment was expedient,<sup>18</sup> or to the interest of all concerned.<sup>19</sup>

(E.) PROCEEDS.—Any payment made to the officer should be indorsed on the writ.<sup>20</sup> But it is no objection to the validity of a levy, that the officer in his return fails to state the amount of the debt and fees and charges of the execution levied, since this may be made certain on inspection.<sup>21</sup>

13. Chase v. Williams, 71 Me. 190.

14. Coan v. Elliott, 101 Ind. 275; Thurston v. Barnes, 10 Ind. 289.

15. See the statutes, and the following: Kan.—Hazen v. Webb, 68 Kan. 308, 74 Pac. 1111. Me.—Millett v. Blake, 81 Me. 531, 18 Atl. 293, 10 Am. St. Rep. 275. Mass.—Blake v. Rogers, 210 Mass. 588, 97 N. E. 68; Holmes v. Jordan, 163 Mass. 147, 39 N. E. 1005; Rand v. Cutler, 155 Mass. 451, 29 N. E. 1085. Mich.—Grand Rapids Nat. Bk. v. Kritzer, 116 Mich. 688, 75 N. W. 90. Neb.—Kuhn v. Kilmer, 16 Neb. 699, 21 N. W. 443. Ore.—United States Mort. & T. Co. v. Marquam, 41 Ore. 391, 69 Pac. 37; German Sav. & L. Soc. v. Kern, 38 Ore. 232, 62 Pac. 788, 63 Pac. 1052. Tex.—Crabtree v. Whiteselle, 65 Tex. 111.

[a] When there has been an adjournment of the sale, notice of same must be shown by the return. Wilson v. Bucknam, 71 Me. 545. See *infra*, II, B, 8, f, (II), (D).

16. See the statutes and the following: Ill.—Gardner v. Eberhart, 82 Ill. 316. Me.—Townsend v. Meader, 58 Me. 288. Miss.—Baldwin v. Dreyfus, 92 Miss. 94, 45 So. 428.

[a] Place of Sale.—The return is sufficient if it does not state the place of sale, providing it appears therefrom that there was a time and place specified in the advertisement. Backus v.

Danforth, 10 Conn. 297; Beattie v. Robin, 2 Vt. 181.

[b] Sale Made by Parcels.—(1) The failure to show that the property was sold in parcels does not affect the validity of the sale. Wilson v. Swasey (Tex.), 20 S. W. 48. (2) But in Cohen v. Menard, 136 Ill. 130, 24 N. E. 604, it is held that it is the duty of the officer selling en masse to make a full return, stating all the facts affecting his right to sell en masse.

17. See the statutes.

18. Frazee v. Nelson, 179 Mass. 456, 462, 61 N. E. 40; Ela v. Yeaw, 158 Mass. 190, 33 N. E. 511; Sanborn v. Chamberlin, 101 Mass. 409, 417.

19. Wilson v. Bucknam, 71 Me. 545.

20. See the statutes.

21. Rawson v. Clark, 38 Me. 223.

[a] Items of Charges and Fees. Where the officer's return does not state specifically the items of his charges and fees, nor the gross amount, but that the land levied upon was appraised at a certain sum, "which is the amount of the execution, fees, and charges," it is sufficient, as the execution and return taken together, furnish data for ascertaining the amount of charges. Kern v. Briggs, 46 Me. 467.

[b] It is insufficient to state in a return that certain money was "taken for costs." The return must specify

(III.) **Description of Property.**—The return should describe the property levied upon with such reasonable certainty that the purchaser can thereby find and identify the same,<sup>22</sup> or contain a reference to another place where such description may be made certain.<sup>23</sup> Certainty to a general intent, such as would put the owners and purchasers on in-

what the costs were. *Harrison v. Thompson*, 9 Ga. 310.

22. **U. S.**—*Barnes v. Billington*, 1 Wash. C. C. 29, 2 Fed. Cas. No. 1,015. **Ala.**—Civ. Code, 1907, §4104. **Colo.**—*Laughlin v. Hawley*, 9 Colo. 170, 11 Pac. 45. **Ga.**—*Edinfield v. Milner*, 138 Ga. 402, 75 S. E. 319; *Crawford v. Verner*, 122 Ga. 814, 50 S. E. 958; *Ford v. Nesmith*, 117 Ga. 210, 43 S. E. 483. **Ill.**—*Stout v. Cook*, 37 Ill. 283; *Fitch v. Pinckard*, 5 Ill. 69. **Ind.**—*Law v. Smith*, 4 Ind. 56. **Ia.**—*Payne v. Billingham*, 10 Iowa 360. **Ky.**—*Mercer v. Hickman-Ebbert Co.*, 32 Ky. L. Rep. 230, 105 S. W. 441; *Holcomb v. Hays*, 23 Ky. L. Rep. 352, 62 S. W. 1028; *Humpich v. Drake*, 19 Ky. L. Rep. 1782, 44 S. W. 632. **Md.**—*Jarboe v. Hall*, 37 Md. 345; *Langley v. Jones*, 33 Md. 171; *Berry v. Griffith*, 2 Harr. & G. 337, 13 Am. Dec. 309. **Miss.**—*Hand v. Grant*, 5 Smed. & M. 508, 43 Am. Dec. 528. **N. H.**—*Lyford v. Thurston*, 16 N. H. 399. **N. J.**—*Canfield v. Browning*, 69 N. J. L. 553, 55 Atl. 101; *Wills v. McKinney*, 41 N. J. L. 120. **N. C.**—*Farrior v. Houston*, 100 N. C. 369, 6 S. E. 72; *Chasteen v. Phillips*, 49 N. C. 459. **Tenn.**—*Helms v. Alexander*, 10 Humph. 44; *Pound v. Pullen's Lessee*, 3 Yerg. 338; *Henderson v. Overton*, 2 Yerg. 394. **Tex.**—*Buckner v. Vancleave*, 34 Tex. Civ. App. 312, 78 S. W. 541; *Stipe v. Shirley*, 27 Tex. Civ. App. 97, 64 S. W. 1012; *Hayes v. Gallaher*, 21 Tex. Civ. App. 88, 51 S. W. 280; *Foeke v. Garcia* (Tex. Civ. App.), 41 S. W. 187. **Vt.**—*Gilson v. Parkhurst*, 53 Vt. 384.

As to description of property in the return of an extent, see *infra*, II, B, 8, j, (III), (B).

As to endorsement on writ of description of property levied on, see *supra*, II, B, 8, e, (I).

[a] **Sufficient Description.**—(1) A return of a levy upon one "fawn-colored oxen, one dunn-pided oxen," as the property of the defendant in execution, was not void for indefinite description. *Denton Bros. v. Hannah*, 12 Ga. App. 494, 77 S. E. 672. (2)

A description of "two tracts of land of A. B., one being that upon which he resides, the other that upon which his mill is situated," was held good, and any further and false description rejected. *Swift v. Lee*, 65 Ill. 336.

[b] Where levy was made upon a certain number of cattle bearing certain brands, it was not insufficient because it did not specify the exact number under each brand. *Brown v. Hudson*, 14 Tex. Civ. App. 605, 38 S. W. 653.

[c] **Insufficient Description.**—A levy upon a lot of land, which identifies it only by reference to a given number in a named city will be held to be void for uncertainty, when there are several lots of that number in the city. *Miller v. Brooks*, 120 Ga. 232, 47 S. E. 646.

[d] Where the return of the sheriff on the execution described the property levied upon as "a lot of lumber consisting of fencing, flooring, sheeting, studding, siding, etc., as the property of the defendant," it was held that the levy was invalid for want of precision and certainty in the description. *Payne v. Billingham*, 10 Iowa 360.

[e] The term "appurtenances," used in the return of levy by the sheriff, is too general, vague, and indefinite, to comprehend in its meaning any personal property as the subject of levy. *Munroe v. Thomas*, 5 Cal. 470.

23. **U. S.**—*Barnes v. Billington*, 1 Wash. C. C. 29, 2 Fed. Cas. No. 1,015. **Ky.**—*Bell v. Weatherford*, 12 Bush 505. **Me.**—*French v. Allen*, 50 Me. 437. **Mass.**—*Allen v. Taft*, 6 Gray 552; *Boylston v. Carver*, 11 Mass. 515. **N. J.**—*Wills v. McKinney*, 41 N. J. L. 120. **Tenn.**—*Riley v. Frost*, 1 Leg. Rep. 272, 2 Shann. Cas. 333; *Brigance v. Erwin's Lessee*, 1 Swan 375. **Tex.**—*Traylor v. Lide*, 7 S. W. 58. **Vt.**—*Gilman v. Thompson*, 11 Vt. 643; *Maeck v. Sinclear*, 10 Vt. 103; *Galusha v. Sinclear*, 3 Vt. 394.

quiry, is sufficient.<sup>24</sup> But it has been held that the description should be as certain as is required in a sheriff's deed,<sup>25</sup> and, on the other hand, that the particularity required in tax sales is not necessary.<sup>26</sup> The return may have the requisite certainty by reference to natural or artificial objects on the land, or to adjoining land;<sup>27</sup> but a return which is defective for uncertainty can be aided by a reference only when the thing referred to forms a part of the record.<sup>28</sup> The nature and extent of defendant's interest in the property levied upon need not be particularly set out.<sup>29</sup> A general description, if it identifies the property, is sufficient.<sup>30</sup> and when an error is made in naming a thing, the description will control.<sup>31</sup> A slight discrepancy in the description will not invalidate a return,<sup>32</sup> nor will a wrong description affect the validity of the sale.<sup>33</sup>

**Mortgaged Property.**—The fact that personal property levied upon is pledged or mortgaged should appear from the return.<sup>34</sup> The mortgage should be particularly described,<sup>35</sup> or a reference made to the registry where it may be found.<sup>36</sup>

(IV.) **Unnecessary Recitals.**—Any action that is not responsive to the commands of the writ need not be incorporated in the officer's return;<sup>37</sup>

24. *Christian v. Mynatt*, 11 Lea (Tenn.) 615; *Brown v. Dickson*, 2 Humph. (Tenn.) 395; *Swan's Lessee v. Parker*, 7 Yerg. (Tenn.) 490, 27 Am. Dec. 522; *Buckner v. Vaneleave*, 34 Tex. Civ. App. 312, 78 S. W. 541.

25. *Henry v. Mitchell*, 32 Mo. 512.

26. *Kilmer v. Gallaher*, 120 Iowa 575, 95 N. W. 180.

27. *Burrowes v. Gibson*, 42 Mich. 121, 3 N. W. 293; *Brigance v. Erwin's Lessee*, 1 Swan (Tenn.) 375. And see *Bell v. Weatherford*, 12 Bush (Ky.) 505; *Holecomb v. Hays*, 23 Ky. L. Rep. 352, 62 S. W. 1028.

28. *Chasten v. Phillips*, 49 N. C. 459; *Gibbs v. Thompson*, 7 Humph. (Tenn.) 179; *Taylor's Lessee v. Cozart*, 4 Humph. (Tenn.) 433.

29. *Humphrey's Exr. v. Wade*, 84 Ky. 391, 1 S. W. 648; *Guelot v. Pearce*, 18 Ky. L. Rep. 1004, 38 S. W. 892; *Davis v. Goforth*, 1 Lea (Tenn.) 31.

30. *Hill v. Harris*, 10 B. Mon. (Ky.) 120, 50 Am. Dec. 542.

31. *Ebelharr v. Tennyly*, 118 Ky. 43, 80 S. W. 459.

32. *Barber Asphalt Pav. Co. v. Kiene*, 99 Mo. App. 528, 74 S. W. 872.

[a] County and state omitted. *Baldwin v. Dreyfus*, 92 Miss. 94, 45 So. 428.

[b] **Misnaming the Township.**—*Perkins v. Spaulding*, 2 Mich. 157.

[c] **Clerical Errors.**—Where, in the

description of land levied upon, the starting point was stated to be in the north line of a certain highway and at the northwest corner of a certain house lot, and it appeared, that the house lot lay on the north side of the same highway and that its southwest corner was the only point where it adjoined the road and the land levied upon, it was held, that the court would intend that the word "north west" was written, by mere clerical error, for "south west," and that the mistake was not fatal to the levy. *Barnard's Admr. v. Russell*, 19 Vt. 334.

33. *Bell v. Weatherford*, 12 Bush (Ky.) 505; *Reid v. Heasley*, 9 Dana (Ky.) 324; *Galot v. Pearce*, 18 Ky. L. Rep. 1004, 38 S. W. 892.

34. *Johnson v. Gerber*, 114 Minn. 174, 130 N. W. 995.

35. *Coffin v. Freeman*, 84 Me. 535, 24 Atl. 986; *Bartlett v. Gilreast*, 72 N. H. 145, 55 Atl. 189.

36. *Coffin v. Freeman*, 84 Me. 535, 24 Atl. 986.

37. Conn.—*Finch v. Bishop*, 13 Conn. 576. N. H.—*Derry Bank v. Webster*, 44 N. H. 264. Vt.—*Willard v. Whipple*, 40 Vt. 219.

[a] **Extraneous Matters.**—It is the officer's duty to certify only to the acts performed by him in his official capacity in the execution of the process, and not as to some agreement

*e. g.*, a previous attachment on mesne process,<sup>38</sup> or the fact of recording.<sup>39</sup>

(V.) **Date.**—The indorsement or return should bear the date on which it was made,<sup>40</sup> and also the time when filed with the clerk of the court.<sup>41</sup>

(VI.) **Signature.**—The return should be signed by the officer who makes it,<sup>42</sup> but his signature may be endorsed thereon by another if he adopts it as his own.<sup>43</sup>

(VII.) **Presumptions.**—In accordance with the general rule that the officer will be presumed to have done his duty, that which is necessarily or reasonably to be inferred from his return will be presumed until the contrary is shown.<sup>44</sup> So, it has been held that the return indorsed on

between the parties of which he may have had knowledge, and his certificate on the latter point is no more entitled to be received in evidence than the certificate of any other person with like knowledge of the alleged agreement. *Barr v. Combs*, 29 Ore. 399, 45 Pac. 776.

38. *Derry Bank v. Webster*, 44 N. H. 264.

39. *Finch v. Bishop*, 13 Conn. 576; *Willard v. Whipple*, 40 Vt. 219.

As to necessity of alleging the recording of a return of an extent, see *infra*, II, B, 8, j, (V).

[a] It is not necessary to the validity of a levy that the officer should state in his return that the levy was actually recorded, as the recording is not his act, but the official act of the town clerk. *Willard v. Whipple*, 40 Vt. 219.

40. *White v. Farley*, 81 Ala. 563, 8 So. 215.

[a] **Clerical Error.**—The levy of one of the executions being dated the day before its issue, is an evident clerical mistake and does not vitiate it. *Renshaw v. Lloyd*, 50 Mo. 368.

41. *Yatter v. Pitkin*, 72 Vt. 255, 47 Atl. 787.

42. *Ga.*—*Vickers v. Hawkins*, 128 Ga. 794, 58 S. E. 44. *Ky.*—*Humphrey's Exr. v. Wade*, 84 Ky. 391, 1 S. W. 648; *Galot v. Pearce*, 18 Ky. L. Rep. 1004, 38 S. W. 892. *Mo.*—*Bennett v. Vinyard*, 34 Mo. 216. *Tex.*—*Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769. *Va.*—*Slingluff v. Collins*, 109 Va. 717, 64 S. E. 1055.

See *supra*, II, B, 8, c.

[a] By a deputy in the name of his principal. *Emley v. Drum*, 36 Pa. 123; *Eastman v. Curtis*, 4 Vt. 616.

43. *Vickers v. Hawkins*, 128 Ga. 794, 58 S. E. 44.

[a] **Where the undisputed evidence** that the levying officer caused the property to be advertised for sale pursuant to the levy, personally cried at the sale, executed a deed to the purchaser and made an entry of the sale on the fieri facias, it is sufficient to authorize an inference that the levying officer adopted the signature as his own. *Vickers v. Hawkins*, 128 Ga. 794, 58 S. E. 44.

44. *Ill.*—*Rivard v. Gardner*, 39 Ill. 125; *Pecos Irr. & Imp. Co. v. Olson*, 63 Ill. App. 313. *Miss.*—*Drake v. Collins*, 5 How. 253. *Mo.*—*Blodgett v. Perry*, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307. *Tex.*—*Jones v. Meyer Bros.*, 25 Tex. Civ. App. 234, 61 S. W. 553. *Vt.*—*Beattie v. Robin*, 2 Vt. 181.

[a] **As to Levy.**—When the officer's return shows that he levied the execution upon the land, but does not recite how the levy was made, the presumption is that he made it as required by law. *White v. Laurel Land Co.*, 26 Ky. L. Rep. 775, 82 S. W. 571.

[b] **Legal Appraisement Presumed.** When a return states that the property was sold "after having the same appraised" it will be presumed that there was a legal appraisement. *Hewitt v. Stephens*, 5 La. Ann. 640.

[c] **When a nulla bona return is made,** (1) the presumption arises that the officer made demand on the defendant and was unable to find any property on which to levy. *Horton v. Brown*, 45 Ill. App. 171. But (2) a nulla bona return before the return day of the writ does not carry the presumption that nothing could be made on the writ between the date of the

the execution was made with the knowledge and approbation of the officer whose name is signed thereto,<sup>45</sup> that his intention was to make a legal return,<sup>46</sup> within the proper time,<sup>47</sup> that the levy referred to was made within the officer's jurisdiction,<sup>48</sup> and that when the execution is found in the clerk's office it was returned there by the officer in the discharge of his duty.<sup>49</sup> But no such presumption arises when the writ is returned *nulla bona* by direction of the plaintiff,<sup>50</sup> or after the return day,<sup>51</sup> or when from the substance of the return it cannot be seen, in such cases, that he was unable to find property of the debtor.<sup>52</sup>

return and the return day. *Hamlin v. Reynolds*, 22 Ill. 207.

[d] If an interlineation appears on the face of an officer's return, and there is no evidence to show when it was done, the court will presume that it was done before the return was made, when the officer had authority to alter his return. *Sloan v. Stanly*, 33 N. C. 627.

[e] Necessary Inference.—From a return stating that the officer sold the property levied on and delivered the possession thereof to the defendant under the writ, it may be fairly inferred that he had previously actually seized the property thereunder. *Howard v. Baum*, 73 Mo. App. 235.

[f] "Substantial compliance" with the statute carries with it the presumption that everything was done which was necessary to be done, and such a return cannot be contradicted by showing that notice of sale was not given. *Ervay v. Hill*, 46 Wash. 457, 90 Pac. 590.

[g] As to Posting Notice of Sale. A sheriff's return reciting that notice of sale was posted in a public place at the courthouse is not void on its face, under a statute prescribing that the notice shall be posted at the courthouse door, inasmuch as it does not negative the fact that it was posted at the required place, and the presumption is that the officer complied with the law. *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046.

[h] When a return states that the sale was made *en masse*, the presumption holds that the officer did his duty and first offered the property for sale in parcels. *Leppel v. Kus*, 38 Colo. 292, 88 Pac. 448.

45. *Parker v. Sedwick*, 5 Md. 281.

46. *Reinhardt v. Kennedy*, 106 Ill. App. 96.

47. Ala.—*Barton v. Lockhart*, 2

Stew. & P. 109. Ind.—*Jones v. Kokomo Bldg. Assn.*, 77 Ind. 340. Ky. *Maury v. Cooper*, 3 J. J. Marsh. 224. Mo.—*Marks v. Hardy*, 86 Mo. 232.

Time for making return, see *supra*, II, B, 8, d.

[a] Date of Levy.—When the return fails to state the date of the levy, it will be presumed to have been made on the day the execution was received by the officer. *Scott's Exx. v. Scott*, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423.

[b] A return bearing no date is presumed to have been made on the return day. *Price v. Cloud*, 6 Ala. 248; *Woodward v. Harbin*, 4 Ala. 534, 37 Am. Dec. 753. *Contra*, *Izod v. Addison*, 5 How. (Miss.) 432.

[c] In the absence of a date, or other evidence showing when the return of an officer on a writ was made, it is presumed to have been made at a time when he had the right to make it, and in due time, as the *prima facie* presumption is that the officer has done his duty. *Rowe's Admr. v. Hardy's Admr.*, 97 Va. 674, 34 S. E. 625.

48. *Blair v. Compton*, 33 Mich. 414; *Jewett v. Guyer*, 38 Vt. 209.

[a] When the return is informal in not stating the town in which the levy was made, except by inference, it is held that, until the contrary appears, the presumption will be in favor of the regularity of the officer's proceedings, that the property was levied on in the same town where it was advertised and sold. *Jewett v. Guyer*, 38 Vt. 209.

49. *Conwell v. Watkins*, 71 Ill. 488.

50. *Reinhardt v. Kennedy*, 106 Ill. App. 96; *Pecos Irr. & Imp. Co. v. Olson*, 63 Ill. App. 313.

51. *Dixon v. White Sew-Mach. Co.*, 128 Pa. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659.

52. *Mich. Central R. Co. v. Keohane*, 31 Ill. 144; *Pecos Irr. & Imp. Co. v. Olson*, 63 Ill. App. 313.

(VIII.) Defects and Objections. — An evident clerical error in the officer's return will not affect its validity,<sup>53</sup> or the purchaser's title.<sup>54</sup>

Objections to the return, if known, must be made during the return term of the writ.<sup>55</sup>

g. *Amendments.* — (I.) Generally. — Before filing his return the officer has absolute control over it and does not need permission to amend.<sup>56</sup> And the return may be amended<sup>57</sup> in the discretion of the court<sup>58</sup>

[a] From a return *nulla bona*, with the added words "returned with schedule," the only presumption that can arise is that the defendant had merely property exempt from execution. *Thompson v. Yates*, 61 Ill. App. 262.

53. *Skakel v. Cycle Trade Pub. Co.*, 237 Ill. 482, 86 N. E. 1058.

54. Fla.—*McKinnon v. Lewis*, 64 Fla. 378, 60 So. 223. Ill.—*Kinney v. Knoebel*, 47 Ill. 417; *Phillips v. Coffee*, 17 Ill. 154, 63 Am. Dec. 357. Md.—*Huddleson v. Reynold's Lessee*, 8 Gill 332, 50 Am. Dec. 702.

See also *supra*, II, B, 8, b.

55. *Voshell v. Cavender*, 1 Penne. (Del.) 167, 39 Atl. 989.

56. Ill.—*Nelson v. Cook*, 19 Ill. 440. Mass.—*Welsh v. Joy*, 13 Pick. 477. Pa.—*Dixon v. White Sew.-Mach. Co.*, 128 Pa. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659.

[a] Officer's Control.—In the transfer of title to land, by the levy of execution, the return of the execution into the office of the clerk of the court from which it is issued, is the consummating act; and until this is done, the previous proceedings are subject to the control and revision of the officer. *Kellogg v. Wadhams*, 9 Conn. 201.

57. Ark.—*Clayton v. State*, 24 Ark. 16. Ind.—*Wilcox v. Moudy*, 89 Ind. 232. Kan.—*Stetson v. Freeman*, 35 Kan. 523, 11 Pac. 431. Ky.—*Boyer v. Lincoln*, 3 Ky. L. Rep. 537. Me.—*Tolman*, petitioner, 101 Me. 559, 64 Atl. 952; *Chase v. Williams*, 71 Me. 190. Md.—*Jarboe v. Hall*, 37 Md. 345. Mass.—*Hunneman v. Phelps*, 207 Mass. 439, 92 N. E. 697; *Frazee v. Nelson*, 179 Mass. 456, 61 N. E. 40; *Sawyer v. Harman*, 136 Mass. 414. Mo.—*State v. Jenkins*, 170 Mo. 16, 70 S. W. 152. Neb.—*O'Brien v. Gaslin*, 20 Neb. 347, 30 N. W. 274. N. H.—*Johnson v. Stone*, 40 N. H. 397, 77 Am. Dec. 706. N. J.—*Homer v. Delaware, etc. Canal Co.*, 16 N. J. L. 265. N. Y.—*James v. Gurlev*, 48 N. Y. 162; *People v. Ames*, 35 N.

Y. 482; *Williams v. Rogers*, 5 Johns. 163. N. C.—*Williams v. Weaver*, 101 N. C. 1, 7 S. E. 565; *Walters v. Moore*, 90 N. C. 41. Okla.—*Payne v. Long-Bell Lumber Co.*, 9 Okla. 683, 60 Pac. 235. Pa.—*Whitman v. Higby*, 24 Pa. Co. Ct. 236. Tenn.—*Atkinson v. Rhea*, 7 Humph. 59. Vt.—*Barnard v. Stevens*, 2 Aik. 429, 16 Am. Dec. 733. W. Va. Code, 1906, §2086.

As to amendments of the return of an extent, see *infra*, II, B, 8, j. (IV).

58. Ind.—*Wilcox v. Moudy*, 89 Ind. 232. Miss.—*Planters Bank v. Walker*, 3 Smed. & M. 409. Mo.—*Scruggs v. Scruggs*, 46 Mo. 271. N. H.—*Baker v. Davis*, 22 N. H. 27. Tex.—*Morrill v. Fitzgerald*, 36 Tex. 275. Vt.—*Barnard v. Stevens*, 2 Aik. 429, 16 Am. Dec. 733.

As to who may amend return, see *infra*, II, B, 8, g. (II).

[a] Leave to amend a sheriff's return will be granted as a matter of course. *Turney v. Organ*, 16 Ill. 43.

[b] Permission Necessary.—An officer cannot amend his return without permission after having filed it with the clerk of the court. *Watkins v. Gayle*, 4 Ala. 153.

[c] Amendment From Memory. "It is not error to refuse to allow an officer, after he is out of office, and several years subsequent to the transaction, to make, wholly from memory, a material addition to his return of a fact which, if untrue, could not be disproved, and which could have made but little impression on his memory, and where the application for leave to amend was not supported by an affidavit." *Fogg v. Bowman*, 5 Mo. App. 579.

[d] Objection to Allowance of Amendment.—The propriety of permitting an amendment to be made can only be questioned by resisting the motion for that purpose, or by an appeal from, or writ of error to, the judgment; and not in any collateral proceeding. *Stone v. Wilson*, 10 Gratt. (51 Va.) 529.

upon motion<sup>59</sup> and notice to the adverse party,<sup>60</sup> after it has been returned. But the court may not order the officer to amend his return; it can only authorize him to do so.<sup>61</sup> The motion to amend should be addressed to the court from which the writ is issued,<sup>62</sup> and not to the appellate court,<sup>63</sup> unless on appeal the whole case goes up.<sup>64</sup> A return which contains a manifest error does not need to be formally amended, it corrects itself.<sup>65</sup>

(II.) **Who May Procure.**—The indorsement or return on a writ of execution may be amended to conform to the truth of the case at the request of the officer who made it,<sup>66</sup> or his deputy,<sup>67</sup> or the parties,<sup>68</sup> or purchasers,<sup>69</sup> or a deceased officer's representatives;<sup>70</sup> but this priv-

59. *Horner v. Delaware, etc. Canal Co.*, 16 N. J. L. 265.

[a] After it has been filed a sheriff cannot amend his return upon an execution, except by motion to the court, upon notice to the creditor. *Hammen v. Minnick*, 32 Gratt. (73 Va.) 249.

60. *Kan.*—*Stetson v. Freeman*, 35 *Kan.* 523, 11 *Pac.* 431. *Me.*—*Chase v. Williams*, 71 *Me.* 190. *Vt.*—*Barnard v. Stevens*, 2 *Aik.* 429, 16 *Am. Dec.* 733.

[a] If the application to amend is made prior to the confirmation of the sale, no new or additional notice to the defendant in the execution is necessary. *Stetson v. Freeman*, 35 *Kan.* 523, 11 *Pac.* 431.

61. *Ark.*—*Humphries v. Lawson*, 7 *Ark.* 341. *Ind.*—*Wilcox v. Moudy*, 89 *Ind.* 232; *Walter v. Palmer*, 18 *Ind.* 279. *Mich.*—*Flynn v. Kalamazoo Circuit Court*, 138 *Mich.* 126, 101 *N. W.* 222. *Pa.*—*Vastine v. Fury*, 2 *Serg. & R.* 426; *Phila. Sav. Fund Soc. v. Purcell*, 24 *Pa. Super.* 205. *S. D.*—*Black Hills Brewing Co. v. Middle West Fire Ins. Co.*, 31 *S. D.* 318, 140 *N. W.* 687.

**Compelling officer to make return**, see *infra*, II, B, 8, k.

62. *Stancill v. Branch*, 61 *N. C.* 217; *Dickinson v. Lippitt*, 27 *N. C.* 560; *Schiffer v. Fort*, 1 *Posey Unrep. Cas.* (Tex.) 198.

63. *Stancill v. Branch*, 61 *N. C.* 216; *Gibbs v. Brooks*, 46 *N. C.* 448.

64. *Stancill v. Branch*, 61 *N. C.* 217 (*overruling Smith v. Low*, 24 *N. C.* 457); *King v. Breeden*, 2 *Coldw. (Tenn.)* 455.

65. *Gaar, Scott & Co. v. Reesor*, 28 *Ky. L. Rep.* 1308, 91 *S. W.* 717, where an execution for \$250.00 was returned as fully satisfied by a sale which netted \$26.15.

66. *Ala.*—*Wilson v. Strobach*, 59 *Ala.* 488; *Molin v. Hamner*, 22 *Ala.* 578; *Cawthorne v. Knight*, 11 *Ala.* 268. *Ark.*—*Clayton v. State*, 24 *Ark.* 16. *Me.*—*Whittier v. Vaughan*, 27 *Me.* 301. *Md.*—*Jarboe v. Hall*, 37 *Md.* 345; *Berry v. Griffith*, 2 *Har. & G.* 337, 18 *Am. Dec.* 309. *Mass.*—*Hunneman v. Phelps*, 207 *Mass.* 439, 93 *N. E.* 697; *Chase v. Merriamack Bank*, 19 *Pick.* 564. *Pa.*—*Lowenstein v. Krell*, 162 *Pa.* 267, 29 *Atl.* 578. *Tenn.*—*Atkinson v. Rhea*, 7 *Humph.* 59. *Tex.*—*Thomas v. Browder*, 33 *Tex.* 783. *Wash.*—*Toner v. Page*, 91 *Wash.* 314, 157 *Pac.* 866.

[a] No very definite rule can be laid down governing amendments, in all cases; but an officer should always be permitted in furtherance of justice, to amend his return on an execution, according to the facts, unless, by the allowance of the amendment, manifest injustice would be done. *Clayton v. State*, 24 *Ark.* 16.

**Who may make return**, see *supra*, II, B, 8, e.

67. *Miller v. Brooks*, 120 *Ga.* 232, 47 *S. E.* 646; *Stone v. Wilson*, 10 *Gratt.* (51 Va.) 529.

68. *Ala.*—*McMichael v. Branch Bank*, 14 *Ala.* 496. *Mich.*—*Flynn v. Kalamazoo Circuit Judge*, 136 *Mich.* 23, 98 *N. W.* 740. *N. H.*—*Baker v. Davis*, 22 *N. H.* 27. *N. Y.*—*Davis v. Weyburn*, 1 *How. Pr.* 153.

69. *McMichael v. Branch Bank*, 14 *Ala.* 496; *Lowenstein v. Krell*, 162 *Pa.* 267, 29 *Atl.* 578.

[a] But a purchaser may not amend a return in the absence of the officer. *Bibb v. Collins*, 51 *Ala.* 450.

70. *McMichael v. Branch Bank*, 14 *Ala.* 496.

ilege is usually not granted to strangers to the proceedings,<sup>71</sup> unless they have an interest therein.<sup>72</sup>

(III.) *Time.*—The return may be amended at any time,<sup>73</sup> even at a term subsequent to that of the return,<sup>74</sup> and although the officer making the return be out of office at the time of the making of the amendment,<sup>75</sup> or after the officer's death, on motion of his representatives.<sup>76</sup> But the allowance of an amendment has been refused after an unreasonable lapse of time.<sup>77</sup> As to whether an amendment may be permitted after an action has been commenced against the officer, the au-

71. *Cawthorne v. Knight*, 11 Ala. 268.

72. *McMichael v. Branch Bank*, 14 Ala. 496.

73. *U. S.*—*Linthicum v. Remington*, 5 Cranch C. C. 546, 15 Fed. Cas. No. 8,377. *Ala.*—*Brandon v. Snows*, 2 Stew. 255. *Ark.*—*Lungren v. Harris*, 6 Ark. 474; *Brown's Admrs. v. Hill & Co.*, 5 Ark. 78. *Colo.*—*Breckenridge Merc. Co. v. Bailif*, 16 Colo. App. 554, 66 Pac. 1079. *Ga.*—*Dorminey v. De Lang*, 130 Ga. 618, 61 S. E. 475, 124 Am. St. Rep. 193; *Spencer v. Fuller*, 68 Ga. 73; *Hopkins v. Burch*, 3 Ga. 222. *Ill.*—*Kinney v. Knoebel*, 47 Ill. 417; *Johnson v. Donnell*, 15 Ill. 97; *Tennent-Stribbling Shoe Co. v. Hargardine-McKittrick D. G. Co.*, 58 Ill. App. 368. *La.*—*Rochelle's Heirs v. Cox*, 5 La. 283. *Me.*—*Woods v. Cooke*, 61 Me. 215. *Md.*—*Jarboe v. Hall*, 37 Md. 345. *Miss.*—*Howard v. Priestly*, 58 Miss. 21; *Garner v. Collins*, 1 Walk. 518; *Planters Bank v. Walker*, 3 Smed. & M. 409. *Mo.*—*Scruggs v. Scruggs*, 46 Mo. 271; *Webster v. Blount*, 39 Mo. 500. *N. H.*—*Avery v. Bowman*, 39 N. H. 393. *N. Y.*—*Davis v. Weyburn*, 1 How. Pr. 153. *N. C.*—*Smith v. Daniel*, 7 N. C. 128. *Tenn.*—*Atkinson v. Rhea*, 7 Humph. 59. *Tex.*—*Vaughan v. Warrnell*, 28 Tex. 119. *Va.*—*Stone v. Wilson*, 10 Gratt. (51 Va.) 529.

[a] *Separate Action.*—The sheriff will not be permitted, on the motion of a party, to amend the return on an execution issued upon a judgment rendered in an entirely separate and distinct action. *Black Hills Brew. Co. v. Middle West Fire Ins. Co.*, 31 S. D. 318, 140 N. W. 687.

[b] *After the determination of the suit in which the execution was issued, an amendment changing the substance of the return and affecting the rights of others, or seeking to evade or defeat the operation of a statute, will*

not be permitted. This rule, however, does not apply when the amendment is for the purpose of correcting a mere oversight, which the officer might amend as a matter of course, even though it may affect the rights of third parties. *Williams v. Houston*, 71 N. C. 163; *Phillipse v. Higdon*, 44 N. C. 380.

74. *Ala.*—*McMichael v. Branch Bank*, 14 Ala. 496. *Ky.*—*Malone, Chiles & Co. v. Samuel*, 3 A. K. Marsh. 350, 13 Am. Dec. 172. *Va.*—*Rucker v. Harrison*, 6 Munf. (20 Va.) 181; *Bullitt's Exrs. v. Winstons*, 1 Munf. (15 Va.) 269.

75. *Ala.*—*McMichael v. Branch Bank*, 14 Ala. 496. *Ind.*—*Turner v. First Nat. Bank of Madison*, 78 Ind. 19. *Ky.*—*Newton v. Prather*, 1 Duv. 100. *La.*—*Elmore v. Bell*, 2 Rob. 484. *Me.*—*Kern v. Briggs*, 46 Me. 467. *Mo.*—*Scruggs v. Scruggs*, 46 Mo. 271; *Miles v. Davis*, 19 Mo. 408. *N. H.*—*Avery v. Bowman*, 39 N. H. 393. *R. I.*—*Lake v. Howland*, 15 R. I. 628. *Tenn.*—*Contra*, *Shores v. Whitworth*, 8 Lea 660. *Tex.*—*Lawrence v. Aguirre* (Tex. Civ. App.), 59 S. W. 289.

[a] *A sheriff may amend the return of his deceased deputy after, as well as before, the expiration of his own term of office.* *Avery v. Bowman*, 39 N. H. 393.

[b] *In Equity.*—If the return ought to be amended, and the officer is no longer in office, a court of equity will consider that done which should have been done and give the same effect to the return as though it had been amended. *Cook v. Dinsmore*, 3 Ohio Cir. Dec. 189, 5 Ohio Cir. Ct. 385.

76. *McMichael v. Branch Bank*, 14 Ala. 496.

77. *Smith v. Burbridge's Com.*, 2 Ky. L. Rep. 65; *Davidson v. Cowan*, 12 N. C. 304.

thorities are not in harmony, some allowing it,<sup>78</sup> and some not allowing it.<sup>79</sup>

(IV.) *Scope*.—Amendments may be allowed to the return to correct or supply deficiencies in regard to the description of the property,<sup>80</sup> the actual time of returning the writ,<sup>81</sup> the date of the levy,<sup>82</sup> or as to the appraisalment,<sup>83</sup> the signature on the return,<sup>84</sup> or the facts concerning a postponement of the sale.<sup>85</sup> An amendment will not be permitted

78. *Ala.*—*Niolin v. Hamner*, 22 *Ala.* 578; *Governor v. Bancroft*, 16 *Ala.* 605; *Hodges v. Laird*, 10 *Ala.* 678. *La.*—*Aubter v. Buhler*, 3 *Mart. (N. S.)* 489; *Elmore v. Bell*, 2 *Rob.* 484. *Miss.* *Howard v. Priestly*, 58 *Miss.* 21; *Trotter v. Parker*, 38 *Miss.* 473. *Mo.*—*Corby v. Burns*, 36 *Mo.* 194. *Tex.* *Vaughan v. Warnell*, 28 *Tex.* 119. *Va.* *Wardsworth v. Miller*, 4 *Gratt.* (45 *Va.*) 99.

[a] "A sheriff may, by leave of court, amend his return or process, during the pendency of a suit or motion against him, though the amendment if true, will relieve him from liability." *Wilson v. Strobach*, 59 *Ala.* 488. "Even though a suit or motion founded on the original return be then pending, and even though the proposed amendment be inconsistent with the original return, and take away the foundation of the suit or motion." *Stone v. Wilson*, 10 *Gratt.* (51 *Va.*) 529. But in *Carr v. Meade*, 77 *Va.* 142, it was held that having made return on an execution and on that return, in part, a decree having been entered, in subsequent proceeding against him and his sureties, the sheriff will not be permitted to amend his return, so as to explain it away and enable his sureties to escape liability for his default.

[b] In an action against a sheriff for conversion, the question arose as to the right of the sheriff to amend his return in regard to the statement that he had levied subject to a certain mortgage. The court said: "It is very questionable whether such a return is amendable; but if so, it must be done upon proof that it was made by mistake and that it is untrue, with due notice to the parties interested in it, and by the court in which it is a part of the record." *Mendelson v. Paschen*, 71 *Wis.* 591, 37 *N. W.* 815.

79. *Colo.*—*Breckenridge Merc. Co. v. Bailif*, 16 *Colo. App.* 554, 66 *Pac.* 1079. *Ky.*—*Wilson v. Huston*, 4 *Bibb* 332.

*Tenn.*—*King v. Breeden*, 2 *Coldw.* 455; *Atkinson v. Rhea*, 7 *Humph.* 59; *Mullins v. Johnson*, *Rayburn & Co.*, 3 *Humph.* 396. *Vt.*—*Paul v. Slason*, 22 *Vt.* 231, 54 *Am. Dec.* 75.

80. *Clarke v. Belmear*, 1 *Gill & J. (Md.)* 443.

As to description of property in return, see *supra*, II, B, 8, f, (III).

[a] A return of a levy on an equity of redemption amended to show that such equity included a creditor's right to contest the validity of a second mortgage. *Mathes v. Dover Nat. Bank*, 62 *N. H.* 491.

[b] *Description Supplied by Sheriff's Deed*.—The return upon an execution omitted to describe the real estate sold, but the sheriff's deed conveying the land described it minutely. In ejectment brought many years afterward against the original defendants in execution, the sheriff, not being dependent on his memory, but being furnished by the deed with the means of accurately supplying the defects, might amend his return so as to make it show what lands were sold and who was the purchaser. *Scruggs v. Scruggs*, 46 *Mo.* 271.

81. *Ware v. Bucksport & B. R. Co.*, 69 *Me.* 97; *Storer v. Haynes*, 67 *Me.* 420.

82. *Brown's Admrs. v. Hill & Co.*, 5 *Ark.* 78.

83. *Kellogg v. Wadhams*, 9 *Conn.* 201; *Chase v. Williams*, 71 *Me.* 190.

84. *Ky.*—*Humphrey's Exr. v. Wade*, 84 *Ky.* 391, 1 *S. W.* 648. *Me.*—*Wilton Mfg. Co. v. Butler*, 34 *Me.* 431. *Tenn.* *Elliott & Co. v. Jordan*, 7 *Baxt.* 376.

[a] "Where the truth of a return . . . is not questioned and no good reason to the contrary is shown, the officer making it should be allowed to amend by signing it, and thus make valid that which before had no appearance of official authenticity." *Slingluff v. Collins*, 109 *Va.* 717, 64 *S. E.* 1055.

85. *Wilson v. Bucknam*, 71 *Me.* 545.

to add anything occurring after the return has been made.<sup>86</sup> Nor will an amendment be permitted which makes a substantial change affecting the rights of parties,<sup>87</sup> or which makes any change that will affect the vested rights of third parties acquired bona fide and without notice.<sup>88</sup>

h. *Quashing and Vacating*.—(I.) **Generally**.—The court from which an execution issues has the power to quash a return for any defect which appears on its face<sup>89</sup> on a motion made by either party during the return term of the writ.<sup>90</sup>

(II.) **Notice**.—Notice of a motion to set aside an officer's return on the writ of execution must be given to the parties to the execution,<sup>91</sup> the officer making the return,<sup>92</sup> and to the purchaser at the sale under the execution.<sup>93</sup>

86. *Bibb v. Collins*, 51 Ala. 450.

87. *Hobart v. Bennett*, 77 Me. 401; *Panhandle Nat. Bk. v. Foster*, 74 Tex. 514, 12 S. W. 223.

[a] **An officer may not amend his return of "satisfied,"** to show that he had merely received a promissory note. *Holt v. Robinson*, 21 Ala. 106, 56 Am. Dec. 240.

88. **Ala.**—*McMichael v. Branch Bank*, 14 Ala. 496. **Cal.**—*Newhall v. Provost*, 6 Cal. 85. **Me.**—*Jackson v. Esten*, 83 Me. 162, 21 Atl. 830, 23 Am. St. Rep. 765; *Williamson v. Wright*, 75 Me. 35. **Miss.**—*Howard v. Priestly*, 58 Miss. 21. **N. J.**—*Bates v. Bachman*, 2 N. J. L. J. 155.

89. **U. S.**—*Warfield v. Wirt*, 2 Cranch C. C. 102, 29 Fed. Cas. No. 17, 174. **Del.**—*Voshell v. Cavender*, 1 Penne. 167, 39 Atl. 989. **Miss.**—*Anderson v. Carlisle & White*, 7 How. 408. **Mo.**—*Creath v. Dale*, 69 Mo. 41. **Mont.**—*McGregor v. Wells, Fargo & Co.*, 1 Mont. 142. **N. Y.**—*Lopez v. Campbell*, 163 N. Y. 340, 57 N. E. 501. **Okl.**—*D. M. Osborne & Co. v. Hughey*, 14 Okla. 29, 76 Pac. 146.

[a] **Obvious Error**.—When a return sets out certain property as a homestead, which on its face is an unwarranted exemption, a motion to quash the return will prevail. *Creath v. Dale*, 69 Mo. 41.

[b] **On Evidence Aliunde**.—The court cannot quash or annul the return of the execution on motion, on evidence aliunde, of irregularity, falsehood or illegality in the conduct of the sheriff. This can only be reached by action against the sheriff for a false return, and damages resulting therefrom. *McGregor v. Wells, Fargo & Co.*,

1 Mont. 142. As to conclusiveness of return and evidence aliunde, see *infra*, II, B, 8, i.

[c] **Sale of Third Person's Property**.—But in *Magwire v. Marks*, 28 Mo. 193, 75 Am. Dec. 121, the court held that if a levy of an execution be made upon property not belonging to the defendant therein, and such execution be returned satisfied to the amount made by the execution sale, should the plaintiff in the execution be compelled to refund to the true owner the amount received by him from such sale, he will be entitled to have the satisfaction endorsed on the execution set aside and to have an execution issue for the full amount of the judgment.

90. *Buckhannon, Hagan & Co. v. Tinnin*, 2 How. (U. S.) 258, 11 L. ed. 259; *Voshell v. Cavender*, 1 Penne. (Del.) 167, 39 Atl. 989.

[a] **Laches**.—A return will not be quashed if the party asking it be guilty of laches in making the motion. *Buckhannon, Hagan & Co. v. Tinnin*, 2 How. (U. S.) 258, 11 L. ed. 259.

[b] **But if the party making the motion did not have notice of the return until after the return term, then the motion may be made at the term following the date of such notice**. *Odom v. Causey*, 59 Ga. 607.

91. *State Bank v. Marsh*, 7 Ark. 390; *McKinney v. Jones*, 7 Tex. 598, 58 Am. Dec. 83. See also *Schiffer v. Fort*, 1 Posey Unrep. Cas. (Tex.) 198.

92. *State Bank v. Marsh*, 7 Ark. 390; *Mann v. Nichols*, 1 Smed. & M. (Miss.) 257. *Contra*, *Sprinz v. Frank*, 81 Ga. 162, 7 S. E. 177.

93. *State Bank v. Marsh*, 7 Ark.

(III.) *Effect.*—Quashing the officer's return does not *per se* annul any action taken by him under the writ;<sup>94</sup> nor does it revive an extinguished lien;<sup>95</sup> it merely renews the judgment creditor's privilege of taking out another writ.<sup>96</sup>

i. *Conclusiveness and Effect.*—The recitals in the officer's return are competent evidence of their truth as to all matters properly incorporated therein, but not as to other matters.<sup>97</sup> As against third persons these recitals are *prima facie* evidence.<sup>98</sup> But they are conclusive<sup>99</sup>

390; *McKinney v. Jones*, 7 Tex. 598, 58 Am. Dec. 83.

94. *Schobee v. Dedman*, 2 Litt. (Ky.) 116.

95. *Ettlinger v. Tansey*, 17 B. Mon. (Ky.) 364. See *Campau v. Detroit Driving Club*, 135 Mich. 575, 98 N. W. 267.

96. *Ettlinger v. Tansey*, 17 B. Mon. (Ky.) 364.

As to alias writ, see *infra*, II, B, 9.

97. *Root v. Columbus R. Co.*, 45 Ohio St. 222, 12 N. E. 812.

[a] "It is well settled that the return of an officer is conclusive as to such parties and privies only as to such facts as it was his legal duty to state. *Cow. & Hill's Notes*; *Phil. Ev.* 383; *Freem. Ex.*, sec. 364. A return upon a writ properly embraces no more than pertinent history of what was done by the officer in executing it according to its requirement; and where it is made to include matters outside of such history, the matters so incorporated constitute no part of the return, and are not evidence even as between parties, much less as between strangers." *Root v. Columbus R. Co.*, 45 Ohio St. 222, 12 N. E. 812.

[b] As to irrelevant matters it is not evidence. *Shannon v. McMullin*, 25 Gratt. (66 Va.) 211.

98. *Ga.*—*Jinks v. American Mfg. Co.*, 102 Ga. 694, 28 S. E. 609. *Ind.*—*Splahn v. Gillespie*, 48 Ind. 397. *Me.*—*Chase v. Gilman*, 15 Me. 64. *Mass.*—*Baker v. Baker*, 125 Mass. 7. *N. C.*—*Miller v. Powers*, 117 N. C. 218, 23 S. E. 182; *Jackson v. Jackson*, 35 N. C. 159. *N. Y.*—*Crouse v. Bailey*, 10 N. Y. Supp. 273. *Ohio.*—*Phillips v. Elwell*, 14 Ohio St. 240. *Tenn.*—*James v. Kennedy*, 10 Heisk. 607. *Vt.*—*Ellison v. Wilson*, 36 Vt. 60; *Burroughs v. Wright*, 19 Vt. 510; *Gates v. Gaines*, 10 Vt. 346. *Va.*—*Lathrop v. Lumpkin*, 2 Rob. 52. *Wis.*—*Sexton v. Rhames*, 13 Wis. 99.

[a] The return of the officer is the

legal evidence of everything therein cited within his official duty. *Gilson v. Parkhurst*, 53 Vt. 384.

[b] As to Third Parties.—"Whatever may be the effect of the return as between the parties to the execution, we are clear it is not the sole and conclusive evidence of the facts stated in it as between the execution creditor and a third person; in this case an attaching creditor of the execution debtor. The contrary doctrine seems to be the rule of the common law in England, but in the American states generally, and in this state, the return is held to be only *prima facie* evidence." *Drake v. Mooney*, 31 Vt. 617.

99. *Ark.*—*Chapline v. Robertson*, 44 Ark. 202. *Cal.*—*Egery v. Buchanan*, 5 Cal. 53. *Colo.*—*People v. Finch*, 19 Colo. App. 512, 76 Pac. 1120. *Ind.*—*Clark v. Shaw*, 79 Ind. 164; *Stockton v. Stockton*, 59 Ind. 574; *Splahn v. Gillespie*, 48 Ind. 397; *Bennett v. Jones*, 7 Blackf. 110. *Kan.*—*Steffins v. Gurney*, 61 Kan. 292, 59 Pac. 725. *Ky.*—*White v. Laurel Land Co.*, 26 Ky. L. Rep. 775, 82 S. W. 571. *Me.*—*True v. Emery*, 67 Me. 28. *Mass.*—*Baker v. Baker*, 125 Mass. 7. *Mich.*—*Flynn v. Kalamazoo Circuit Judge*, 136 Mich. 23, 98 N. W. 740. *Minn.*—*Hutchins v. Carver County Comrs.*, 16 Minn. 13; *Tullis v. Brawley*, 3 Minn. 277. *Mo.*—*Mason v. Perkins*, 180 Mo. 702, 79 S. W. 683. *N. Y.*—*Walden v. Davison*, 15 Wend. 575. *Ohio.*—*Langdon v. Summers*, 10 Ohio St. 77; *Hill v. Kling*, 4 Ohio 135. *Pa.*—*Jaffray's Appeal*, 101 Pa. 583; *Bogue's Appeal*, 83 Pa. 101; *Rice v. Groff*, 58 Pa. 116. *Vt.*—*Yatter v. Pitkin*, 72 Vt. 255, 47 Atl. 787; *Wilson v. Spear*, 68 Vt. 145, 34 Atl. 429; *Wood v. Doane*, 20 Vt. 612. *Va.*—*Rowe's Admr. v. Hardy's Admr.*, 97 Va. 674, 34 S. E. 625; *Taylor v. Dundass*, 1 Wash. 92.

As to conclusiveness of the return of extent, see *infra* II, B, 8, j, (VI).

as between the parties to the action, and their privies<sup>1</sup> and not subject to collateral attack or impeachment,<sup>2</sup> except in a direct action against the officer for making a false return.<sup>3</sup> Therefore the return may not be contradicted by extrinsic evidence,<sup>4</sup> except to identify the property,<sup>5</sup> or to show a clerical error in a recital,<sup>6</sup> or to explain a mistake on which the return was based.<sup>7</sup> The officer who made the return cannot deny<sup>8</sup> or

[a] **Exception.**—Return conclusive except on timely motion to quash. Miss. Code, 1906, §3963.

[b] **Effect of the Rule.**—By this it is meant that, so far as that particular cause is concerned, nothing can be alleged against the validity of the judgment, by the parties to the suit, which is contradictory of the return; nor can any rights acquired under such judgment be divested or disturbed by disproving the return of the officer, either upon the writ of summons or the execution. There is, however, no public policy to be subserved by giving to such official acts any greater force and effect than this, while great injustice might result from giving the principle a more extended application. Decker v. Armstrong, 87 Mo. 316.

[c] **As to Directions by Plaintiff To Return Writ.**—But it seems proper to allow the plaintiff in an execution to dispute the sheriff's indorsement thereon that the plaintiff had directed him to return the execution to the clerk. Vroman v. Thompson, 51 Mich. 452, 16 N. W. 308.

1. Stockton v. Stockton, 59 Ind. 574.

[a] **Title Derived Prior to Levy.** One claiming rights in property that has been sold on execution, by a title originating prior to the levy, is not precluded by the return of the officer from showing the real facts as to the validity of the levy and sale. Winfield v. Adams, 34 Mich. 437.

2. Ark.—Chapline v. Robertson, 44 Ark. 202. Cal.—Egery v. Buchanan, 5 Cal. 53. Kan.—Thompson v. Pfeiffer, 60 Kan. 409, 56 Pac. 763. Ky.—Com. v. Salyer, 146 Ky. 453, 142 S. W. 1015. Mass.—Sawyer v. Harmon, 136 Mass. 414; Sanborn v. Chamberlin, etc., 101 Mass. 409; Simmons v. Bradford, 15 Mass. 82. Minn.—Tullis v. Browley, 3 Minn. 277. Mo.—Ables v. Webb, 186 Mo. 233, 85 S. W. 383, 105 Am. St. Rep. 610; Decker v. Armstrong, 87 Mo. 316. N. C.—Edwards v. Tipton, 77 N. C. 222. Tex.—Flaniken v. Neal, 67 Tex. 629, 4 S. W. 212.

[a] **Effect of Irregularities.**—That an execution is not properly indorsed, and proper credits are not made, will not render it void in a collateral proceeding. Hall v. Doyle, 35 Ark. 445.

3. Ind.—Stockton v. Stockton, 59 Ind. 574; Splahn v. Gillespie, 48 Ind. 397. Ky.—Taylor v. Com., 3 Bibb. 356. Minn.—Folsom v. Carli, 5 Minn. 333, 80 Am. Dec. 429.

**Action for false return, see the title "Sheriffs, Constables and Marshals."**

4. Mass.—Blake v. Rogers, 210 Mass. 588, 97 N. E. 68. Me.—True v. Emery, 67 Me. 28; Tibbets v. Merrill, 12 Me. 122. N. J.—Wills v. McKinney, 41 N. J. L. 120. Pa.—Phila. Sav. Fund Soc. v. Purcell, 24 Pa. Super. 205. Tenn.—Cowan v. Sloan, 95 Tenn. 424, 32 S. W. 388; Union Bank v. Barnes, 10 Humph. 244; Hill v. Hinton, 2 Head 124.

5. Broadus v. Smith, 121 Ala. 335, 26 So. 34; Morgan v. Spangler, 14 Ohio St. 102; Douglass v. McCoy, 5 Ohio 522; Matthews v. Thompson, 3 Ohio 272.

6. Davidson v. Chandler, 27 Tex. Civ. App. 418, 65 S. W. 1080.

7. McNeal v. Hunt, 6 Kan. App. 670, 50 Pac. 63.

8. Ala.—Governor v. Baneroft, 16 Ala. 605; Barton v. Lockhart, 2 Stew. & P. 109. Ark.—Lawson v. Main, 4 Ark. 184. Colo.—People v. Finch, 19 Colo. App. 512, 76 Pac. 1120; Breckenridge Merc. Co. v. Bailiff, 16 Colo. App. 554, 66 Pac. 1079. Ind.—State v. Cisney, 95 Ind. 265. Kan.—Spokenbarger v. Lemert, 23 Kan. 55; Gapen v. Stephenson, 17 Kan. 613. Me.—Cowan v. Wheeler, 31 Me. 439; Wyer v. Andrews, 13 Me. 168. Mass.—Gardner v. Hosmer, 6 Mass. 325. Miss.—Doe ex dem. Van Campen v. Snyder, 3 How. 66. Mo.—Hopke v. Lindsay, 83 Mo. App. 85. N. H.—Johnson v. Stone, 40 N. H. 197. N. J.—Hustick v. Allen, 1 N. J. L. 168. N. Y.—Townsend v. Olin, 5 Wend. 207. N. C.—Walters v. Moore, 90 N. C. 41; Governor v. Tivitty, 12 N. C. 153. Pa.—Freeman v. Apple, 99 Pa. 261; Miller

contradict it, nor may his sureties.<sup>9</sup> But the purchaser is neither bound by the return nor protected by it.<sup>10</sup> The legal effect of a return may always be inquired into and determined.<sup>11</sup>

After an execution has been returned, the officer has no control over it or authority under it.<sup>12</sup>

j. *Return of Extent.*—(I.) *Necessity for.*—It is an essential requisite to the purchaser's title that the return of an extent of an execution on land be filed with the clerk of the court from which the writ issued.<sup>13</sup>

(II.) *Time for.*—The return must be made within the life of the execution.<sup>14</sup>

(III.) *Form and Sufficiency.*—(A.) *IN GENERAL.*—All the material facts necessary to show that the law has been complied with should appear from the officer's return.<sup>15</sup>

v. Com., 5 Pa. 294; *Brownfield v. Com.*, 13 Serg. & R. 265. Wis.—*Mendelson v. Paschen*, 71 Wis. 591, 37 N. W. 815.

[a] *Deputy's Return.*—A sheriff cannot contradict the return of his deputy. *Sheldon v. Payne*, 7 N. Y. 453.

[b] *As to Delivery of Property.* Evidence that the sheriff delivered the property by an agent or deputy, will not have the effect of contradicting his return, that he himself delivered it. *Fatapasco v. Magee*, 86 N. C. 350.

[c] *As to Title.*—The sheriff is precluded from the assertion of a different title to the goods seized under his execution than that shown to have been acquired by his levy of the process. *Hopke v. Lindsay*, 83 Mo. App. 85.

9. *Bagot v. State*, 33 Ind. 262.

10. *Meherin v. Saunders*, 131 Cal. 681, 63 Pac. 1084, 54 L. R. A. 272.

11. *Holcomb v. Hays*, 23 Ky. L. Rep. 352, 62 S. W. 1028; *Doe v. Ingersoll*, 11 Smed. & M. (Miss.) 249. See also *Wildasin v. Bare*, 171 Pa. 387, 33 Atl. 365; *Appeal of Titusville Novelty Iron Wks.*, 77 Pa. 103; *Hoffman v. Danner*, 14 Pa. 25.

[a] *To Interpret Terms.*—Parol evidence admissible to enable the court to understand the terms used in the description of the property levied upon. *Holcomb v. Hays*, 23 Ky. L. Rep. 352, 62 S. W. 1028.

12. Ala.—*Chaney v. Burford Lumber Co.*, 132 Ala. 315, 31 So. 369. Kan.—*Buist v. Citizens' Sav. Bank*, 4 Kan. App. 700, 46 Pac. 718. R. I.—*Rowley v. Nichols*, 14 R. I. 14.

13. Me.—*Cutting v. Harrington*, 104 Me. 96, 71 Atl. 374, 129 Am. St. Rep.

373; *Caldwell v. Blake*, 69 Me. 458. N. H.—*Rand v. Hadlock*, 6 N. H. 514. Vt.—*Russell v. Brooks*, 27 Vt. 640.

[a] *Against Tax Collector.*—An extent against a delinquent tax collector for revenues collected and due the town treasury does not require a return. *Hackett v. Amsden*, 57 Vt. 432.

*Necessity for return generally*, see *supra*, II, B, 8, b.

14. *Hall v. Hall*, 5 Vt. 304.

[a] The time of returning into the clerk's office an execution extended on land, is not material, if it has been recorded in the registry of deeds within three months after the extent. *Emerson v. Towle*, 5 Me. 197.

*Time for return generally*, see *supra*, II, B, 8, d.

15. Conn.—*Bissell v. Nooney*, 33 Conn. 411; *Camp v. Bates*, 13 Conn. 1; *Booth v. Booth*, 7 Conn. 350. Me.—*Munroe v. Reding*, 15 Me. 153; *Tibbets v. Merrill*, 12 Me. 122. Mass.—*Pickering v. Reynolds*, 111 Mass. 83; *Williams v. Amory*, 14 Mass. 20. N. H.—*Avery v. Bowman*, 39 N. H. 393. Vt.—*Sleeper v. Newbury Sem.*, 19 Vt. 451; *Henry v. Tilson*, 19 Vt. 447.

*Form and sufficiency of return generally*, see *supra*, II, B, 8, f.

[a] *Should Be Sufficient by Itself.* The return should show with reasonable certainty the quantity of land levied upon without the aid of extrinsic facts not so referred to as to be made a part of the return. *Coe v. Wickham*, 33 Conn. 389.

[b] *Should Be Specific.*—The day the extent was commenced should be stated, it is insufficient to say that it was commenced within thirty days

(B.) DESCRIPTION OF PROPERTY.—The return of an extent should describe the land levied upon by metes and bounds;<sup>16</sup> but the description is sufficient if it describes the land with such certainty that there can be no mistake as to its location,<sup>17</sup> or if the return contain a reference to some place where such description may be made certain.<sup>18</sup>

(C.) APPRAISEMENT.—The return of the officer must show, either expressly or by necessary inference, that all the statutory requirements in relation to the appraisement have been complied with.<sup>19</sup> But if the certificate of appraisement be attached to and made a part of the return, the facts therein shown need not be set out in the return.<sup>20</sup>

(IV.) AMENDMENTS.—The officer has the right to amend his return<sup>21</sup>

after judgment. *Cooper v. Bisbee*, 4 N. H. 329.

[c] **Inferential Statements.**—(1) The return is sufficient if a levy is shown from the acts set out without specifically averring it. *Cowls v. Hastings*, 9 Mete. (Mass.) 476. (2) The return of the extent of an execution upon real estate must expressly state every fact which the statute makes essential to its validity, or every such fact must be necessarily implied in what is stated. *Avery v. Bowman*, 39 N. H. 393.

[d] **Notice.**—Under a statute which provides that notice of levy should be given to the execution defendant's attorney in the absence of the former, a return is insufficient which shows that notice was left at defendant's usual place of abode. *Wellington v. Fuller*, 38 Me. 61.

16. Conn.—*Eels v. Day*, 4 Conn. 95. Me.—*Roop v. Johnson*, 23 Me. 335. Mass.—*Hedge v. Drew*, 12 Pick. 141, 22 Am. Dec. 416; *Boylston v. Carver*, 11 Mass. 515.

[a] **Insufficient Description.**—A return which merely states the quantity of land levied upon, without mentioning its location or giving its boundaries, is insufficient. *Eels v. Day*, 4 Conn. 95.

As to description, generally, see *supra*, II, B, 8, f, (III).

17. *Roop v. Johnson*, 23 Me. 335; *Buck v. Hardy*, 6 Me. 162; *Lyford v. Thurston*, 16 N. H. 399.

[a] **Inconsistency in Description.** If the description of the land in an extent be sufficient to ascertain the land intended, it will pass although some particulars in the description do not agree. *Morse v. Dewey*, 3 N. H. 535.

[b] **Land extended upon by an exe-**

cution is sufficiently set out by metes and bounds, within the meaning of the statute, if it be described as bounded by the lands of other persons, provided its situation can be ascertained. *McConihe v. Sawyer*, 12 N. H. 396.

18. Me.—*French v. Allen*, 50 Me. 437; *Roop v. Johnson*, 23 Me. 335. Mass. *Boylston v. Carver*, 11 Mass. 515; *Herring v. Polley*, 8 Mass. 113. Vt.—*Hyde v. Barney*, 17 Vt. 280, 44 Am. Dec. 335; *Maeck v. Sinclear*, 10 Vt. 103.

[a] **Several Writs.**—An officer having more than one writ for and against the same parties, may extend upon the same parcel of land without specifying in each return distinct boundaries. *Baldwin v. Foot*, 1 Tyler (Vt.) 14.

19. Conn.—*Coe v. Wickham*, 33 Conn. 389; *Metcalf v. Gillet*, 5 Conn. 400. Me.—*Huntress v. Tiney*, 39 Me. 237; *Fitch v. Tyler*, 34 Me. 463. Mass. *Allen v. Thayer*, 17 Mass. 299. N. H. *Whittier v. Varney*, 10 N. H. 291. Vt. *Day & Co. v. Roberts*, 8 Vt. 413.

[a] **Notice to Debtor.**—(1) The return of an extent must show that the debtor was duly notified to choose an appraiser. *Means v. Osgood*, 7 Me. 146. (2) But if the return state that the debtor neglected to choose an appraiser it is sufficient, as this statement carries the inference that he had notice of the time and place of the appraisement. *Blanchard v. Brooks*, 12 Pick. (Mass.) 47; *Daniels v. Ellison*, 3 N. H. 279.

Recital as to appraisement generally, see *supra*, II, B, 8, f, (II), (B).

20. *Fitch v. Tyler*, 34 Me. 463; *Williams v. Amory*, 14 Mass. 20.

21. *Bates v. Willard*, 10 Mete. (Mass.) 62.

As to amendments generally, see *supra*, II, B, 8, g.

of an extent, by leave of court,<sup>22</sup> within a reasonable time<sup>23</sup> as to matters of form;<sup>24</sup> as, for example, to add his signature,<sup>25</sup> change a date,<sup>26</sup> or correct a clerical error;<sup>27</sup> providing the return, before being amended, is not a nullity,<sup>28</sup> and the rights of innocent third parties are not affected thereby.<sup>29</sup> However, an amendment as to a fact material to the title will be permitted, even as against third persons, if the return show on its face a compliance with all the requirements of the statute.<sup>30</sup>

(V.) **Record.**—The officer's return of an extent on lands must be filed for record in accordance with the statute.<sup>31</sup> This is essential to preserve the lien<sup>32</sup> and to pass the title,<sup>33</sup> but not as between the execution creditor and debtor.<sup>34</sup> The fact of recording need not appear from the return.<sup>35</sup>

22. *Pratt v. Wheeler*, 6 Gray (Mass.) 520; *Baker v. Davis*, 22 N. H. 27.

23. *Gilman v. Stetson*, 16 Me. 124; *Russ v. Gilman*, 16 Me. 209; *Libbey v. Copp*, 3 N. H. 45.

[a] **After Registry.**—Me.—*Howard v. Turner*, 6 Greenl. 106. Mass.—*Bates v. Willard*, 10 Mete. 62. N. H.—*Whittier v. Varney*, 10 N. H. 291.

[b] **After Term of Office.**—*Fitch v. Tyler*, 34 Me. 463.

[c] **Pending Action for the Land.** *Howard v. Turner*, 6 Greenl. (Me.) 106; *Brown v. Washington*, 110 Mass. 529.

24. See the following: Me.—*Williamson v. Wright*, 75 Me. 35; *Fitch v. Tyler*, 34 Me. 463. Mass.—*Pratt v. Wheeler*, 6 Gray 520. N. H.—*Saunders v. First Nat. Bank*, 61 N. H. 31.

25. *Briggs v. Hodgdon*, 78 Me. 514, 7 Atl. 387.

26. *Eveleth v. Little*, 16 Me. 374.

27. *Peaks v. Gifford*, 78 Me. 362, 5 Atl. 879; *Brown v. Washington*, 110 Mass. 529.

28. Me.—*Peaks v. Gifford*, 78 Me. 362, 5 Atl. 879. Mass.—*Brown v. Washington*, 110 Mass. 529; *Pratt v. Wheeler*, 6 Gray 520. N. H.—*Saunders v. First Nat. Bank*, 61 N. H. 31; *Derry Bank v. Webster*, 44 N. H. 264.

29. Me.—*Briggs v. Hodgdon*, 78 Me. 514, 7 Atl. 387; *Gilman v. Stetson*, 16 Me. 124. Mass.—*Bates v. Willard*, 10 Mete. 62. N. H.—*Saunders v. First Nat. Bank*, 61 N. H. 31; *Avery v. Bowman*, 39 N. H. 393.

30. *Knight v. Taylor*, 67 Me. 591; *Smith v. Knight*, 20 N. H. 9.

[a] **An officer will be permitted or directed to amend his return of an extent, in order to perfect the title, according to the justice and truth of the**

case, when no rights of third persons have intervened, and the evidence is full and satisfactory; and, even as against third persons, the return may and will be thus amended, if it contain in itself sufficient matter to show that, in making the levy, all the requisitions of the statute were probably complied with. *Avery v. Bowman*, 39 N. H. 393.

31. Me.—*Stevens v. Bachelder*, 28 Me. 218. N. H.—*Morse v. Child*, 7 N. H. 581. Vt.—*Hubbard v. Dewey*, 2 Aik. 312.

As to filing or recording the return generally, see *supra*, II, B, 8, e, (IV).

[a] **Before Next Term.**—If the proceedings of the levy cannot be completed so that record can be made prior to the return day of the execution, it should be done as soon after as may be practicable, and at least prior to the next term of court. *Morse v. Child*, 7 N. H. 581.

[b] **Before Actual Return.**—The record, in the town clerk's office, of an execution levied upon real estate, and the return thereon, is to be made within the life of the execution and before the return, and if not so made the levy is void. *Little v. Sleeper*, 37 Vt. 105.

32. *Spencer v. Champion*, 13 Conn. 11.

33. Conn.—*Tapliff v. Davis*, 1 Root 556. Mass.—*Sargent v. Peirce*, 2 Mete. 80; *McGregor v. Brown*, 5 Pick. 170. N. H.—*Morse v. Child*, 7 N. H. 581; *Sullivan v. McKean*, 1 N. H. 371. Vt. *Perrin v. Reed*, 33 Vt. 62.

34. *Stevens v. Bachelder*, 28 Me. 218; *Perrin v. Reed*, 33 Vt. 62.

35. *Finch v. Bishop*, 13 Conn. 576.

[a] But see *Jewitt v. Guyer*, 38 Vt.

(VI.) **Conclusiveness.**—The officer's return of an extent on realty is conclusive upon the officer,<sup>36</sup> parties,<sup>37</sup> and all claiming under them.<sup>38</sup>

k. **Enforcing Return.**—The officer may be compelled, on application to the court by the execution plaintiff, to make his return;<sup>39</sup> and this may be done either by motion,<sup>40</sup> by contempt proceedings,<sup>41</sup> or by a special action to enforce the forfeitures and penalties prescribed by law for not making a return.<sup>42</sup> Mandamus will not lie to compel a sheriff to make return of an execution, where he has been ordered by the court to withhold its return pending the final determination of another action involving property affected by the lien of the judgment upon which the execution had issued.<sup>43</sup>

9. **Alias and Pluries Writs.**—a. **Definition and Nature.**—An alias writ is a second writ issued where one of the same kind has been issued before in the same cause.<sup>44</sup> It is in itself an original, and does not stand in lieu of the first writ.<sup>45</sup>

A pluries writ is one issued subsequently to the original and to an alias writ.<sup>46</sup>

209, wherein the court says the return must state that a copy was filed with the town clerk in order to create a valid lien, though not essential to subsequent proceedings.

36. **Me.**—Allen v. Doyle, 33 Me. 420. **N. H.**—Ladd v. Wiggin, 35 N. H. 421, 69 Am. Dec. 551. **Vt.**—Swift v. Cobb, 10 Vt. 282.

As to conclusiveness generally, see *supra*, II, B, 8, i.

37. **Me.**—Mansfield v. Jack, 24 Me. 98. **Mass.**—Bott v. Burnell, 11 Mass. 163. **N. H.**—Ladd v. Wiggin, 35 N. H. 421, 69 Am. Dec. 551. **Vt.**—Hathaway v. Phelps, 2 Aik. 84.

38. **Me.**—Mansfield v. Jack, 24 Me. 98. **Mass.**—Bott v. Burnell, 11 Mass. 163. **N. H.**—Ladd v. Wiggin, 35 N. H. 421, 69 Am. Dec. 551. **Vt.**—Stevens v. Brown, 3 Vt. 420, 23 Am. Dec. 215.

39. See the cases cited *infra*, this section.

40. Shindler v. Blunt, 1 Sandf. (N. Y.) 683; *In re Dawson*, 20 Abb. N. C. (N. Y.) 188; Holmes v. Rogers, 50 Hun 600, 2 N. Y. Supp. 501, 18 N. Y. St. 652; National Exch. Bank of Boston v. Burkhalter, 20 N. Y. Supp. 593.

41. Rowe's Admr. v. Hardy's Admr., 97 Va. 674, 34 S. E. 625.

See generally the title, "Contempt."

42. Rowe's Admr. v. Hardy's Admr., 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811.

See generally the title, "Penalties, Forfeitures and Fines."

43. State v. Hartman, 26 Wash. 524, 67 Pac. 223.

As to remedy of mandamus generally, see the title "Mandamus."

44. Swift v. Flanagan, 12 How. Pr. (N. Y.) 438.

[a] The term alias necessarily imports that a prior execution issued. Pollard v. Cocke, 19 Ala. 188.

[b] An execution issuing upon a forthcoming bond is not an alias. Caperton v. Martin, 5 Ala. 217.

[c] "A venditioni exponas is in its nature and operation, as to the property on which the levy may have been made, an alias execution; it merely commands and authorizes, as to real estate, the completion of the execution already begun." Beebe v. United States, 161 U. S. 104, 10 Sup. Ct. 532, 40 L. ed. 636; Dryer v. Graham, 58 Ala. 623. But the fieri facias clause attached to a writ of venditioni exponas has not the force of an alias fieri facias, but is dependent upon the result of the sale under the venditioni exponas when, if such sale be insufficient for the purposes of the execution, it for the first time becomes operative. Dunn v. Nichols, 63 N. C. 107.

As to necessity for return of original before issuance of alias, see *infra*, II, B, 9, c, II, (A).

45. Kellogg & Co. v. Buckler, 17 Ga. 187.

46. Swift v. Flanagan, 12 How. Pr. (N. Y.) 438.

[a] A pluries writ "technically pre-

A substitute or renewed writ is one issued after the loss or destruction of the first, to take its place.<sup>47</sup> It is not considered strictly an alias writ.<sup>48</sup>

b. *On What Founded.*<sup>49</sup>—There must be a valid, subsisting judgment upon which to issue an alias or pluries writ.<sup>50</sup> But it is not necessary that the judgment should expressly provide for the issuance of an alias execution.<sup>51</sup>

c. *Issuance of.*—(I.) *Right to, Generally.*—The fact that statutes have remained silent as to the propriety of issuing an alias or have provided that the original may be renewed or reissued does not take away the power of the clerk to issue an alias.<sup>52</sup> Where satisfaction of the judgment was not obtained by the original writ, the creditor is entitled to the issuance of an alias or pluries writ.<sup>53</sup> Where the first writ issued for too small an amount, an alias may issue for the balance if the discrepancy was due to mistake,<sup>54</sup> but not where it was due to plaintiff's directions.<sup>55</sup> The forfeiture of a forthcoming bond given upon the interposition of a claim, does not deprive the execution plaintiff of the right to sue out an alias or pluries execution on his original judgment.<sup>56</sup> Generally the plaintiff cannot arbitrarily abandon one

supposes two or more writs issued and returned before it." *Sellers v. Hayes*, 17 Ala. 749; *Hamilton v. Lyman*, 9 Mass. 14, 17.

47. *Del.*—*Morrison v. Taylor*, 4 Penne. 211, 55 Atl. 335. *Ga.*—*Cooper v. Huff*, 55 Ga. 119; *Kellogg & Co. v. Buckler*, 17 Ga. 187; *Rushin v. Shields & Ball*, 11 Ga. 636, 56 Am. Dec. 436. *N. Y.*—*White v. Lovejoy*, 3 Johns. 448.

48. *Conn.*—*Roberts v. Church*, 17 Conn. 142. *Ga.*—*Freeman v. Coleman*, 88 Ga. 421, 14 S. E. 551; *Milner v. Akin*, 58 Ga. 555; *Walls v. Smith*, 19 Ga. 8. *N. Y.*—*White v. Lovejoy*, 3 Johns. 448.

[a] In Georgia (1) it is designated by statute as an alias writ in lieu of the lost original (*Ward v. Miller*, 143 Ga. 164, 84 S. E. 480), (2) and the fact that it is called a copy is immaterial. *Ward v. Miller*, 143 Ga. 164, 84 S. E. 480.

49. *Foundation for writ of execution generally*, see *supra*, II, B, 1, b.

50. *Lowry v. Richards*, 62 Ga. 370.

[a] *Loss of Judgment Record.* Where the original execution has been returned unsatisfied, an alias may be issued although the record of the judgment is lost. *Childress v. Marks*, 2 Baxt. (Tenn.) 12.

51. *Riddell v. Ebinger*, 6 La. Ann. 407; *Weddington v. Carver*, 45 Tex. Civ. App. 68, 100 S. W. 786. *Compare supra*, II, B, 1, b, (I), (B).

52. *Walter v. Greenwood*, 29 Minn. 87, 12 N. W. 145; *Yetzer v. Young*, 3 S. D. 263, 270, 52 N. W. 1054.

53. *Steele v. Thompson*, 62 Ala. 323; *Steele v. Murray*, 1 Blackf. (Ind.) 179, may have another writ of the same or of a different sort, at his election.

[a] *Abandonment or Removal Without Consent of Plaintiff.*—If the levy be abandoned by the sheriff, with the consent of the defendants, without the concurrence or authority of the plaintiff; or if the property is eloiigned or removed by the defendant out of the reach of the sheriff, without the consent of the sheriff or the plaintiff, the latter may sue out a new execution. *Walker v. Com.*, 18 Gratt. (59 Va.) 13.

54. *Haw.*—*Hackfeld v. Ludovico*, 10 Hawaii 348. *N. Y.*—*People v. Judges*, 1 Wend. 73. *Eng.*—*Hunt v. Passmore*, 2 Dowl. P. C. 414.

55. *Todd v. Botchford*, 86 N. Y. 517 (will not issue for collection of interest); *People v. Onondaga*, 3 Wend. (N. Y.) 331.

[a] *Where Execution Plaintiff Instructed Under Misapprehension.*—However in *Bank of Sheboygan v. Trilling*, 75 Wis. 163, 43 N. W. 830, the court allowed an alias for an amount which the plaintiff had instructed the sheriff not to collect, such instruction having been given through misapprehension.

56. *Patton v. Hamner*, 33 Ala. 307.

execution and needlessly subject the defendant to the costs incident to an alias,<sup>57</sup> except with the consent of the defendant,<sup>58</sup> but he may abandon one which has been irregularly or improperly issued or executed and thereafter have an alias issued.<sup>59</sup> And the fact that plaintiff has suffered property taken under the original writ to be released, will not estop him from procuring an alias.<sup>60</sup>

**Substituted or Duplicate Writs.**—Statutes in the various jurisdictions enact that if an outstanding execution be lost or destroyed previous to the satisfaction thereof, a duplicate execution as of the day of the lost execution may be issued.<sup>61</sup>

(II.) **Prerequisites to.**<sup>62</sup>—(A.) **NECESSITY FOR RETURN OF PRIOR WRIT.** An alias is not to be issued until the return, unsatisfied, in whole or in

57. **Ark.**—Trapnall *v.* Richardson, 13 Ark. 543. **Ind.**—MeIver *v.* Ballard, 96 Ind. 76. **Ia.**—McWilliams *v.* Myers, 10 Iowa 325. **N. Y.**—McChain *v.* Duffy, 2 Duer 645. **Va.**—Baird *v.* Rice, 1 Call (5 Va.) 18.

[a] **Abandonment of Sale.**—A judgment creditor who purchases the property at the sheriff's sale cannot treat such sale as a mere nullity and have another execution issued for the collection of his judgment. Harpham *v.* Worthington, 100 Iowa 313, 69 N. W. 535.

58. **Walker v. Com.**, 18 Gratt. (59 Va.) 13.

[a] **If the defendants in an execution be a principal and his sureties, and the property levied on be that of the sureties, the plaintiff may, with the consent of the sureties only, abandon the levy and afterwards sue out executions against all the defendants.** Walker *v. Com.*, 18 Gratt. (59 Va.) 13.

59. **Mass.**—Slater *v.* Lamb, 150 Mass. 239, 22 N. E. 892; Dewing *v.* Durant, 10 Gray 29. **N. Y.**—Cairns *v.* Smith, 8 Johns. 337; Green *v.* Burke, 23 Wend. 490, levy made by a constable who is a minor. **Pa.**—McKeeby *v.* Webster, 170 Pa. 624, 32 Atl. 1096 (writ prematurely issued); Bole *v.* Bogardis, 86 Pa. 37; Burns *v.* Toner, 9 Phila. 37, 29 Leg. Int. 68, goods claimed by third person.

[a] **Where a levy under a fieri facias has been abandoned, to enable the plaintiff to sell the property, an alias fieri facias must be issued and a new seizure made and new notice of the time of the sale given.** Roman *v.* Denny, 19 La. Ann. 521.

60. **Ill.**—Howard *v.* Bennett, 72 Ill. 297. **Ind.**—Cooley *v.* Harper, 4 Ind. 454. **Mich.**—Lustfield *v.* Ball, 103 Mich.

17, 61 N. W. 339. **Miss.**—Parker *v.* Dean, 45 Miss. 408. **Tenn.**—Telford *v.* Cox, 15 Lea 298. **Tex.**—Cornelius *v.* Burford, 28 Tex. 202.

[a] **Release Because of Chattel Mortgage.**—Where an execution is returned by the sheriff with his certificate showing a levy, and a release and restoration of the property because subject to chattel mortgage which the judgment creditor refused to pay, a second execution may be issued by the clerk. Yetzer *v.* Young, 3 S. D. 263, 52 N. W. 1054.

[b] **Levying Alias Writ on Same Property.**—Although the levy is released because plaintiff refuses to give an indemnifying bond to the sheriff, this fact does not prevent the levy of an alias writ upon the same property. Clark *v.* Reiniger, 66 Iowa 507, 24 N. W. 16.

61. **Fla.**—Hart's Est. *v.* Smith, 20 Fla. 58. **Ga.**—Freeman *v.* Coleman, 88 Ga. 421, 14 S. E. 551; Torrent *v.* Sulter, 67 Ga. 32; Milner *v.* Akin, 58 Ga. 555; Walls *v.* Smith, 19 Ga. 8; Kellogg & Co. *v.* Buckler, 17 Ga. 187; Rushin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436. **Ia.**—Code (Sup. 1907), §3955. **N. Y.** White *v.* Lovejoy, 3 Johns. 448, no statute referred to. **R. I.**—Gen. Laws, 1909, ch. 303, §5.

**As to lost or destroyed process and the issuance of duplicates, see the title "Process."**

62. **As to prerequisites to issuance of writ generally, see supra, II, B, 1, i, (II).**

**As to filing of transcript as prerequisite to issuance of execution upon judgment of an inferior court, see supra, II, B, 1, i, (IV).**

**As to docketing of judgment as prerequisite to issuance outside of county**

part, of the first writ,<sup>43</sup> or until after the original has been legally ex-

of venue, see *supra*, II, B, 1, g, (II).

As to issuance of writ in county of venue as prerequisite to issuance outside, see *supra*, II, B, 1, g, (III).

63. **U. S.**—*Ross v. Duval*, 13 Pet. 45, 59, 10 L. ed. 51; *Taylor v. Thomson*, 5 Pet. 358, 369, 8 L. ed. 154; *Corning v. Burdick*, 4 McLean 133, 6 Fed. Cas. No. 3,246. **Ala.**—*Civ. Code*, 1907, §4087; *Steele v. Thompson*, 62 Ala. 323. **Ark.**—*Dig. St.*, 1904, §3212; *Pennington's Exr. v. Yell*, 11 Ark. 212. **Cal.**—*Town of Hayward v. Pimental*, 107 Cal. 386, 40 Pac. 545. **Conn.**—*Woods v. Brzezinski*, 57 Conn. 471, 18 Atl. 252. **Fla.**—*Gen. St.*, 1906, §1613; *Jordan v. Petty*, 5 Fla. 326. **Ill.**—*County Court v. Buck*, 27 Ill. 440; *Evans v. Landon*, 6 Ill. 307. **Ind.**—*Cooley v. Harper*, 4 Ind. 454. **Ia.**—*Code*, 1897, §4031; *Clark v. Reiniger*, 66 Iowa 507, 24 N. W. 16; *Downard v. Crenshaw*, 49 Iowa 296. **Ky.**—*St.*, 1909, §1652. **La.**—*Hudson v. Dangerfield*, 2 La. 63; *State v. Judge Court of Probates*, 3 Rob. 355; *Mackey v. Trustees*, 3 Mart. N. S. 390. **Me.**—*Belcher v. Knowlton*, 89 Me. 93, 35 Atl. 1019; *Rice v. Cook*, 75 Me. 45; *Darling v. Rollins*, 18 Me. 405. **Md.**—*Waters v. Caton*, 1 Harr. & McH. 407. **Mass.**—*Rev. Laws*, 1902, p. 1595; *Chesebro v. Barme*, 163 Mass. 79, 39 N. E. 1033; *Slater v. Lamb*, 150 Mass. 239, 22 N. E. 892. **Mich.**—*Howell's Ann. St.*, 1913, §13,002; *Friyer v. McNaughton*, 110 Mich. 22, 67 N. W. 978; *Miller v. Hanley*, 94 Mich. 253, 53 N. W. 962; *Nelson v. Ferris*, 30 Mich. 497; *President, etc. Farmer's & M. Bank v. Kingsley*, 2 Dougl. 379, 389; *Spafford v. Beach*, 2 Dougl. 150. **Minn.**—*Walter v. Greenwood*, 29 Minn. 87, 12 N. W. 145. **Miss.**—*Locke v. Brady*, 30 Miss. 21; *McGehe v. Handley*, 5 How. 625; *Tutt's Admr. v. Fulgham*, 5 How. 621. **Mo.**—*Howell v. Sherwood*, 242 Mo. 513, 147 S. W. 810; *Clemens v. Brown*, 9 Mo. 718; *Lindell v. Benton*, 6 Mo. 361; *Dowsman v. Potter*, 1 Mo. 518. **Neb.**—*Reynolds v. Cobb*, 15 Neb. 378, 19 N. W. 502, execution returned after levy and before sale releases the property from the levy and gives judgment creditor right to issue alias. **N. J.**—*Lloyd v. Wyckoff*, 11 N. J. L. 218; *Trenton Delaware Bridge Co. v. Ward*, 4 N. J. L. 320. **N. Y.**—*Ledyard v. Buckle*, 5 Hill 571; *Cumpston v. Field*, 3 Wend. 382;

*Swift v. Flanagan*, 12 How. Pr. 438; *Cairns v. Smith*, 8 Johns. 337; *Dorland v. Dorland*, 5 Cow. 417. **N. C.**—*Pell's Rev.*, 1908, §618. **Pa.**—*Purd. Dig.*, vol. 2, p. 1577; *Moyer v. Sekenger*, 16 W. N. C. 212; *Landonzy v. Seelos*, 4 W. N. C. 151. **S. C.**—*Jenkins v. Mayrant*, 3 McCord 560. **S. D.**—*Yetzer v. Young*, 3 S. D. 263, 52 N. W. 1054. **Tenn.**—*Schaller v. Wickerham*, 7 Coldw. 376; *Union Bank v. McClung*, 9 Humph. 91; *Daley v. Perry*, 9 Yerg. 442; *Wiseman v. Bean*, 2 Heisk. 390. And see *Hogshhead v. Carruth*, 5 Yerg. 227, wherein an alias writ was issued after a return, but before a disposition of the levy made upon real property, the court holding that a levy upon real property not being a satisfaction of the judgment, an alias writ might be issued. **Tex.**—*Spiller v. Holinger* (Tex. Civ. App.), 148 S. W. 338. **Va.**—*Sutton v. Marve*, 81 Va. 329. **Wis.**—*St.*, 1898, §2968. **Eng.**—*Oviat v. Vyner*, 1 Salk. 318, 91 Eng. Reprint 281; *Chapman v. Bowlby*, 8 Mees. & W. 249. **Can.**—*Smith v. Jones*, 7 N. Bruns. 176.

[a] **Reason for Rule.**—The court should see what has been done under the first writ so as to be able to give proper directions for the enforcement of the second. *Cumpston v. Field*, 3 Wend. (N. Y.) 382; *Cairns v. Smith*, 8 Johns. (N. Y.) 337.

[b] **An execution, ordinarily, must be regarded as existing until it has been returned;** and in cases where that cannot be done, it devolves upon the party in interest to allege and prove facts, showing that a second execution might lawfully issue. *Merritt v. Grover*, 57 Iowa 493, 10 N. W. 899.

[c] **Alias writs of possession, being executed upon specific property only, may be issued without the necessity of a previous return of the original.** *Cumpston v. Field*, 3 Wend. (N. Y.) 382; *Jackson ex dem. Thompson v. Stiles*, 9 Johns. (N. Y.) 391.

[d] **A statute providing that only one execution shall be in existence at the same time, is mandatory; and the fact that the first execution was ordered returned, but was not, does not make a second execution, issued before the first one was returned, legal, and a sale thereunder valid.** *Merritt v. Grover*, 61 Iowa 99, 15 N. W. 860.

tinguished as a writ,<sup>64</sup> either by virtue of its quashal or otherwise.

A pluries writ may not issue until after the return of the alias.<sup>65</sup>

Where nothing appears to the contrary, it will be presumed that a previous execution was regularly issued,<sup>66</sup> and that the return thereon was made before the issuance of the alias or pluries.<sup>67</sup>

The return on the original or upon the alias must show or the fact be established that the writ remains wholly or partly unsatisfied,<sup>68</sup> or

[e] A levy of execution upon money constitutes a satisfaction of the judgment, though not paid over by the sheriff until the determination of another suit, where it was stipulated by the judgment creditor that it should be held by the sheriff to abide the result thereof; and in such case the judgment creditor would not be entitled to the issuance of an alias execution for the purpose of recovering interest on the sum the sheriff had been withholding. *Adams v. Nat. Bank of Commerce*, 30 Wash. 20, 70 Pac. 105.

[f] A return which shows that the sheriff has paid the judgment because of his liability due to his negligent delay in collecting an execution, and has taken an assignment from the plaintiff to a third person in trust for himself, the judgment is not thereby extinguished, and no oppression appearing, the assignee is entitled to an alias execution thereupon. *Heileg v. Lemley*, 74 N. C. 250.

[g] Where alias issues on what is virtually a new judgment, being on the remainder of several notes, it need not await the return of the original. *Martin v. McBride*, 2 Phila. (Pa.) 343.

[h] An alias writ issued after the return day but before the actual return of the original is valid. *Supplee v. Ashby*, 8 W. N. C. (Pa.) 407.

[i] Two or More Writs to Different Counties.—See *supra*, II, B, 1, i, (III).

64. U. S.—*Corning v. Burdick*, 4 McLean 133, 6 Fed. Cas. No. 3,246. Conn. *Roberts v. Church*, 17 Conn. 142. N. J. *Rammel v. Watson*, 31 N. J. L. 281.

[a] Where a first execution is found to be so defective as to be invalid, it may be treated as void, and another issued. *Woods v. Brzezinski*, 57 Conn. 471, 18 Atl. 252; *Mitchell v. Duncan*, 7 Fla. 13.

[b] When an execution has been quashed at the instance of the claimant, as defective because not conforming to the judgment, the clerk may is-

sue another execution which does conform to the judgment; and whether it be called an original or an alias makes no difference. *Westbrook v. Hays*, 89 Ga. 101, 14 S. E. 879. See also *Lee's Admr. v. Thompson*, 132 Ky. 608, 116 S. W. 775.

[c] Where the execution of the first writ is enjoined because of an irregularity in the proceedings, an alias may be issued after the return of the first and a correction of the irregularities. *Smith v. Purves*, 20 La. Ann. 278; *Wright v. Rousselle*, 6 La. Ann. 73.

65. Mass.—*Hamilton v. Lyman*, 9 Mass. 14, 17. Mich.—*Howell's Ann. St.*, 1913, §13002. N. Y.—*Swift v. Flanagan*, 12 How. Pr. 438.

66. Beebe v. United States, 161 U. S. 104, 16 Sup. Ct. 532, 40 L. ed. 633; *Pollard v. Cocke*, 19 Ala. 188; *Sellers v. Hayes*, 17 Ala. 749.

67. *Douglass v. Owens*, 5 Rich. (S. C.) 534.

68. Cal.—*Tevis v. Hicks*, 38 Cal. 234. Ill.—*Marshall v. Moore*, 36 Ill. 321; *People v. Brayton*, 37 Ill. App. 319. Ia.—*Downard v. Crenshaw*, 49 Iowa 296. Mass.—*King v. Goodwin*, 16 Mass. 63. Mich.—*Friyer v. McNaughton*, 110 Mich. 22, 67 N. W. 978. Minn. *Hastings Bk. v. Rogers*, 13 Minn. 407. Ore.—*Wright v. Young*, 6 Ore. 87. Pa. *Missimer v. Ebersole*, 87 Pa. 109. Tenn. *Carroll v. Fields*, 6 Yerg. 305. Tex. *Cornelius v. Buford*, 28 Tex. 202. Va. *Sutton v. Marye*, 81 Va. 329.

As to return of writ generally, see *supra*, II, B, 8.

[a] Where the return fails to disclose facts from which the court can clearly determine whether or not the writ has been fully executed, and it is made to appear to the court, by affidavits, not contradictory of the return, but explanatory thereof, that the writ has not been fully executed, it is competent and proper for the court to order and direct an alias writ to be issued. *Tevis v. Hicks*, 38 Cal. 234.

if the return shows a satisfaction of the writ, an alias cannot subsequently issue, until such satisfaction has been set aside.<sup>69</sup> By statute, however, in some states, the execution plaintiff may sue out, at his own costs, a second execution, though the first writ has not been returned,<sup>70</sup> or executed.<sup>71</sup>

**Where Alias Is of Different Nature From Original.** — A plaintiff having sued out a fieri facias may omit to execute it and take out a capias ad satisfaciendum before the former writ is returnable,<sup>72</sup> but if he execute the fieri facias, he cannot sue out a capias until he has returned the first writ.<sup>73</sup> If the fieri facias is returned satisfied in part only, the judgment creditor may sue out an elegit without the necessity of a return nihil of the first writ.<sup>74</sup> And while the defendant is imprisoned, an execution against his property cannot issue.<sup>75</sup>

(B.) **NECESSITY FOR DISPOSITION OF LEVY.** — Where a levy is made upon sufficient property, the execution plaintiff cannot issue another writ while such levy remains undisposed of.<sup>76</sup> If the life of the first writ

69. **Ala.**—McMichael v. Branch Bank, 14 Ala. 496. **Ill.**—Bressler v. Martin, 133 Ill. 278, 24 N. E. 518; Watson v. Reissig, 24 Ill. 281, 76 Am. Dec. 746; Hughes v. Streeter, 24 Ill. 647, 76 Am. Dec. 777. **Kan.**—McNeal v. Hunt, 6 Kan. App. 670, 50 Pac. 63. **La.**—Brooks v. Hardwick, 5 La. Ann. 675. **Me.**—Soule v. Buck, 55 Me. 30. **Neb.**—Ziegler v. McCormick, 13 Neb. 25, 13 N. W. 28. **N. Y.**—Adams v. Smith, 5 Cow. 280. **N. C.**—Aycock v. Harrison, 63 N. C. 145. **Ohio.**—Wilson v. Stilwell, 14 Ohio St. 464. **Pa.**—Peddle v. Hollingshead, 9 Serg. & R. 277.

70. **Ala.**—Fryer v. Dennis, 3 Ala. 254; Webb v. Bumpass, 9 Port. 201, 33 Am. Dec. 310. **Ark.**—Dig. St., 1904, §3211. **Miss.**—Jennings v. Dennis, 6 Smed. & M. 379. **Va.**—Coleman v. Cocke, 6 Rand. (27 Va.) 618, 18 Am. Dec. 757. **W. Va.**—Code, 1913, §5120.

71. **Ala.**—Fryer v. Dennis, 3 Ala. 254; Webb v. Bumpass, 9 Port. 201. **Miss.**—Jennings v. Dennis, 6 Smed. & M. 379. **Va.**—Coleman v. Cocke, 6 Rand. (27 Va.) 618, 18 Am. Dec. 757.

72. **Ind.**—Steele v. Murray, 1 Blackf. 179. **Mass.**—Chesebro v. Barme, 163 Mass. 79, 39 N. E. 1033. **Va.**—Coleman v. Cocke, 6 Rand. (27 Va.) 618, 18 Am. Dec. 757. **Eng.**—Miller v. Parnell, 6 Taunt. 370, 128 Eng. Reprint 1078; Dias v. Warne, 10 Bing. 341, 25 E. C. L. 158. See Franklin v. Hodgkinson, 3 Dowl. & L. 554.

73. Turner v. Walker, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329; Miller v. Parnell, 6 Taunt. 370, 128 Eng. Re-

print 1078; Wilson v. Kingston, 2 Chitty (Eng.) 203.

[a] Where the fieri facias is partially satisfied, an alias capias ad satisfaciendum issuing for the full amount is erroneous. Dennis v. Wells, Cro. Eliz. 344, 78 Eng. Reprint 593.

[b] In Lawes v. Codrington, 1 Dowl. (Eng.) 30, it was held that where a fieri facias has issued, and a levy less than the plaintiff's debt has been made, a capias ad satisfaciendum cannot issue till after the return day of the fieri facias; although in fact the sheriff has made a return to it, and the capias ad satisfaciendum recites the writ and the sheriff's return.

74. Coleman v. Cocke, 6 Rand. (27 Va.) 618.

75. Steele v. Murray, 1 Blackf. (Ind.) 179; Kennedy v. Dunclee, 1 Gray (Mass.) 65. See Mich. Pub. Acts, 1899, p. 339.

As to issuance of execution against the person, see *infra*, II, C.

76. **Ark.**—Anderson v. Fowler, 8 Ark. 388. **Del.**—Fiddleman v. Biddle, 1 Har. 500. **Ill.**—Babcock v. McCamant, 53 Ill. 214; Marshall v. Moore, 36 Ill. 321; Ambrose v. Weed, 11 Ill. 488. **Ind.**—Garrison v. State, 110 Ind. 145, 11 N. E. 2; Richey v. Merritt, 108 Ind. 347, 9 N. E. 368; McIver v. Ballard, 96 Ind. 76; Doe *ex dem.* Mace v. Dutton, 2 Ind. 309; Macy v. Hollingsworth, 7 Blackf. 349. **Ia.**—Downard v. Crenshaw, 49 Iowa 296; McWilliams v. Myers, 10 Iowa 325. **Ky.**—Allen v. Johnson, 4 J. J. Marsh. 235; Hopkins v.

under which the levy was made has expired or it has been returned without a sale of the property, the levy is disposed of by a writ of venditioni exponas,<sup>77</sup> or by its statutory substitute, an alias execution.<sup>78</sup>

(III.) **Time of Issuance.**<sup>79</sup>—In some jurisdictions, the time within which an alias writ may be issued is limited by statute.<sup>80</sup> But in the absence of statute the general rule is that an alias or pluries writ may issue at any time while the judgment remains in force.<sup>81</sup> At common

Chambers, 7 Mon. 257. **Mich.**—Frierer v. McNaughton, 110 Mich. 22, 67 N. W. 978. **N. Y.**—Peck v. Tiffany, 2 N. Y. 451; Cumpston v. Field, 3 Wend. 382. **N. C.**—Scott's Exr. v. Hill, 6 N. C. 143. **Ohio.**—Arnold v. Fuller's Heirs, 1 Ohio 458; Sturgeon v. Mason, 8 Ohio Cir. Ct. 118, 4 Ohio Cir. Dec. 353; Cutler v. Brinker, Tapp. 343. **Pa.** Gray v. Krugerman, 4 Pa. Co. Ct. 290; Burns v. Toner, 9 Phila. 37, 29 Leg. Int. 68; Shier v. Hettle, 1 W. N. C. 6. **Tex.**—Bryan's Admr. v. Bridge, 10 Tex. 149. **Va.**—Sutton v. Marye, 81 Va. 329.

[a] **Reason for Rule.**—The requirement that the levy made under the first writ shall be first discharged is necessary to prevent abuse and oppression. Cairns v. Smith, 8 Johns. (N. Y.) 337.

[b] **Levy Sufficiently Disposed of.** If a sheriff, having levied upon personal property, leaves it in the hands of the execution defendant for safe keeping, and the latter loses it, or converts it to his own use, such loss or conversion is a sufficient disposition of the levy to authorize the issuing of another execution. Cooley v. Harper, 4 Ind. 454; Peck v. Tiffany, 2 N. Y. 451.

[c] In *Moll v. The Bark "George,"* 1 Hawaii 495, the court allowed a second execution to issue against the property of the judgment debtor, although a levy had been made under the first execution, and it did not appear to be insufficient, the libelants having stated, under oath, that they had reason to believe that means would be taken to render their first levy abortive.

77. **Ill.**—Babcock v. McCamant, 53 Ill. 214; Marshall v. Moore, 36 Ill. 321. **Ind.**—Richey v. Merritt, 108 Ind. 347, 9 N. E. 368. **Ohio.**—Cutler v. Brinker, Tapp. 343; Sturgeon v. Mason, 8 Ohio Cir. Ct. 118, 4 Ohio Cir. Dec. 353.

[a] **The use of an alias instead of a venditioni exponas** is not such an

irregularity as will render the proceedings void. *Kerr v. South Park Comrs.*, 8 Biss. 276, 14 Fed. Cas. No. 7,733; *Baldwin v. Dreyfus*, 92 Miss. 94, 45 So. 428.

78. See the statutes and the following: **U. S.**—*Beebe v. United States*, 161 U. S. 104, 10 Sup. Ct. 532, 40 L. ed. 636, Alabama. **Kan.**—*Ritchie v. Higginbotham*, 26 Kan. 645. **Miss.** *Baldwin v. Dreyfus*, 92 Miss. 94, 45 So. 428. **S. D.**—*Yetzer v. Young*, 3 S. D. 203, 52 N. W. 1054.

[a] **Under the statute** the property may be sold under an alias execution in the same form as the original and no clause of venditioni exponas is necessary. *Ritchie v. Higginbotham*, 26 Kan. 645.

[b] **Where sale enjoined** and original writ returned for this reason. *Rain v. Young*, 61 Kan. 428, 59 Pac. 1068.

[c] **Venditioni Exponas or Alias Execution.**—An alias writ with the indorsements thereon of the prior levy is as efficacious as a formal venditioni exponas, and, as said in *Dryer v. Graham*, 58 Ala. 623, "It rests in the election of the plaintiff in execution to take out an alias execution, or a writ of venditioni exponas. If he desires merely a sale of the property on which a levy has been made, and not of other property, or the acquisition of a lien on other property, a venditioni exponas is the proper writ. The venditioni exponas continues the lien of the execution which has been levied, as to the property on which the levy was made, whether the property be real or personal." *Beebe v. United States*, 161 U. S. 104, 16 Sup. Ct. 532, 40 L. ed. 633.

79. **As to time of issuance of original writ**, see *supra*, II, B, 1, f.

80. See generally the statutes, and *Belcher v. Knowlton*, 89 Me. 93, 35 Atl. 1019; *Simpson v. Sutton*, 61 N. C. 112.

81. **Ala.**—*Jewett v. Hoogland*, 30

law, the succeeding writs were connected with the original by continuances entered upon the record,<sup>82</sup> and it was unnecessary, therefore, at any time within the period of the life of the judgment while the parties to the judgment were living, to proceed by scire facias to obtain an alias execution to enforce the judgment, if the original writ had been issued and returned unsatisfied within the time allowed.<sup>83</sup> After the return of an execution, the judgment creditor need not wait until the return day before issuing an alias.<sup>84</sup>

Ala. 716. Fla.—Jordan v. Petty, 5 Fla. 326. Ky.—Payne v. Payne's Exr., 8 B. Mon. 391. Md.—Mitchell v. Chestnut, 31 Md. 521. Miss.—Abbey v. Commercial Bank, 31 Miss. 434; Bank of Mississippi v. Catlett's Exrs., 5 How. 175. Mo.—Clemens v. Brown, 9 Mo. 718; Lindell v. Benton, 6 Mo. 361; Dowsman v. Potter, 1 Mo. 518. Mont. Northern Pac. R. Co. v. Bender, 13 Mont. 432, 34 Pac. 848. N. J.—Claflin v. Voorhees, 35 N. J. L. 484. N. Y. McSmith v. Van Deusen, 9 How. Pr. 245; Pierce v. Craine, 4 How. Pr. 257; Flanagan v. Tinen, 53 Barb. 587.

[a] A writ issued by the clerk without authority does not constitute such a writ as will affect the time within which an alias may issue. Seavy v. Bennett, 64 Miss. 735, 2 So. 177.

[b] Right Not Affected by Laches. Gay v. Gay, 123 Ill. 221, 13 N. E. 813.

[c] The institution of proceedings supplementary to execution, and after a return of execution against property, does not preclude the issuing of another execution upon the same judgment. The two proceedings having the same object in view—the collection of the judgment—may be pursued concurrently. Smith v. Mahony, 3 Daly (N. Y.) 285; Smith v. Davis, 63 Hun 100, 17 N. Y. Supp. 614.

82. U. S.—Erwin's Lessee v. Dundas, 4 How. 58, 11 L. ed. 875. Ala.—Scull v. Godbolt, 4 Ala. 326. Ky.—Craig v. Johnson, Hard. 520. Miss.—Abbey v. Commercial Bank, 31 Miss. 434; Bank of Mississippi v. Catlett's Exrs., 5 How. 175. N. Y.—Swift v. Flanagan, 12 How. Pr. 438; Pierce v. Craine, 4 How. Pr. 257. Pa.—Lewis v. Smith, 2 Serg. & R. 142. Eng.—Franklin v. Hodgkinson, 3 Dowl. & L. 554.

[a] "Such continuances were not, in fact, entered when the writs were issued, for the reason that the entry might be made afterwards, even after

objection taken, so as to cure the irregularity." Swift v. Flanagan, 12 How. Pr. (N. Y.) 438. See Ala.—Scull v. Godbolt, 4 Ala. 326. Ill.—Lampsett v. Whitney, 3 Ill. 441, holding that continuances from term to term were not necessary. Miss.—Bank of Mississippi v. Catlett's Exrs., 5 How. 175. Pa.—Lewis v. Smith, 2 Serg. & R. 142.

[a] No formal entry of such continuances is necessary, as they are presumed to be entered. Bank of Mississippi v. Catlett's Exrs., 5 How. (Miss.) 175.

[b] If such continuances are filled in, the creditor may have his alias execution issued without the necessity of a return of the original. Lewis v. Smith, 2 Serg. & R. (Pa.) 142.

83. Ala.—Scull v. Godbolt, 4 Ala. 326. Ill.—Lampsett v. Whitney, 3 Ill. 441. Ky.—Nicholson v. Howsley, Litt. Sel. Cas. 300; Craig v. Johnson, Hard. 520. Mass.—Hamilton v. Lyman, 9 Mass. 14. Miss.—Abbey v. Commercial Bank, 31 Miss. 434; Bank of Mississippi v. Catlett's Exrs., 5 How. 175. N. Y.—Swift v. Flanagan, 12 How. Pr. 438; Pierce v. Craine, 4 How. Pr. 257; Thorp v. Fowler, 5 Cow. 446. Pa. Shaw v. Richards, 2 Miles 103; Young v. Taylor, 2 Binn. 218. Eng.—Franklin v. Hodgkinson, 3 Dowl. & L. 554.

[a] An alias or pluries writ cannot be issued for the same term to which the original is issued. Shaffer v. Watkins, 7 Watts & S. (Pa.) 219.

[b] If an execution is issued in the lifetime of the defendant the lien may be continued after his death by an alias or pluries. But if there be a chasm by the lapse of a term, an alias cannot issue, but the judgment must be revived by scire facias against the personal representative. Erwin's Lessee v. Dundas, 4 How. (U. S.) 58, 11 L. ed. 875; Boyd v. Dennis, 6 Ala. 55; Fryer v. Dennis, 3 Ala. 254.

84. Ala.—Berry v. Perry, 81 Ala.

But where the right of execution is stayed or suspended for some reason, an alias or pluries writ cannot be issued during such period;<sup>85</sup> and after the expiration of the period within which execution may issue as of course<sup>86</sup> a revivor is necessary.<sup>87</sup>

(IV.) **Procuring Issuance.**—It has been held necessary that the plaintiff should have the alias issue under leave of court,<sup>88</sup> though this would seem to be unnecessary if the propriety of issuing the alias appears on the face of the record.<sup>89</sup> And in some jurisdictions, an alias or pluries writ is issued upon an application to the clerk of the court, who issued the original.<sup>90</sup> Statutes sometimes require an application to obtain a

103, 1 So. 118. Ark.—Pennington's Exrs. v. Yell, 11 Ark. 212, 52 Am. Dec. 262. N. J.—Rammel v. Watson, 31 N. J. L. 281.

85. See notes following.

[a] Will not issue (1) while a forthcoming bond is in force, though such bond is irregular (Downman v. Chinn, 2 Wash. [2 Va.] 189); (2) nor while a replevy bond is in force (Taylor v. Dundass, 1 Wash. [1 Va.] 92), such bonds being a satisfaction of the original judgment.

[b] **Pending Appeal.**—No alias writ may be issued while an appeal from a motion quashing the levy and return of the original is pending. Bryan's Admr. v. Bridge, 10 Tex. 149.

86. See *supra*, II, B, 1, f, (I), (II).

87. Miss.—Abbey v. Commercial Bank, 31 Miss. 434. N. Y.—Redmond v. Wheeler, 2 Abb. Pr. 117; Sacia v. Nestle, 13 How. Pr. 572; Swift v. Flanagan, 12 How. Pr. 438. Pa.—Young v. Taylor, 2 Binn. 218. S. C.—Garvin v. Garvin, 34 S. C. 388, 13 S. E. 625.

88. Ala.—Harkins v. Clemens, 1 Port. 30. Cal.—Tevis v. Hicks, 38 Cal. 234. Conn.—Williams v. Cable, 7 Conn. 119. Fla.—White v. Staley's Exrs., 21 Fla. 396. Ky.—Mayo's Heirs v. Chiles, 3 T. B. Mon. 258. See Frankfort Bank v. Markley, 1 Dana 373, holding that an alias issued by the clerk without an order would not be quashed where the facts justifying its issuance were proved at the hearing of the motion. Me.—Steward v. Allen, 5 Greenl. 103. Neb.—Zeigler v. McCormick, 13 Neb. 25, 13 N. W. 28. N. Y.—Swift v. Flanagan, 12 How. Pr. 438. Vt.—Tudor v. Taylor, 26 Vt. 444.

[a] Leave is required only in case no execution has been issued within a certain period after a judgment was recovered. Claflin v. Voorhees, 35 N. J. L. 484.

[b] **An alias fieri facias cannot regularly issue without an order of the court** for that purpose, which order should set forth all the previous proceedings which had taken place under the original execution. Where an alias execution has been issued by the clerk, without such order, the objection to the regularity of the proceedings comes too late, after the parties had litigated a claim case under such alias fieri facias. The defect will be considered as having been waived. Watson v. Taylor & Co., 9 Ga. 275.

[c] **Direction in Order.**—The court, in its order directing the alias writ to issue, should specifically direct the proceedings of the officer in the execution of the writ. Tevis v. Hicks, 38 Cal. 234.

[d] **Where, by mistake, partial payment has been endorsed on the returned writ, a new writ for the full amount of the judgment, issued by the clerk, will not be quashed on motion, where the mistake is shown, even though the clerk should have waited for an order of court.** Frankfort Bank v. Markley, 1 Dana (Ky.) 373.

89. Conn.—Johnson v. Huntington, 13 Conn. 47. Ga.—Westbrook v. Hays, 89 Ga. 101, 14 S. E. 879. R. I.—Me-Manaman's Petition, 16 R. I. 358, 16 Atl. 148, 1 L. R. A. 561.

90. Steele v. Thompson, 62 Ala. 323.

[a] **No particular form of application is necessary.** "The application may be oral or written. If the clerk deems it necessary for his protection, he may require that it be reduced to writing. But if it is oral, and he makes no objection on that ground when it is made, he cannot subsequently excuse his failure to comply with it, on the ground that it was not in writing." Steele v. Thompson, 62 Ala. 323, 327.

substitute or renewed writ to be based upon the affidavit of the execution creditor,<sup>91</sup> or his attorney,<sup>92</sup> or agent,<sup>93</sup> or by the officer to whom the writ was issued,<sup>94</sup> or by a purchaser at the sale, where the writ is lost before its return.<sup>95</sup> Upon satisfactory proof of the loss or destruction of the writ, the court will grant an order for the issuing of another writ in lieu of the lost one.<sup>96</sup> or upon the filing of such affidavit, the clerk of the court may issue the duplicate writ.<sup>97</sup> Where an affidavit

91. *Ga.*—*Torrent v. Sulter*, 67 *Ga.* 32; *Milner v. Akin*, 58 *Ga.* 555. *Ia.* Code Supp., 1907, §3955. *R. I.*—*Gen. Laws*, 1909, ch. 303, §5.

92. *Ga.* Code, 1910, §5321; *Iowa* Code, Supp. 1907, §3955.

93. *Ga.* Code, 1910, §5321; *Iowa* Code, Supp. 1907, §3955.

94. *Iowa* Code, Supp. 1907, §3955.

95. *Morrison v. Taylor*, 4 *Penne.* (Del.) 211, 55 *Atl.* 335.

[a] **Form of Petition by Purchaser at Sale for Issuance of Substitute Writ.** "The petition of A. B. respectfully represents: That the above stated judgment was duly recovered in this Honorable Court, being No. 151, September Term, A. D. 1901. That thereafter a writ of *levari facias*, being No. 12 to the November Term, 1901, of said court, was issued directed to X. Y., then Sheriff of \_\_\_\_\_ county. That in obedience to the command in the said writ of *levari facias* contained, the said sheriff did give due and public notice, and expose the lands and premises in the said writ mentioned at public sale and sold the same on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 190—, to your petitioner for the sum of \$\_\_\_\_\_. That your petitioner duly paid to the said X. Y., then sheriff, the said sum of \$\_\_\_\_\_. That thereafter the said X. Y., sheriff as aforesaid, by deed poll bearing date the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 190—, conveyed the said lands and premises to your petitioner in fee simple, as by the said deed poll recorded in the office for recording of deeds, etc., in and for \_\_\_\_\_ county, in Deed Record, etc., appears. That the said writ of *levari facias*, being No. 12 to the Nov. Term, 1901, has been in some way lost, and that the same has never been returned by the said X. Y. to this Honorable Court. Your petitioner therefore prays that the prothonotary of this court may be

directed to prepare a duplicate or substitute writ to take the place of the said writ so lost as aforesaid, and that the said X. Y., late sheriff, may be authorized to make return thereon of the said sale to your petitioner as aforesaid; said return to be made at the \_\_\_\_\_ term, 190—, of this Honorable Court; and hat your petitioner may have such other or further relief as the nature of the case may require." *Morrison v. Taylor*, 4 *Penne.* (Del.) 211, 55 *Atl.* 335.

96. *Torrent v. Sulter*, 67 *Ga.* 32; *Milner v. Akin*, 58 *Ga.* 555; *R. I. Gen. Laws*, 1909, ch. 303, §5.

[a] **In Term Time or Vacation.** Such order may be made either in term time or vacation. *Torrent v. Sulter*, 67 *Ga.* 32; *Milner v. Akin*, 58 *Ga.* 555.

[b] **Order Granting Right To Issue Substitute Writ.**—"And now, to-wit, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 190—, the foregoing petition having been read, and it appearing to the court that the said writ of *levari facias* in the said petition mentioned being No. 12 to the \_\_\_\_\_ term, 190—, was duly issued and delivered to X. Y., then sheriff; and it further appearing that the said X. Y. in pursuance of the directions of the said writ sold the lands and premises therein mention unto A. B., and that the said A. B. has paid therefor; and it further appearing that the said X. Y., then sheriff, has executed and delivered unto the said A. B., a deed of said lands and premises; and it further appearing that the said writ of *levari facias* has been lost. It is thereupon ordered by the court, that the prothonotary of this court do issue a substitute writ in lieu of, and to take the place of the one so lost as aforesaid." *Morrison v. Taylor*, 4 *Penne.* (Del.) 211, 55 *Atl.* 335.

97. *Iowa* Code, 1907, §3955.

is required for the issuance of the original execution, it may suffice for the issuance of an alias.<sup>98</sup>

**By Scire Facias.**—Where there is no real, but only an apparent, satisfaction of the execution by reason of a mistaken or fruitless levy, the judgment creditor may have a writ of scire facias against the defendant,<sup>99</sup> and if the debtor fails to show sufficient cause why another execution should not issue, an alias execution will be issued for the amount then due on the judgment.<sup>1</sup>

**Who May Demand Issuance.**—An assignee of the judgment may demand the issuance of an alias or pluries writ.<sup>2</sup>

**Notice.**—Notice of motion for leave to issue an alias or substitute a new writ is required, where the writ is returned satisfied by a defective levy.<sup>3</sup>

98. *Johnson v. Holloway*, 82 Ill. 334, before justice of the peace.

99. **U. S.**—*United States v. Poole*, 5 Fed. 412. **Conn.**—*Cowles v. Bacon*, 21 Conn. 451, 56 Am. Dec. 371; *Ensworth v. Davenport*, 9 Conn. 390; *Langdon v. Langdon*, 1 Root 403. **Ky.**—*Scott v. Maupin*, Hard. 122. **Me.**—*Prescott v. Prescott*, 65 Me. 478; *Soule v. Buck*, 55 Me. 30; *Grosvenor v. Chesley*, 48 Me. 369; *Pillsbury v. Smyth*, 25 Me. 427; *Steward v. Allen*, 5 Greenl. 103. **Mass.**—*Habib v. Evans*, 222 Mass. 480, 111 N. E. 362; *Perry v. Perry*, 2 Gray 326; *Dennis v. Arnold*, 12 Mete. 449; *Flagg v. Dryden*, 7 Pick. 52; *Kendrick v. Wentworth*, 14 Mass. 57; *Hatch v. Green*, 12 Mass. 195. **N. H.**—*Coos Bank v. Brooks*, 2 N. H. 148. **Vt.**—*Baxter v. Tucker*, 1 D. Chip. 353.

[a] "The creditor's right to this remedy accrues upon the happening of some event, by which it can be made legally to appear, that the property or estate, on which the first execution had been levied, did not at the time of the levy belong to the debtor, in consequence of which the creditor has lost his satisfaction." *Baxter v. Tucker*, 1 D. Chip. (Vt.) 353.

[b] **Scire Facias Only Remedy After Return of Writ.**—Where, after the execution is returned as satisfied, the levy proves to be invalid, scire facias is the only remedy to obtain a new writ. **Me.**—*Grosvenor v. Chesley*, 48 Me. 369. **Mass.**—*Habib v. Evans*, 222 Mass. 480, 111 N. E. 362. **N. H.**—*Green v. Bailey*, 3 N. H. 33.

[c] **Defective or Void Levy.**—(1) Scire facias is not the appropriate remedy to obtain a new execution, when the former execution has been levied in a defective manner, especially

where the defect does not appear upon the face of the levy. *Royce's Admrs. v. Strong*, 11 Vt. 248. (2) And where the levy is void because the execution does not conform to the judgment, scire facias is not the appropriate remedy. *Prescott v. Prescott*, 65 Me. 478.

**As to proper remedy** where levy proves invalid before a return of the writ, see *supra*, III, B, 1, a, (I).

1. **U. S.**—*United States v. Poole*, 5 Fed. 412. **Conn.**—*Cowles v. Bacon*, 21 Conn. 451, 56 Am. Dec. 371; *Langdon v. Langdon*, 1 Root 453. **Me.**—*Prescott v. Prescott*, 65 Me. 478; *Steward v. Allen*, 5 Greenl. 103. **Mass.**—*Habib v. Evans*, 222 Mass. 480, 111 N. E. 362; *Flagg v. Dryden*, 7 Pick. 52. **Vt.**—*Baxter v. Tucker*, 1 D. Chip. 353.

2. *Steele v. Thompson*, 62 Ala. 323; *Guiterman v. Coutant*, 112 N. Y. Supp. 900.

**As to who may demand issuance of an original writ of execution**, see *supra*, II, B, 1, d.

3. **Conn.**—*Williams v. Cable*, 7 Conn. 119. **Mass.**—*Newcomb v. Newcomb*, 12 Gray 28. But see *Chase v. Chase*, 105 Mass. 385, where it is held that the court may dispense with the necessity for such notice. **N. Y.**—*Todd v. Botsford*, 86 N. Y. 517; *Douw v. Burt*, 1 Wend. 89. **Wis.**—*Bank of Sheboygan v. Trilling*, 75 Wis. 163, 43 N. W. 30.

[a] **Notice of motion to substitute for a lost writ not required.** *Lowry v. Richards*, 62 Ga. 370.

[b] **In a foreclosure case** notice is not required if the application be made within six years of the entry of the decree of foreclosure. *Sandford v. Wellborn*, 85 N. J. Eq. 577, 96 Atl. 1018.

d. *Form and Sufficiency of Writ.*<sup>4</sup>—An alias or pluries writ of execution is generally governed by the same rules which apply to the original,<sup>5</sup> as to the parties,<sup>6</sup> amount,<sup>7</sup> signature,<sup>8</sup> conformity to judgment,<sup>9</sup> direction to the officer,<sup>10</sup> bill of costs,<sup>11</sup> with such modifications as the changed conditions and circumstances require. It should appear on the face of the writ whether it is an original, an alias or a pluries,<sup>12</sup> but a mere indorsement of "alias" or "pluries" on an original writ will not alter its character.<sup>13</sup> If an alias or pluries writ, it should show on its face the number of previous executions,<sup>14</sup> and the proceedings

4. For forms of alias and pluries writs, see 9 STANDARD PROC. 732.

5. Harlan v. Harlan, 14 Lea (Tenn.) 107.

As to form and sufficiency of writ generally, see *supra*, II, B, 2.

6. Jackson v. Scandland, 65 Miss. 481, 4 So. 552; Brem v. Jamieson, 70 N. C. 566.

7. See *supra*, II, B, 2, e.

[a] **Deduction of Amount Collected.** The alias should direct that the whole sum of the judgment be recovered, less the amount recovered on the original. Fairbanks v. Devereaux, 48 Vt. 550; Chapman v. Bowlby, 8 Mees. & W. (Eng.) 249.

[b] **Interest.**—An alias should not be issued to collect interest on the judgment where the original writ contained no provision therefor. Todd v. Botchford, 86 N. Y. 517.

8. Huggins v. Ketchum, 20 N. C. 550; Fairbanks v. Devereaux, 48 Vt. 550.

9. Fairbanks v. Devereaux, 48 Vt. 550; Lee v. Neilson, 3 U. C. L. J. (Can.) 72.

10. Maupin v. Emmons, 47 Mo. 304.

[a] **The form of the mandate** in an alias writ is "we command you, as before we have commanded you," but in a pluries writ it takes the form, "we command you as we have often (pluries) commanded you before." See Bouvier's Law Dict.; Kellogg & Co. v. Buckler, 17 Ga. 187.

11. See cases following.

[a] **The statute (1) requiring that executions shall contain an itemized statement of the bill of costs** applies to alias and pluries writs of execution as well as original executions. Marks v. Wood, 133 Ala. 533, 31 So. 978. (2) **The amount of the costs taxed, however, is not the same in the alias as in the original.** Sheppard v. Melloy,

12 Ala. 561. See also Bryan v. Smith, 3 Ill. 47.

12. Scott v. Allen, 1 Tex. 508.

[a] The omission of the statement that the writ is an alias, will not invalidate it. Woods v. Brzezinski, 57 Conn. 471, 18 Atl. 252; Graves v. Hall, 13 Tex. 379.

[b] A writ is sufficiently shown to be an alias where there is a command in it to collect "fifty cents for a former writ." Bellows v. Sowles, 71 Vt. 214, 44 Atl. 68.

13. Ga.—Walls v. Smith, 19 Ga. 8. N. Y.—Jackson v. Sternbergh, 1 Johns. Cas. 153. N. C.—Simpson v. Simpson, 64 N. C. 427.

14. McMichael v. Knapp, 7 Cow. (N. Y.) 413; Vernon's Sayles' Tex. Civ. St., 1914, §3729, subd. 7; Driscoll v. Morris, 2 Tex. Civ. App. 603, 21 S. W. 629.

[a] Former levies need not be recited when the property taken under them has been sold and those writs fully executed, the clerk having endorsed the previous credits and charges upon the alias. Howell v. Sherwood, 242 Mo. 513, 147 S. W. 810.

[b] In Bellows v. Sowles, 71 Vt. 214, 44 Atl. 68, it was held that a command in the writ to collect for a former writ sufficiently showed that it was an alias.

[c] Failure (1) to state in the executions the number of executions previously issued did not render the last execution void. It was a mere irregularity. Corder v. Steiner (Tex. Civ. App.), 54 S. W. 277. (2) Alias permitted to be amended at creditor's cost to recite the original. McMichael v. Knapp, 7 Cow. (N. Y.) 413. (3) And a second execution will not be quashed merely because it is not entitled an alias execution. Woods v. Brzezinski, 57 Conn. 471, 18 Atl. 252; Bushong v. Taylor, 82 Mo. 660.

thereunder.<sup>15</sup> An alias or pluries writ will not be rendered void by mere irregularities or inaccuracies.<sup>16</sup> The issuance of an alias writ before the return of the original is merely irregular, and does not render the writ void.<sup>17</sup>

e. *Operation and Effect*.—In some jurisdictions, the issuance of an alias writ after a levy made and returned waives the benefit<sup>18</sup> of the

[d] **The alias writ must recite the issuance of the original and the return thereof.** *N. Y.*—*Cumpston v. Field*, 3 Wend. 382. *Eng.*—*Chapman v. Bowlby*, 8 Mees. & W. 249. *Can.*—*Smith v. Jones*, 7 N. Bruns. 176.

15. *Conn.*—*Johnson v. Huntington*, 13 Conn. 47. *N. M.*—*Ann. St.*, 1915, §2211. *N. Y.*—*McMichael v. Knapp*, 7 Cow. 413. *Eng.*—*Chapman v. Bowlby*, 8 Mees. & W. 249.

[a] An alias should recite that the original was not satisfied in whole. *Oviat v. Vyner*, 1 Salk. 318, 91 Eng. Reprint 281; *Smith v. Jones*, 7 N. Bruns. (Can.) 176.

[b] **A failure to recite the proceedings under the first writs will not render the alias void.** Such defect may be amended. *Johnson v. Huntington*, 13 Conn. 47; *Coleman v. Mansfield*, 1 Miles (Pa.) 56.

16. *U. S.*—*Schroeder v. Young*, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. ed. 721. *Ga.*—*Ruskin v. Shields*, 11 Ga. 636. *Ind.*—*Doe ex dem. Mace v. Dutton*, 2 Ind. 309, 52 Am. Dec. 510. *Me.*—*Bryant v. Johnson*, 24 Me. 304. *N. J.*—*Rammel v. Watson*, 31 N. J. L. 281. *N. Y.*—*McMichael v. Knapp*, 7 Cow. 413. *Tex.*—*Graves v. Hall*, 13 Tex. 379.

[a] But under a statute providing that an alias may issue upon the amount then due on the judgment without interest, an alias writ calling for interest is void. *Haskell v. Littlefield*, 155 Mass. 320, 29 N. E. 626.

17. *Fla.*—*White v. Staley's Exrs.*, 21 Fla. 396. *Ind.*—*Doe ex dem. Mace v. Dutton*, 2 Ind. 309, 52 Am. Dec. 510. *Mich.*—*Miller v. Hanley*, 94 Mich. 253, 53 N. W. 962. *N. J.*—*Rammel v. Watson*, 31 N. J. L. 281. *S. C.*—*State v. Page*, 1 Spears 408, 40 Am. Dec. 608. *Tenn.*—*Wiseman v. Bean*, 2 Heisk. 390.

[a] Where a levy made is released and the sheriff endorses a nulla bona return upon the writ but fails to return it, it has been held that the issuance of an alias before the return

in such case, is a mere irregularity and not sufficient to render the levy made under it invalid. The court may direct a return nunc pro tunc of the preceding writ. *Miller v. Hanley*, 94 Mich. 253, 53 N. W. 962.

[b] **An amendment of the return of the original execution may be had to make the issuance of the alias regular.** *Rammel v. Watson*, 31 N. J. L. 281.

[c] **Issuance by Clerk.**—"Where there is a power in the clerk to issue more than one (writ) upon the return of the original, the issue by him of an execution without a return of a former one is an irregularity merely in the exercise of a granted power, which cannot be attacked in a collateral proceeding for the recovery of property sold under it, and is only voidable. . . . But where the power does not exist in the clerk, either because it was not originally vested in him, or that by its exercise in a single instance he has exhausted the power, an execution issued by him is void." *White v. Staley's Exrs.*, 21 Fla. 396.

[d] A prior levy, not amounting to a satisfaction of the judgment, having been made, the issuance of a subsequent execution before a return of the former, or other proceedings to effect a vacation of the levy having been had, will be considered at most but an error which will render the execution voidable and not void. *Doe ex dem. Mace v. Dutton*, 2 Ind. 309, 52 Am. Dec. 510.

18. *Kerr v. South Park Comrs.*, 8 Biss. 276, 14 Fed. Cas. No. 7,733; *Yarborough v. President, etc. of the State Bank*, 13 N. C. 23. But see *Brasfield v. Whitaker*, 11 N. C. 309.

**As to the effect of the issuance of an alias writ before the return of the original execution as an abandonment of the levy**, see *supra*, II, B, 4, n, (I), (D).

[a] An alias writ issued to another county does not waive or abandon the levy made under the original in a dif-

levy. The issuance of an alias and pluries writs preserves the lien of the original execution.<sup>19</sup>

C. AGAINST PERSON.<sup>20</sup> — 1. **Nature and Purpose of Remedy.**<sup>21</sup> Imprisonment for debt was the rule of the common law;<sup>22</sup> but with the exception of certain specified cases, saved generally by the statutory<sup>23</sup> or constitutional<sup>24</sup> provisions upon the subject, it has been abolished.<sup>25</sup> If a party, therefore, seeks to imprison his debtor, he must bring the case clearly within one of the enumerated exceptions.<sup>26</sup> Execution against the body, or *capias ad satisfaciendum*, as the process was usually called,<sup>27</sup> is an extraordinary remedy<sup>28</sup> long known to the

ferent county. *Hicks v. Ellis*, 65 Mo. 176.

19. **U. S.**—*Beebe v. United States*, 161 U. S. 104, 10 Sup. Ct. 532, 40 L. ed. 636; *Erwin's Lessee v. Dundas*, 4 How. 58, 11 L. ed. 875. **Ala.**—*Boyd v. Dennis*, 6 Ala. 55; *Collingsworth v. Horn*, 4 Stew. & P. 237, 24 Am. Dec. 753. **Ind.**—*Doe ex dem. Murphy v. Hayes*, 4 Ind. 117. **N. C.**—*Brasfield v. Whitaker*, 11 N. C. 309.

[a] A venditioni with an alias fieri facias clause, is the proper writ to keep up the lien created by the levy, and the relation of the process, to the teste of the original fieri facias. *Yarborough v. President, etc. of State Bank*, 13 N. C. 23.

20. On judgment in justice's court, see the title "Justices of the Peace."

Execution against property, see *supra*, II, B.

As to arrest on mesne process, see the title "Arrest in Civil Cases."

21. Definitions of execution, see generally *supra*, II, A.

22. See the following: **Ill.**—*Strode v. Broadwell*, 36 Ill. 419. **Mass.** *Frost's Case*, 127 Mass. 550. **N. Y.** *Davids v. Brooklyn Heights R. Co.*, 104 App. Div. 23, 93 N. Y. Supp. 285.

23. See generally the statutes and the following: **La.**—*Chaffe & Sons v. Handy*, 36 La. Ann. 22; *Anderson v. Brinkley*, 1 La. Ann. 126. **Mass.** *Frost's Case*, 127 Mass. 550. **N. Y.** *Elwood v. Gardner*, 45 N. Y. 349, 355, 10 Abb. Pr. (N. S.) 238; *People ex rel. Latorre v. O'Brien*, 3 Abb. Dec. 552; *Moak v. De Forrest*, 5 Hill 605.

24. See generally the constitutions of the several states, and the following: **Ill.**—*Strode v. Broadwell*, 36 Ill. 419; *Maher v. Huette*, 10 Ill. App. 56. **Ind.** *Baker v. State*, 109 Ind. 47, 9 N. E. 711. **Nev.**—*Ex parte Bergman*, 18 Nev. 331, 4 Pac. 209.

25. See the following: **Ala.**—*Kennedy v. Rice*, 1 Ala. 11. **La.**—*Anderson v. Brinkley*, 1 La. Ann. 126; *Thornhill v. Christmas*, 10 Rob. 543. **N. Y.** *Frost v. Brisbin*, 19 Wend. 11, 32 Am. Dec. 423. **N. C.**—*Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43. **Tenn.** *State v. Paint Rock Coal, etc. Co.*, 92 Tenn. 81, 20 S. W. 499, 36 Am. St. Rep. 68; *Graham v. Merrill*, 5 Coldw. 622, 632; *Gasget v. Scott*, 9 Yerg. 244; *Dwyer v. Foster*, 4 Yerg. 533. **Tex.** *Lockridge v. Baldwin*, 20 Tex. 303, 70 Am. Dec. 385.

26. **Ill.**—*Marshall Field & Co. v. Freed*, 191 Ill. App. 619. **N. Y.**—*Elwood v. Gardner*, 45 N. Y. 349, 355, 10 Abb. Pr. (N. S.) 238. **S. C.**—*Martin v. Hutto*, 82 S. C. 432, 440, 64 S. E. 421.

27. See note following.

[a] "A *capias ad satisfaciendum* is defined to be a judicial writ of execution, which issues out on the record of a judgment. And by the writ the sheriff is commanded to take the body of the defendant in execution, and him safely keep, so that he have his body in court at the return of the writ to satisfy the plaintiff his debt and damages." *People v. Hoffman*, 97 Ill. 234.

28. *Baker v. State*, 109 Ind. 47, 9 N. E. 711.

[a] This remedy should not be confused with provisional arrest, effected at common law by a *capias ad respondendum*. Provisional arrest secures simply the defendant's presence at the time of trial and is employed before judgment, while execution against the person is a means employed after judgment to obtain a satisfaction thereof. See definition of these writs in *Bouvier's L. Dict.*, and as to provisional arrest in civil cases, see 2 STANDARD PROC. 922 et seq.

common law.<sup>29</sup> The issuance of such a writ is not regarded as a suit at law.<sup>30</sup> It forms, however, a part of a "proceeding at law" within the meaning of that expression as ordinarily used.<sup>31</sup> It is usually regarded as a civil, rather than a criminal, proceeding,<sup>32</sup> the primary purpose of which is the collection of the amount due.<sup>33</sup> At the same time, there is a marked resemblance between such a proceeding and a criminal prosecution,<sup>34</sup> and it is sometimes, at least, intended as a punishment for dishonest debtors.<sup>35</sup>

2. **Conditions Precedent.**—a. *General Statement.*—There are a number of matters which precede the issuance of an execution against the person in point of time and yet are not conditions precedent as that expression is ordinarily understood. Hence, matters relating to the affidavit or complaint,<sup>36</sup> the certificate of the court in "wilful and malicious act" cases,<sup>37</sup> the order of court directing the issuance of the writ,<sup>38</sup> and the verdict in an action of tort,<sup>39</sup> are discussed elsewhere in this article.

b. *Previous Execution Against Property and Demand for Satisfaction.*—At common law an execution against the debtor's property, and one against his person may issue simultaneously,<sup>40</sup> but the plaintiff may not proceed under both writs at the same time.<sup>41</sup> Statutes in

29. *First Nat. Bank v. Sanford*, 83 Ill. App. 58.

30. *First Nat. Bank v. Sanford*, 83 Ill. App. 58.

31. *First Nat. Bank v. Sanford*, 83 Ill. App. 58, under a statute providing for an appeal in a suit or proceeding at law or in chancery.

32. *Baker v. State*, 109 Ind. 47, 9 N. E. 711; *Burkett v. Holman*, 104 Ind. 6, 3 N. E. 406; *Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632.

[a] In *Indiana* it is considered a "civil action" within the meaning of the code for the purpose of applying the doctrine of *res judicata* to a second application, on grounds identical with the first. *Baker v. State*, 109 Ind. 47, 9 N. E. 711.

33. *Hobson v. Watson*, 34 Me. 20, 56 Am. Dec. 632. See also *Frost's Case*, 127 Mass. 550, holding that such proceedings are "merely proceedings in the course of a civil suit for the collection of a debt, to which the twelfth article of the Declaration of Rights has no application."

34. *Weber v. Goldenberg*, 10 Pa. Co. Ct. 72.

35. *In re Prime*, 1 Barb. (N. Y.) 296, 1 Edm. Sel. Cas. 479.

36. *Infra*, II, C, 8, b.

37. *Infra*, II, C, 8, c.

38. *Infra*, II, C, 8, d.

39. *Infra*, II, C, 8, e.

40. Ill.—*Marshall Field & Co. v. Freed*, 191 Ill. App. 619. Pa.—*Lancaster Supply Co. v. Butt*, 22 Pa. Dist. 170; *Young v. Taylor*, 2 Binn. 218. S. C. *Miller v. Bagwell*, 3 McCord 429; *State v. Guignard*, 1 McCord 176; *Alkin v. Bolan*, 1 Brev. 537. Eng.—*Dicas v. Warne*, 1 Scott 537, 25 E. C. L. 164.

41. Ky.—*Leavison v. Rosenthal*, 5 Ky. L. Rep. 132. N. C.—*McNair v. Ragland*, 17 N. C. 42, 22 Am. Dec. 728. Pa.—*Young v. Taylor*, 2 Binn. 218. S. C. *Miller v. Bagwell*, 3 McCord 429; *State v. Guignard*, 1 McCord 176.

[a] When a levy has been made (1) upon property of the defendant, the plaintiff may not abandon it and proceed upon an execution against the defendant's person (*Bank of Pennsylvania v. Latshaw*, 9 Serg. & R. [Pa.] 9), (2) nor may he levy his execution against the defendant's person while the former levy remains in force. *McNair v. Ragland*, 17 N. C. 42, 22 Am. Dec. 728.

[b] The Reason.—Such a rule "is necessary, that the officer may know the sum for which he detains the prisoner." *McNair v. Ragland*, 17 N. C. 42, 22 Am. Dec. 728.

[c] The proper practice is to call on the defendant to show cause why the levy should not be set aside, and if, by reason of prior liens, it is found altogether worthless as a means of sat-

a number of states now provide that an execution against the person of a judgment debtor cannot issue until an execution against his property has been taken out and returned,<sup>42</sup> wholly or partly unsatisfied,<sup>43</sup>

isfaction, the rule will be made absolute, after which the *ca. sa.* will be regular. *Bank of Pennsylvania v. Latshaw*, 9 Serg. & R. (Pa.) 9.

42. **U. S.**—*The Delaware, Ole.* 240, 7 Fed. Cas. No. 3,762. **Ga.**—*Craig v. Adair*, 22 Ga. 373. **Ill.**—*McDonald v. Wilkie*, 13 Ill. 22, 54 Am. Dec. 423; *Marshall Field & Co. v. Freed*, 191 Ill. App. 619. **La.**—*Chaffe & Sons v. Handy*, 36 La. Ann. 22. **Md.**—*Turner v. Walker*, 3 Gill & J. 377, 22 Am. Dec. 329. **N. Y.**—*Matter of Langslow*, 167 N. Y. 314, 321, 60 N. E. 590; *N. Y. Guaranty & Indemnity Co. v. Rogers*, 71 N. Y. 377; *Lehman v. Mayer*, 68 App. Div. 12, 74 N. Y. Supp. 194; *Bergman v. Noble*, 45 Hun 133, 19 Abb. N. C. 62, 12 Civ. Proc. 256; *O'Shea v. Kohn*, 33 Hun 149; *Walker v. Isaacs*, 36 Hun 233. **N. C.**—*Carroll v. Montgomery*, 128 N. C. 278, 38 S. E. 874; *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43. **S. C.** *Martin v. Hutto*, 82 S. C. 432, 440, 64 S. E. 421.

[a] **The Reason.**—(1) "All the possibilities of collecting the judgment out of the property of the judgment debtor must be exhausted before resort can be had to this extreme action" of execution against the person (*Bergman v. Noble*, 45 Hun [N. Y.] 133), (2) since "to make the two remedies concurrent would be oppressive, and it was deemed reasonable that an effort to satisfy the debt out of the property of the judgment debtor should be made before subjecting him to imprisonment." *New York Guaranty & Ind. Co. v. Rogers*, 71 N. Y. 377.

[b] **Where property has been sold under a fieri facias** there is additional reason for such a requirement. In such a case a return is necessary that the officer executing the *ca. sa.* may know the amount for which he holds the body of the defendant. *Turner v. Walker*, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329.

[c] **Execution against property need not issue to other counties** than that in which the defendant resides. *O'Shea v. Kohn*, 33 Hun (N. Y.) 149.

[d] **An execution to a county where the defendant is confined as a**

**prisoner under criminal process** is not a sufficient compliance with a statute requiring the issuance to the county where the defendant resides, since the term "residence," whether taken in the sense of domicile or of abode, implies a place where the party is situated through choice. *American Surety Co. v. Cosgrove*, 40 Misc. 262, 81 N. Y. Supp. 945.

[e] **In Michigan this prerequisite may be dispensed with by order of court.** *Sink v. Circuit Judge*, 146 Mich. 121, 109 N. W. 115.

[f] **The effect of failure to comply with this prerequisite** is to make the process void, there being no jurisdiction to issue it. *Bergman v. Noble*, 45 Hun (N. Y.) 133, 19 Abb. N. C. 62, 12 Civ. Proc. 256.

[g] **A return unsatisfied, without actual levy, is a sufficient compliance.** *Fake v. Edgerton*, 3 Abb. (N. Y.) 229, 5 Duer 681; *In re Mowry*, 12 Wis. 52, since the sheriff may not believe that the available property will pay the costs of levy and sale.

As to recital in writ showing this condition to have been complied with, see *infra*, II, C, 9, d, (I).

43. **Ill.**—*Huntington v. Metzger*, 153 Ill. 272, 41 N. E. 881; *McDonald v. Wilkie*, 13 Ill. 22, 54 Am. Dec. 423; *Marshall Field & Co. v. Freed*, 191 Ill. App. 619. **La.**—*Casson v. Cureton*, 12 Mart. (O. S.) 435. **N. Y.**—*Matter of Langslow*, 167 N. Y. 314, 321, 60 N. E. 590; *Lehman v. Mayer*, 68 App. Div. 12, 74 N. Y. Supp. 194; *Bergman v. Noble*, 45 Hun 133, 19 Abb. N. C. 62, 12 Civ. Proc. 256; *Walker v. Isaacs*, 36 Hun 233. **N. C.**—*Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43. **S. C.** *Martin v. Hutto*, 82 S. C. 432, 440, 64 S. E. 421.

[a] **Where an execution issues against two defendants jointly, and a return showing nulla bona as to one and a stay as to the other renders improper an execution against the person of the former.** *Casson v. Cureton*, 12 Mart. O. S. (La.) 435.

[b] **Waiver.**—The right to have the property execution returned before the issuing of an execution against the person may be waived. *New York Guar-*

unless the debtor is already under arrest by virtue of mesne process.<sup>44</sup>

**Demand for Satisfaction.**—Some statutes provide that an execution may issue against the person of a defendant who, after demand made therefor, refuses to surrender up his estate to the satisfaction of the judgment.<sup>45</sup> The demand contemplated is an unequivocal one, made in a manner calculated to inform the debtor that he must comply therewith or suffer arrest.<sup>46</sup> It need not be made for any particular property or estate, but is sufficient if it be for the debtor's estate generally,<sup>47</sup> especially where the debtor refuses absolutely to so apply any of his estate.<sup>48</sup> Such a demand, moreover, is only necessary in those cases where the debtor's arrest is sought upon the ground of his unjust refusal to surrender his estate.<sup>49</sup> The demand may be made by the execution plaintiff's attorney,<sup>50</sup> or, under some statutes, by the officer holding the writ of execution.<sup>51</sup>

c. *Previous Arrest on Mesne Process.*—Where the right of the plaintiff to arrest the body of the defendant under an execution depends upon the nature of the action, the granting of an order of arrest before judgment is not necessary.<sup>52</sup> Under statutes in some states,

anty & Ind. Co. v. Rogers, 71 N. Y. 377.

44. N. Y. Code of Civ. Proc., §1489.

45. See the statutes, and *Huntington v. Metzger*, 158 Ill. 272, 280, 41 N. E. 881; *Fergus v. Hoard*, 15 Ill. 357; *Maier v. Huette*, 10 Ill. App. 56; *Steward v. Biddlecum*, 2 N. Y. 103.

46. *Maier v. Huette*, 10 Ill. App. 56.

[a] **Sufficiency of Demand.**—(1) Merely reading the execution to the defendant and asking him to pay it is not sufficient. *Maier v. Huette*, 10 Ill. App. 56. (2) But a demand for payment, and upon its refusal, a request that property be pointed out in which a levy might be made, is sufficient. *Bulkley v. Finch*, 37 Conn. 71.

47. *Bulkley v. Finch*, 37 Conn. 71; *Steward v. Biddlecum*, 2 N. Y. 103.

[a] In Louisiana this demand must be made first of the defendant, and if that be barren of results, then upon the judgment creditor to point out property of the debtor. *Conway v. Jones*, 17 La. 413.

48. *Steward v. Biddlecum*, 2 N. Y. 103.

[a] By absenting himself or removing his property the defendant as effectually refuses to surrender his property as though a personal demand and refusal had been made. *Fergus v. Hoard*, 15 Ill. 357.

49. *Kitterman v. People*, 181 Ill. App. 682.

[a] For example, an affidavit showing such a demand "is not a prerequisite to the issuance of a writ of *capias ad satisfaciendum*, where the judgment is recovered in an action of which malice is the gist, but such writ is properly issued upon an order of the court." *Kitterman v. People*, 181 Ill. App. 682.

50. *Steward v. Biddlecum*, 2 N. Y. 103.

[a] After the institution of proceedings, based upon the demand and refusal, it is too late to raise an objection that no proper person was present at the demand to receive the property, after institution of proceedings based upon the demand and refusal. *Steward v. Biddlecum*, 2 N. Y. 103.

51. *Maier v. Huette*, 10 Ill. App. 56; *Conway v. Jones*, 17 La. 413.

52. *Sherman v. Grinnell*, 159 N. Y. 50, 53 N. E. 674; *Elwood v. Gardner*, 45 N. Y. 349, 10 Abb. Pr. (N. S.) 238; *Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 288, 52 N. Y. Supp. 985, 27 Civ. Proc. 395, 6 N. Y. Ann. Cas. 65; *Martin v. Hutto*, 82 S. C. 432, 64 S. E. 421.

[a] The grounds of arrest must appear from the essential allegations of the complaint; it is not sufficient that they appear from incidental and unnecessary averments. *Elwood v. Gardner*, 45 N. Y. 349, 352, 10 Abb. Pr. (N. S.) 238; *Wood v. Henry*, 40 N. Y. 124;

however, in cases where the cause of arrest is extrinsic and does not appear in the complaint, an execution against the person may not be had, unless an order of arrest has been granted and executed before judgment.<sup>53</sup> But even in these states it is sufficient that an order for provisional arrest has actually been granted and executed, and has not been vacated, though the defendant was not liable to such arrest and might have had the order vacated upon a motion before judgment.<sup>54</sup>

d. *Judgments Which Authorize Execution Against the Person.*

(1.) *General Statement.*—Execution against a defendant's person will only issue upon a judgment in personam,<sup>55</sup> which has not become dormant,<sup>56</sup> and which was recovered in an action in which such an execution is proper.<sup>57</sup> Local requirements, as, for example, that the judgment shall be obtained in a certain manner,<sup>58</sup> shall not be for less than a certain amount,<sup>59</sup> and shall state that the defendant is subject to arrest,<sup>60</sup> must be complied with.

Richtmeyer v. Remsen, 38 N. Y. 206; Smith v. Knapp, 30 N. Y. 581, 588; Aetna Ins. Co. v. Shuler, 28 Hun (N. Y.) 338.

53. Ill.—People v. Healey, 128 Ill. 9, 20 N. E. 692, 15 Am. St. Rep. 90; People v. Hoffman, 97 Ill. 234. N. Y. Chapin v. Foster, 101 N. Y. 1, 3 N. E. 786; Prouty v. Swift, 51 N. Y. 594; Elwood v. Gardner, 45 N. Y. 349, 10 Abb. Pr. (N. S.) 238; Wood v. Henry, 49 N. Y. 124. S. C.—Martin v. Hutto, 82 S. C. 432, 64 S. E. 421. S. D.—Griffith v. Hubbard, 9 S. D. 15, 67 N. W. 850.

As to provisional arrest generally, see 2 STANDARD PROC. 922.

54. Smith v. Knapp, 30 N. Y. 581.

[a] Should such order of arrest be actually vacated, however, the parties are relegated to the same position as though no order of arrest had been made. Stelle v. Palmer, 11 Abb. Pr. (N. Y.) 62.

55. Hill v. Bowman, 14 La. 445.

[a] Where personal service of process was not made, jurisdiction being acquired by attachment, an execution against the defendant may not issue. Clark v. Holliday, 9 Mo. 711.

56. Strawbridge v. Mann, 17 Ga. 454.

57. Winton v. Kirby, 7 S. D. 461, 64 N. W. 528; Winton v. Knott, 7 S. D. 179, 63 N. W. 783.

58. Cal.—Davis v. Robinson, 10 Cal. 411. Ill.—Boos v. White, 64 Ill. App. 177. N. C.—Ledford v. Emerson, 143 N. C. 527, 55 S. E. 969.

[a] In Illinois (1) it is necessary that the judgment be predicated upon

a jury's verdict (Boos v. White, 64 Ill. App. 177), (2) unless the judgment is of a justice of the peace. Boos v. White, 64 Ill. App. 177. As to the necessity of verdict of a jury generally, see *infra* II, C, 3, e.

59. Me.—Kelley v. Morris, 63 Me.

57. Mass.—Hooper v. Cox, 117 Mass.

1. N. H.—Gilman v. Perkins, 11 N. H. 343. N. Y.—People v. Costigan, 54 App. Div. 186, 66 N. Y. Supp. 376.

[a] How Amount Computed.—Under a statute providing that such a writ shall not issue where the amount of the original debt is less than ten dollars, it has been held that the debt must be of this amount, exclusive of interest. Kelley v. Morris, 63 Me. 57.

60. Cal.—Davis v. Robinson, 10 Cal. 411. N. Y.—Carpenter v. Willet, 31 N. Y. 90, 28 How. Pr. 225, 1 Keyes 510, 1 Abb. Dec. 312 (under ch. 344, Laws of 1857); People *ex rel.* Burroughs v. Willett, 26 Barb. 78 (under early New York statute); Bacon v. Grossmann, 90 App. Div. 204, 86 N. Y. Supp. 66 (under Municipal Court Act); People v. Costigan, 54 App. Div. 186, 66 N. Y. Supp. 376 (under §1386, Consol. Act); Etlich v. Stock, 67 Misc. 399, 123 N. Y. Supp. 87 (under Municipal Court Act, Laws 1902, ch. 550, §251); Musica v. Amalfitano, 56 Misc. 505, 107 N. Y. Supp. 179, under Municipal Court Act, §251. N. C.—See Ledford v. Emerson, 143 N. C. 527, 55 S. E. 969, where it is said that when fraud on the part of the defendant is established "it is safer and better . . . that it should be recited in the judgment with a proper

(II.) Decree for Alimony.—In some jurisdictions a decree for alimony may be enforced by an execution against the person,<sup>61</sup> while in others this remedy is not available.<sup>62</sup>

(III.) Judgment for Costs.—A defendant is liable to imprisonment for costs necessarily incurred in an action in which execution against his body might have been had for the principal debt.<sup>63</sup> If the nature of the action is such that an execution against the person might have issued upon a judgment in favor of the plaintiff,<sup>64</sup> such an execution

order or direction as to the issuing of executions to enforce it."

[a] Where this is required it is "an essential part of the judgment, so that if it is omitted in a proper case or inserted improperly, the judgment may be reversed or modified on appeal." *In re Zeitz*, 12 Civ. Proc. (N. Y.) 423.

As regards certificates of "wilful and malicious act," which, in some jurisdictions, are attached to the judgment, see *infra*, II, C, 8, c.

[b] In New York, "in the municipal court, where the pleadings may be oral, the law requires when an execution can be issued against the person that the judgment of the justice must so state, and then the clerk must enter such fact in the docket. In the Code of Civil Procedure there is no such provision relating to courts of record, showing that the allegations of the complaint must determine whether execution against the person can issue, and there is no provision authorizing any action of the clerk upon the subject. In the lower court mentioned, where the pleadings may be oral, of course the record contains nothing to indicate whether the action is of that character or not, and hence there must be a judicial direction." *Bacon v. Grossmann*, 90 App. Div. 204, 86 N. Y. Supp. 66, 67.

[c] Amendment of Judgment.—(1) Under a statute which provides that an amendment to a judgment must be made either at the close of the trial, or upon two day's notice of motion, a judgment cannot be amended in the lower court by inserting the words "Defendant liable to arrest and imprisonment on execution," where the statutory conditions have not been complied with (*Musica v. Amalfitano*, 56 Misc. 505, 107 N. Y. Supp. 179), (2) though upon an appeal from an order vacating the order modifying the judgment, if the facts disclosed justify

the issuance of that process, the judgment could be modified by directing the insertion of the words quoted above. *Musica v. Amalfitano*, *supra*. (3) In the absence of some such provision a party may have the judgment amended in this regard if he moves promptly upon discovering the omission (*Elair v. Russell*, 14 Bush [Ky.] 412), (4) although it has been held that such an application at a subsequent term comes too late. *Purdy v. Squires*, 14 Ky. L. Rep. 271.

61. *Bailey v. Bailey*, 166 Mass. 226, 44 N. E. 143; *Chase v. Ingalls*, 97 Mass. 524; *Sheafe v. Loughton*, 36 N. H. 240; *Sheafe v. Sheafe*, 36 N. H. 155.

62. *Elmer v. Elmer*, 150 Pa. 205, 24 Atl. 670.

[a] Where alimony awarded in a lump sum, it is to be regarded as a simple money judgment for the enforcement of which an ordinary execution is the only remedy. *White v. White*, 130 Cal. 597, 62 Pac. 1062, 30 Am. St. Rep. 150.

63. *Ex parte Bergman*, 18 Nev. 331, 4 Pac. 209; *Smith v. Duffy*, 37 Hun (N. Y.) 506; *Finkemaur v. Dempsey*, 8 N. Y. Civ. Proc. 418.

[a] Where defendant exempt from arrest for principal debt he is also exempt from arrest for costs. *In re Pierce's Appeal*, 103 Pa. 27.

64. *Dauids v. Brooklyn Heights R. R. Co.*, 104 App. Div. 23, 93 N. Y. Supp. 285.

[a] "The controlling determination is the tortious character of the cause of action, and not the mere consideration whether or not the arrest and imprisonment of the defendant would for any reason, such as incorporation or otherwise, be a practical possibility. Indeed, in the early case of *Miller v. Scherder*, 2 N. Y. 262, it was held that where a complaint united causes of action upon contract and in tort, so that the defendant would have been ex-

may issue on a judgment entered against him for the costs,<sup>65</sup> provided such costs were awarded upon a final judgment,<sup>66</sup> and no statute expressly relieves either party in an action of tort from the collection of costs in this manner.<sup>67</sup> The converse is also true, that in an action in which an execution against the defendant's person will not issue, costs adjudged against the plaintiff may not be recovered in this manner,<sup>68</sup> and in some jurisdictions a judgment for costs is considered as a simple judgment for debt and accordingly execution will not issue against the plaintiff's person for the collection thereof.<sup>69</sup>

**3. In Federal Courts.**—By act of congress the issuance of execution against the person from a United States court is made to depend upon the law of the state in which the court sits.<sup>70</sup> Hence in states

empted from imprisonment on execution under a judgment rendered against him, he could nevertheless imprison the plaintiff, who failed in the action, upon execution for the costs.' *Dauids v. Brooklyn Heights R. Co.*, 104 App. Div. 23, 93 N. Y. Supp. 285, holding that the fact that the defendant was incorporated did not alter the rule in this case, the cause of action being one in tort, for which the master is liable for the wrongful act of his servant, and in which an execution against the person may issue.

[b] Where a previous order of arrest is necessary to authorize the issuance of an execution against a defendant, and none is obtained, he cannot have an execution against the plaintiff for costs. *Purchase v. Bellows*, 19 Abb. Pr. (N. Y.) 306, affirming 14 Abb. Pr. 357, 23 How. Pr. 421.

65. *Nev.*—*Ex parte Bergman*, 18 Nev. 351, 4 Pac. 209. *N. Y.*—*Losaw v. Smith*, 109 App. Div. 754, 96 N. Y. Supp. 191; *Dauids v. Brooklyn Heights R. Co.*, 104 App. Div. 23, 93 N. Y. Supp. 285; *Saffier v. Haft*, 86 App. Div. 284, 82 N. Y. Supp. 763, 13 N. Y. Ann. Cas. 518; *Knapp v. Murphy*, 20 App. Div. 83, 46 N. Y. Supp. 1047, 4 N. Y. Ann. Cas. 313; *Miller v. Woodhead*, 52 Hun 127, 5 N. Y. Supp. 88, 17 Civ. Proc. 102; *Philbrook v. Kellogg*, 21 Hun 238. *S. D.* *Winton v. Knott*, 7 S. D. 179, 63 N. W. 783.

66. *Losaw v. Smith*, 109 App. Div. 754, 96 N. Y. Supp. 191, under §15, Code Civ. Proc.

67. *Losaw v. Smith*, 109 App. Div. 754, 96 N. Y. Supp. 191, holding that §1487, Code Civ. Proc. applies as well to the collection of costs, as to claims for damages recovered.

[a] Reference may be had to the

affidavit made to procure the order of arrest, in order to ascertain whether the case is one in which the person may be arrested on a *ca. sa.* *Smith v. Knapp*, 30 N. Y. 581, 588, under the early New York Code. See *Bacon v. Grossmann*, 90 App. Div. 204, 86 N. Y. Supp. 66.

68. *Ex parte Beatty*, 12 Wend. (N. Y.) 229; *People v. Onondaga*, 9 Wend. (N. Y.) 430; *Prince v. Camman*, 3 Edw. Ch. (N. Y.) 413.

69. *Ex parte Thayer*, 11 R. I. 160.

70. U. S. Comp. St., 1913, §1636; *Stuart v. Reynolds*, 204 Fed. 709, 123 C. C. A. 13; *Mallory Mfg. Co. v. Fox*, 26 Fed. 409; *Low v. Durfee*, 5 Fed. 256; *United States v. Moller*, 10 Ben. 189, 26 Fed. Cas. No. 15,793; *Moore v. Wilmarth*, 17 Fed. Cas. No. 9,781; *Moan v. Wilmarth*, 3 Woodb. & M. 399, 17 Fed. Cas. No. 9,686; *Curtis v. Feste*, 6 Fed. Cas. No. 3,502.

As to the conformity act generally, see the title "United States Courts."

[a] The act of congress is not prospective; it adopted only the state laws existing at the time of its enactment. *Catherwood v. Gapete*, 2 Curt. 94, 5 Fed. Cas. No. 2,513; *Campbell v. Hadley*, 1 Spr. 470, 4 Fed. Cas. No. 2,358, affirming in this regard *In re Freeman*, 2 Curt. 491, 10 Fed. Cas. No. 5,083. And see *Low v. Durfee*, 5 Fed. 256 (reviewing with approval the opinion in *Catherwood v. Gapete*, *supra*); and *United States v. Tetlow*, 2 Low. 159, 28 Fed. Cas. No. 16,456; *Sadlier v. Fallen*, 2 Curt. 190, 21 Fed. Cas. No. 12,209.

[b] Penal statutes, such as those providing for imprisonment as punishment, cannot be enforced in the United States courts. *Curtis v. Feste*, 6 Fed. Cas. No. 3,502.

[c] But where this writ is sought against a debtor of the United States,

where imprisonment for debt is permitted under certain conditions and restrictions the same conditions and restrictions are applicable to executions against the person issuing out of the courts of the United States.<sup>71</sup>

4. **Who May Have Execution Issued.**<sup>72</sup> — a. *Assignee.* — The assignee of a judgment may, in a proper case, have an execution against the person of the defendant therein,<sup>73</sup> especially where it appears that some of the grounds for the issuance thereof accrued after the assignment.<sup>74</sup>

b. *Sureties.* — In some states a surety who has paid a judgment rendered against his principal is entitled to an execution against the person of the judgment debtor.<sup>75</sup> It has been held, however, to the contrary.<sup>76</sup>

c. *Wage Earner.* — A domestic servant is a "wage earner" within the meaning of that term as used in a statute giving wage earners a right to resort to this process.<sup>77</sup>

d. *Attorneys.* — It has been held that an attorney who has a lien on a judgment for costs, may have execution against the person, in a proper case.<sup>78</sup>

e. *Interveners.* — An intervener in a suit, in whose favor a judg-

state laws have no bearing on the question; jurisdiction to issue such a writ is then determined by reference to the acts of congress relative thereto. *Moore v. Wilmarth*, 17 Fed. Cas. No. 9,781; *Moan v. Wilmarth*, 3 Woodb. & M. 399, 17 Fed. Cas. No. 9,686.

71. *United States v. Moller*, 10 Ben. 189, 26 Fed. Cas. No. 15,793; *Curtis v. Feste*, 6 Fed. Cas. No. 3,502; *Catherwood v. Gapepe*, 2 Curt. 94, 5 Fed. Cas. No. 2,513.

72. As to issuance by joint plaintiffs, see *infra*, II, C, 9, b, (II).

Who may have execution against property, see 15 STANDARD PROC. 747.

73. *Lasher v. Carey*, 182 Ill. App. 147; *Dougherty v. Gardner*, 58 How. Pr. (N. Y.) 284; *King v. Kirby*, 28 Barb. (N. Y.) 49; *Miller v. Woodhead*, 52 Hun 127, 5 N. Y. Supp. 88, 17 Civ. Proc. 102, under §1375, Code Civil Proc. See also *Moore v. U. S. Barrall Co.*, 238 Ill. 544, 551, 87 N. E. 536, where the court, in passing upon the right of an assignee of a judgment against a stockholder on a stockholders' liability, says that the assignee of a judgment is entitled to "any appropriate legal or equitable remedy which might have been employed by the judgment creditor."

[a] Where a part only of a judgment is assigned, a writ will issue in

the name of the assignor, though at the instance of assignee, for the full amount of the judgment. *Dougherty v. Gardner*, 8 Abb. N. C. (N. Y.) 224.

[b] The assignee (1) of an account for goods sold may not have an execution against the person, based on an action *ex delicto* connected with the sale of the goods (*Birdsall v. Fuller*, 11 Hun [N. Y.] 204), (2) unless by virtue of statute such a cause of action would pass with the assignment. *Lasher v. Carey*, 182 Ill. App. 147.

74. *King v. Kirby*, 28 Barb. (N. Y.) 49, action for fraud and false representations.

75. *Rapp v. Masten*, 4 Redf. Sur. (N. Y.) 76. See also *David v. Blundell*, 40 N. J. L. 372, holding that a surety on an insolvent debtor bond who, after forfeiture, has paid the same, is entitled to an alias execution against the person of the debtor.

[a] The Rule Is Based on Equitable Doctrine of Subrogation.—*Rapp v. Masten*, 4 Redf. Sur. (N. Y.) 76.

76. *Elam v. Rawson*, 21 Ga. 139, because at common law this was not the rule, and the statute must be construed in support of personal liberty.

77. *Greenberg v. Laeov*, 84 N. Y. Supp. 930.

78. *Parker v. Speer*, 17 Jones & S. (N. Y.) 1, affirming 62 How. Pr. 394.

ment is rendered, may, in a proper case, have a *capias ad satisfaciendum* to enforce his judgment.<sup>79</sup>

**5. Against Whom Issued.**<sup>80</sup> — Statutes in some states exempt certain persons from arrest on executions against the person.<sup>81</sup> Other statutes provide for its issuance against specified persons.<sup>82</sup> But it will only issue against those as to whom the application shows grounds for its issuance.<sup>83</sup>

**6. From What Court and by Whom Issued.**<sup>84</sup> — What courts have authority to issue an execution against the person depends to some extent upon constitutional and statutory provisions.<sup>85</sup> A statute authorizing a specified court to issue such a writ applies only to judgments of that court.<sup>86</sup> The statutes variously provide for the issuance of this writ by the clerk of the court in which the judgment is rendered,<sup>87</sup> or properly docketed.<sup>88</sup> The duties of the clerk in such matters are purely ministerial,<sup>89</sup> unless he is charged with the responsibility of determin-

79. *Chaffe & Sons v. Handy*, 36 La. Ann. 22.

80. Against whom execution against property issues, see 15 STANDARD PROC. 749.

As to issuance against joint debtors see *infra*, II, C, 9, b, (II).

81. See generally the statutes. See also *Quinby v. Duncan*, 4 Harr. (Del.) 383, and the title "Privilege."

As to attorneys see 3 STANDARD PROC. 851.

[a] A statute exempting citizens includes non-resident citizens. *Quinby v. Duncan*, 4 Harr. (Del.) 383.

82. See *Chaffe & Sons v. Handy*, 36 La. Ann. 22 (sheriff); *Miller v. Woodhead*, 52 Hun 127, 5 N. Y. Supp. 88, guardian ad litem.

83. *Saunders v. Gallaher*, 2 Humph. (Tenn.) 445.

84. As to who issues execution against property, see 15 STANDARD PROC. 743, et seq.

85. See generally the statutes, and the following: *Kan.*—*In re Heath*, 40 Kan. 333, 19 Pac. 926, district judge at chambers, or in vacation of the court, has power to issue such a writ in a proper case. *Nev.*—*Ex parte Bergman*, 18 Nev. 331, 4 Pac. 209. *N. J.* *Wire v. Browning*, 20 N. J. L. 364. *N. Y.*—See *People ex rel. Sharkey v. Goodwin*, 50 Barb. 562; *Latham v. Westervelt*, 26 Barb. 256; *People ex rel. Corlis v. Smith*, 9 How. Pr. 464; *Wilson v. Andrews*, 9 How. Pr. 39. *Ohio.* *Milson R. & F. Co. v. Ronk*, 54 Ohio St. 422, 43 N. E. 919. *Pa.*—*Weber v. Goldenberg*, 10 Pa. Co. Ct. 72. *Vt.* *Nichols v. Packard*, 16 Vt. 147. *Wis.*

*Medcraft v. Dart*, 67 Wis. 115, 30 N. W. 223, 31 N. W. 476; *In re Mowry*, 12 Wis. 52.

[a] The supreme court (1) cannot issue such a writ. *Medcraft v. Dart*, 67 Wis. 115, 30 N. W. 223, 31 N. W. 476. (2) In Vermont the supreme court has no jurisdiction of an application for the issuance of such a writ. *Nichols v. Packard*, 16 Vt. 147.

[b] When this writ is sought on ground of fraud perpetrated by a resident of the state it does not defeat jurisdiction to issue same that some of the acts which constitute the fraud complained of were committed during a temporary absence from the state. *Ex parte Bergman*, 18 Nev. 331, 4 Pac. 209.

86. *Milson R. & F. Co. v. Ronk*, 54 Ohio St. 422, 43 N. E. 919.

87. *La.*—See *Chaffe & Sons v. Handy*, 36 La. Ann. 22. *N. Y.*—See *Bacon v. Grossmann*, 90 App. Div. 204, 86 N. Y. Supp. 66; *People v. Costigan*, 54 App. Div. 186, 66 N. Y. Supp. 376. *N. C.*—*Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43.

88. *McAden v. Banister*, 63 N. C. 478.

[a] When not docketed where rendered, the docketing in another county, being void, will not support the issuance of a writ from the latter. *McAden v. Banister*, 63 N. C. 478.

89. *Bacon v. Grossmann*, 90 App. Div. 204, 86 N. Y. Supp. 66; *People v. Costigan*, 54 App. Div. 186, 66 N. Y. Supp. 376. See 15 STANDARD PROC. 722, n. 40.

ing the sufficiency of the affidavit, which action is quasi-judicial.<sup>90</sup>

7. **Time for Issuance.**<sup>91</sup> — In the absence of statute the execution plaintiff has a reasonable time within which to take out execution against the body,<sup>92</sup> which, under the common law, was a year from the rendition of the judgment.<sup>93</sup> Statutes in some states specify a time within which such an execution shall issue.<sup>94</sup> A failure to issue the same within the time therein specified will not, however, deprive the plaintiff in the judgment of the right to its issuance,<sup>95</sup> but the defendant may be discharged from custody or imprisonment under such an execution upon a proper application,<sup>96</sup> unless the delay is sufficiently

90. *Atkinson v. Mischeaux*, 1 Humph. (Tenn.) 312.

[a] A person, not a deputy clerk, but performing temporarily and by courtesy the duties of the clerk, may not issue an execution against the person. *Atkinson v. Mischeaux*, 1 Humph. (Tenn.) 312.

91. **Time for issuance of execution against property**, see 15 STANDARD PROC. 750, et seq.

92. *Norman v. Manciette*, 1 Sawy. 484, 18 Fed. Cas. No. 10,300.

[a] A reasonable time is, in any event, more than one day. *Norman v. Manciette*, 1 Sawy. 484, 18 Fed. Cas. No. 10,300.

93. *Norman v. Manciette*, 1 Sawy. 484, 18 Fed. Cas. No. 10,300.

[a] If the defendant had been arrested provisionally upon a *capias ad respondendum* he remained in custody until he was charged in execution. *Norman v. Manciette*, 1 Sawy. 484, 18 Fed. Cas. No. 10,300.

94. See the statutes and the following: *Smith v. Knapp*, 30 N. Y. 581, 590; *Jenkins v. Mayrant*, 3 McCord (S. C.) 560; *Primrose v. Becket*, 3 McCord (S. C.) 418, involving South Carolina Act of 1815.

[a] Within ten days after return of execution against the property. *Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 288, 52 N. Y. Supp. 985, 27 Civ. Proc. 395, 6 N. Y. Ann. Cas. 65; *Perry v. Kent*, 88 Hun 407, 34 N. Y. Supp. 843, affirmed in 157 N. Y. 710, 53 N. E. 1130.

[b] Within three months after entry of judgment. *Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 288, 52 N. Y. Supp. 985, 27 Civ. Proc. 395, 6 N. Y. Ann. Cas. 65; *Segelke v. Finan*, 22 Abb. N. C. 458, 5 N. Y. Supp. 671; *Hobbs v. Bashford*, 45 Hun 592, 10 N. Y. St. 389; *De Silva v.*

*Holden*, 11 N. Y. Civ. Proc. 404, 22 Jones & S. 532.

[c] When a previous order of arrest has been granted. See the following: **U. S.**—*Barnes v. Viall*, 6 Fed. 661, involving a Rhode Island statute. **N. Y.**—*Sweet v. Norris*, 110 N. Y. 668, 18 N. E. 481 (affirming 45 Hun 595); *People v. Gill*, 85 App. Div. 192, 83 N. Y. Supp. 135; *Redner v. Jewett*, 72 Hun 598, 25 N. Y. Supp. 273. **Eng.** *Blandford v. Foote*, 1 Cowp. 72, 98 Eng. Reprint 973; *Pullen v. White*, 3 Burr. 1448, 97 Eng. Reprint 921; *Russell v. Stewart*, 3 Burr. 1787, 97 Eng. Reprint 1099.

95. *Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 288, 52 N. Y. Supp. 985, 27 Civ. Proc. 395, 6 N. Y. Ann. Cas. 65. See also *Minturn v. Phelps*, 3 Johns. (N. Y.) 446.

[a] Under a Rhode Island statute it was said by the United States court that failure to obtain execution within this prescribed time does not release the debt; "but the plaintiff cannot lawfully arrest the debtor again upon an execution issued upon the same judgment, nor can he evade that consequence by arresting him upon *mesne process* in an action on the judgment; but he may again imprison his debtor upon a second judgment." *Barnes v. Viall*, 6 Fed. 661.

96. *Norman v. Manciette*, 1 Sawy. 484, 18 Fed. Cas. No. 10,300; *Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 288, 52 N. Y. Supp. 985, 27 Civ. Proc. 395, 6 N. Y. Ann. Cas. 65, under §572, Code Civ. Proc.

[a] Reason.—"Although no such execution was issued within the three months named (after the rendering of judgment) the plaintiff would be entitled to issue his execution, and then have the question of his right to enforce it determined on an application

excused,<sup>67</sup> or the time has been extended by the issuance and return unsatisfied of another execution within the prescribed time.<sup>68</sup> If the writ issues only upon an order of court attached to the judgment, the order may not be made at a term subsequent to the one at which judgment was rendered.<sup>69</sup>

In determining the time an execution is issued, reference is had not to the teste, but to the signing of the execution.<sup>1</sup>

**8. Procuring Issuance.**<sup>2</sup>—a. *General Statement.*—Statutes regulating the proceedings by which this writ is procured must be strictly complied with,<sup>3</sup> and this compliance should be made to appear from the record.<sup>4</sup>

made, either to discharge defendant from imprisonment, or to relieve him from imprisonment under the mandate, as the plaintiff would have the right upon such application to show a reasonable cause why it should not be granted. It might appear that the defendant had been absent from the state during all the period that had elapsed since the judgment was entered." *Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 288, 52 N. Y. Supp. 985, 27 Civ. Proc. 395, 6 N. Y. Ann. Cas. 65.

**97. Lapham v. Oakland Circuit Judge**, 170 Mich. 564, 136 N. W. 594; *Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 288, 52 N. Y. Supp. 985, 27 Civ. Proc. 395, 6 N. Y. Ann. Cas. 65; *Segelke v. Finan*, 22 Abb. N. C. 458, 5 N. Y. Supp. 671; *Hobbs v. Bashford*, 45 Hun 592, 10 N. Y. St. 389; *Newgas v. Solomon*, 20 Abb. N. C. (N. Y.) 175.

[a] **Delay caused by pendency of negotiations for settlement**, is excusable. *Lapham v. Oakland Circuit Judge*, 170 Mich. 564, 136 N. W. 594.

**98. Quigley v. Baumann**, 29 Misc. 515, 61 N. Y. Supp. 966. And see *Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 288, 52 N. Y. Supp. 985, 27 Civ. Proc. 395, 6 N. Y. Ann. Cas. 65.

[a] **In the absence of statute the taking out and return of a previous execution does not extend the time.** *Primrose v. Becket*, 3 McCord (S. C.) 418.

**99. Leavison v. Rosenthal**, 5 Ky. L. Rep. 132.

**As to when an order of court is necessary**, see *infra*, II, C, 8, d.

**1. Jenkins v. Mayrant**, 3 McCord (S. C.) 560.

**2. Procuring issuance of execution**

**against property**, see 15 STANDARD PROC. 775.

**3. Del.**—*Johnson v. Temple*, 4 Harr. 446 (failure to first issue and return a fieri facias); *Quinby v. Duncan*, 4 Harr. 383. **Ill.**—*Von Kettler v. Johnson*, 57 Ill. 109; *Gorton v. Frizzell*, 20 Ill. 291; *Marshall Field & Co. v. Freed*, 191 Ill. App. 619; *Maier v. Huette*, 10 Ill. App. 56. **Me.**—*Whiting v. Trafton*, 16 Me. 398. **Mass.**—*Williams v. Shillaber*, 153 Mass. 541, 27 N. E. 767. **Mich.**—*Badger v. Reade*, 39 Mich. 771. **N. J.**—See *Breithecker v. Dallas*, 87 N. J. L. 362, 94 Atl. 307. **N. Y.**—*Auerbach v. Rogan*, 40 Misc. 695, 83 N. Y. Supp. 154.

See also the cases cited throughout this section.

[a] **"We cannot take anything by intendment, or supply deficiencies in a matter which the legislature deemed material."** *Whiting v. Trafton*, 16 Me. 398.

**4. Breithecker v. Dallas**, 87 N. J. L. 362, 94 Atl. 307.

[a] **In New York under §39 of the Municipal Court act**, which provides, in part, that "In an action where an execution may issue against the person, . . . unless a verified complaint is served with the summons, a general reference to that fact must be indorsed by the clerk upon the summons, and upon the copy to be served on the defendant in the following form, 'Plaintiff claims defendant is liable to arrest and imprisonment in this case,' " a failure to procure this indorsement in a case where the pleadings were oral was held fatal to the validity of the execution even though this question was raised in the course of the trial by a motion to set aside a provisional order of arrest. *Auerbach v. Rogin*, 40 Misc. 695, 83 N. Y. Supp. 154.

b. *The Affidavit or Complaint.*<sup>5</sup> — (I.) *Generally.*<sup>6</sup> — Under statutory provisions in some states, upon an application for an execution against the person of a judgment debtor, an affidavit must be filed, showing the facts relied upon as a basis for ordering the execution,<sup>7</sup> though in some states, an affidavit is unnecessary where the court makes a certificate that the cause of action arose from the wilful and malicious act of the defendant,<sup>8</sup> or where the plaintiff's verified complaint, either of necessity or incidentally, sets forth facts showing the debtor to be guilty of fraud, a wilful and malicious disregard of plaintiff's rights, or some similar recognized cause of arrest,<sup>9</sup> or where the execution is for

5. *Affidavit for provisional arrest*, see 2 STANDARD PROC. 927, et seq.

6. *As to affidavit for provisional arrest*, see 2 STANDARD PROC. 927, et seq.

*As to complaint as basis for provisional arrest*, see 2 STANDARD PROC. 962, et seq.

7. *Ala.*—Kenan v. Carr, 10 Ala. 867; O'Brien v. Lewis, 8 Ala. 666. *Del.* Johnson v. Temple, 4 Harr. 446; Quinby v. Duncan, 4 Harr. 383; Fromberger v. Karsner, 1 Houst. 290. *Ga.* Dozier v. Dozier, 30 Ga. 523. *Ill.* Huntington v. Metzger, 158 Ill. 272, 41 N. E. 881; Doty v. Colton, 90 Ill. 453; Tuttle v. Wilson, 24 Ill. 553; Gorton v. Frizzell, 20 Ill. 291; Fergus v. Hoard, 15 Ill. 357. See also Marshall Field & Co. v. Freed, 191 Ill. App. 619. *Kan.*—In re Heath, 40 Kan. 333, 19 Pac. 926. See also Newton First Nat. Bank v. Briggs, 6 Kan. 684. *La.*—See Florance v. Camp, 5 La. 280. *Me.*—Whiting v. Trafton, 16 Me. 398. *Mich.*—Badger v. Reade, 39 Mich. 771. And see Wilcox v. Ismon, 34 Mich. 268. *N. H.*—Stearns v. Veasey, 33 N. H. 61; Jones v. Miller, 21 N. H. 371; Naramore v. Miller, 21 N. H. 367; Kidder v. Farrar, 20 N. H. 320. *N. J.* Kipp v. Chamberlin, 20 N. J. L. 656; Morgan v. Morgan, 28 N. J. Eq. 23. *N. Y.*—People ex rel. Dusenbury v. Speir, 77 N. Y. 144, 57 How. Pr. 274 (under Non-Imprisonment Act of 1831, ch. 300, §4); Weaton v. Fay, 62 N. Y. 275; People ex rel. Valkenburgh v. Recorder of Albany, 6 Hill 429. See also Hall v. McMahon, 10 Abb. Pr. 103. *N. C.*—Huntley v. Hasty, 132 N. C. 279, 43 S. E. 844; Magruder v. Shelton, 98 N. C. 545, 4 S. E. 141, 2 Am. St. Rep. 349; Peebles v. Foote, 83 N. C. 102; Brown v. Walk, 30 N. C. 517. *Ohio.* See Gates v. Maxon, Kerr & Co., 1 Ohio Dec. (Reprint) 132. *R. I.*—Shaw v. Silverstein, 21 R. I. 500, 44 Atl. 931;

*In re Keen*, 15 R. I. 294. *Tenn.*—See Saunders v. Gallaher, 2 Humph. 445. *Vt.* Adams v. Wait, 42 Vt. 16. See Converse v. Washburn, 43 Vt. 129; Davis v. Dorr, 30 Vt. 97; Blood v. Crandall, 28 Vt. 396. *Wash.*—Burrichter v. Cline, 3 Wash. 135, 28 Pac. 367. *Eng.*—Davis v. Simmonds, 14 L. R. Ir. 364.

[a] *In Indiana* the grounds on which the execution against the body is sought may be presented by affidavit or complaint. Baker v. State, 109 Ind. 47, 9 N. E. 711.

[b] *In Massachusetts* (1) the proper practice is to file an affidavit in all actions ex contractu (Noyes v. Manning, 162 Mass. 14, 37 N. E. 768; Williams v. Shillaber, 153 Mass. 541, 27 N. E. 767; Atwood v. Wheeler, 149 Mass. 96, 21 N. E. 232; Frost's Case, 127 Mass. 550; Hildreth v. Brigham, 12 Allen 71; Abbott v. Tucker, 4 Allen 72. See also Radovsky v. Sperling, 187 Mass. 202, 72 N. E. 949; Bailey v. Bailey, 166 Mass. 226, 44 N. E. 143), (2) but no affidavit is necessary in an action ex delicto. Hildreth v. Brigham, 12 Allen (Mass.) 71.

[c] *Resident Citizens—Joint Defendants.*—Under statutes requiring an affidavit when it is sought to arrest a resident citizen, the affidavit must be filed where the execution is predicated on a joint judgment, if any one of the joint judgment debtors is a resident citizen, even though the particular debtor whose arrest is sought is a non-resident. Fromberger v. Karsner, 1 Houst. (Del.) 290.

8. Adams v. Wait, 42 Vt. 16.

*As to this certificate generally*, see *infra*, II, C, 8, c.

9. *Colo.*—Jahl v. Lewis, 57 Colo. 109, 139 Pac. 1113. *Ill.*—Nelson v. Swanson, 186 Ill. App. 632; Kitterman v. People, 181 Ill. App. 682. *N. Y.*—Elwood v. Gardner, 45 N. Y. 349, 10 Abb.

the recovery of costs,<sup>10</sup> or to enforce a decree for alimony.<sup>11</sup> Some states also do not require a new affidavit where a provisional order for the debtor's arrest was made and has not been vacated: the affidavit which was filed at that time being considered sufficient to authorize the issuance of the *capias ad satisfaciendum*,<sup>12</sup> though in other courts this qualification of the general rule is not followed.<sup>13</sup> Where fraud is the basis of the writ it must, in some states, be alleged in the complaint upon which the judgment is founded rather than in a subsequent affidavit.<sup>14</sup>

(II.) **Requisites.**<sup>15</sup>—As a general rule, the affidavit should follow the terms of the statute or, at least, the language employed should be substantially equivalent thereto,<sup>16</sup> in which event it is usually considered

Pr. (N. S.) 238, where the court seems to restrict this rule to a case where the cause of arrest is essential to the sufficiency of the complaint, saying, in part, "it is not necessary or proper to set forth the facts constituting the cause of arrest in the complaint, because they constitute no part of the cause of action." **N. C.**—Huntley v. Hasty, 132 N. C. 279, 43 S. E. 844; Peebles v. Foote, 83 N. C. 102.

[a] **There should be an express demand for such a writ in the complaint,** for in case of a default judgment it has been held that an execution against the person may not be awarded in the absence thereof. Jahl v. Lewis, 57 Colo. 109, 139 Pac. 1113.

10. Mass. Rev. Laws, 1902, ch. 168, §26. And see *In re Stone*, 129 Mass. 156; *Hildreth v. Brigham*, 12 Allen (Mass.) 71.

11. *Bailey v. Bailey*, 166 Mass. 226, 44 N. E. 143; *Chase v. Ingalls*, 97 Mass. 524; *Sheafe v. Loughton*, 36 N. H. 240.

12. *Stewart v. Cunningham*, 22 Ala. 626; *Converse v. Washburn*, 43 Vt. 129; *Davis v. Dorr*, 30 Vt. 97. *Compare*, *O'Brien v. Lewis*, 8 Ala. 666.

**As to affidavit for provisional arrest,** see 2 STANDARD PROC. 927, et seq.

[a] **Where a provisional order of arrest is vacated before execution the execution creditor is in the same situation as though the order had never been made.** *Stelle v. Palmer*, 11 Abb. Pr. (N. Y.) 62.

13. *Stearns v. Veasey*, 33 N. H. 61; *Janes v. Miller*, 21 N. H. 371; *Naramore v. Miller*, 21 N. H. 367; *Kidder v. Farrar*, 20 N. H. 320; *Gates v. Maxon*, *Kerr & Co.*, 1 Ohio Dec. (Reprint) 132.

[a] **The reason is that "A long time may have elapsed between the**

commencement of the suit and the recovery of the judgment. Circumstances may have changed, and that which the plaintiff might conscientiously have sworn to, when his action was brought, may no longer be true in his belief." *Janes v. Miller*, 21 N. H. 371.

14. **U. S.**—*Mitchell v. Porter*, 194 Fed. 49, 114 C. C. A. 69. **Cal.**—*Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80; *Davis v. Robinson*, 10 Cal. 411, quoted with approval in *Mitchell v. Porter*, 194 Fed. 49. **N. C.**—*Ledford v. Emerson*, 143 N. C. 502, 527, 51 S. E. 42. And see *Copeland v. Fowler*, 151 N. C. 353, 66 S. E. 215, where the court says, in part, that the issue of fraud must be "expressly submitted" to the jury.

*Compare*, 2 STANDARD PROC. 962, 963.

[a] **The reason is that in these jurisdictions the facts upon which the arrest is made must be determined by the jury.** *Davis v. Robinson*, 10 Cal. 411.

**As to the hearing and determination of these facts generally,** see *infra*, II, C, 8, f.

[b] **Where Grounds of Arrest Occur After Filing Complaint.**—In discussing this point in "fraud" cases it was said by the court in *Davis v. Robinson*, 10 Cal. 411: "In the few instances where the circumstances authorizing an arrest occur subsequently to the filing of the complaint, application should be made to the court either to amend the original, or to file a supplemental complaint, so as to set forth the facts upon which execution against the person of the defendant will be asked."

15. **Requisites of affidavit for provisional arrest,** see 2 STANDARD PROC. 929, et seq.

16. **Ill.**—*Tuttle v. Wilson*, 24 Ill. 553; *Gorton v. Frizzell*, 20 Ill. 291. **Me.**

sufficient.<sup>17</sup> The return unsatisfied of an execution against the property, where an essential prerequisite, must be made to appear.<sup>18</sup> If the statute provides several grounds of arrest, an affidavit setting forth one of the specified grounds is sufficient.<sup>19</sup>

The affidavit should not be in the alternative,<sup>20</sup> and should state facts, not conclusions,<sup>21</sup> which facts must show the debtor to be within the statutory exceptions to the usual prohibition of imprisonment for debt.<sup>22</sup> The charges preferred, whether by affidavit or complaint, should be by specific, not general, averments.<sup>23</sup> Where charges of fraud are preferred they must be presented with such fullness, clearness and precision as will inform the defendant of the nature and particulars of the transaction to be proved against him, and to enable him

Whiting v. Trafton, 16 Me. 398. **N. J.** Kipp v. Chamberlin, 20 N. J. L. 656. **Ohio.**—State v. Robinson, 1 Ohio Dec. (Reprint) 483.

[a] **Illustrations.**—Where a statute provided that an affidavit should state that the creditor believes the debtor has "estate, lands and tenements, goods and chattels," an affidavit which stated that the debtor had "property and estate" was held not sufficient, the latter phrase not being equivalent to the statutory expression. Tuttle v. Wilson, 24 Ill. 553.

17. **Ala.**—Kenan v. Carr, 10 Ala. 867. **Ga.**—Dozier v. Dozier, 30 Ga. 523. **Ill.**—See Fergus v. Hoard, 15 Ill. 357. **La.**—See Florance v. Camp, 5 La. 280. **Ohio.**—State v. Robinson, 1 Ohio Dec. (Reprint) 483. **Vt.**—Davis v. Dorr, 30 Vt. 97.

18. Baker v. State, 109 Ind. 47, 9 N. E. 711. See *supra*, II, C, 2, b.

19. Brown v. Walk, 30 N. C. 517.

20. **Ala.**—Wade v. Judge, 5 Ala. 130. **Ill.**—Gorton v. Frizzell, 20 Ill. 291. **N. Y.**—People *ex rel.* Van Valkenburgh v. Recorder of Albany, 6 Hill 429.

Compare, 2 STANDARD PROC. 954.

**Form of averments in affidavit for provisional arrest, see 2 STANDARD PROC. 933, et seq.**

[a] **An affidavit alleging** (1) "that the debtors not long since had a farm, a store of goods, or some other kind of corporeal property, etc.," is defective on this ground (People *ex rel.* Van Valkenburgh v. Recorder of Albany, 6 Hill [N. Y.] 429), (2) as is an affidavit which avers that the debtor "withholds his money or secretes his property." Gorton v. Frizzell, 20 Ill. 292.

21. **Mich.**—Luton v. Newaygo Circuit Judge, 70 Mich. 152, 38 N. W. 13.

And see Proctor v. Prout, 17 Mich. 473. **N. J.**—Bowne v. Titus, 30 N. J. L. 340; Kipp v. Chamberlin, 20 N. J. L. 656. **Ohio.**—Luhrig v. Ludlum, 69 Ohio St. 311, 69 N. E. 562, 100 Am. St. Rep. 675; Vore v. Woodford, 29 Ohio St. 249. **Wash.**—Burrichter v. Cline, 3 Wash. 135, 28 Pac. 367, involving §§116, 117, Code of 1881.

Compare 2 STANDARD PROC. 944.

[a] **Facts Showing Intent.**—An affidavit that the debtor has disposed of his property "with intent to defraud his creditors" is defective on this ground. "He could only swear to facts from which the law would or might draw its own conclusion." Kipp v. Chamberlin, 20 N. J. L. 656. Compare 2 STANDARD PROC. 946, 954.

22. **Mass.**—*In re* Blake, 106 Mass. 501. **Mich.**—Badger v. Reade, 39 Mich. 771. **Ohio.**—Luhrig v. Ludlum, 69 Ohio St. 311, 69 N. E. 562, 100 Am. St. Rep. 675.

[a] **If the debtor be under guardianship** as an insane person or a spendthrift, an affidavit looking towards his arrest which avers that he has property, not exempt from execution, which he does not intend to apply to the satisfaction of the judgment, does not charge him with any wrong since the entire control and management of his property is in his guardian. *In re* Blake, 106 Mass. 501.

23. **Cal.**—Payne v. Elliot, 54 Cal. 339, 35 Am. Rep. 80; Davis v. Robinson, 10 Cal. 411, involving complaints. **Mass.**—Frost's Case, 127 Mass. 550. See also Radovsky v. Sperling, 187 Mass. 202, 72 N. E. 949. **Mich.**—Badger v. Reade, 39 Mich. 771, involving an affidavit. **N. C.**—Peebles v. Foote, 83 N. C. 102.

[a] **A Test.**—These averments should

to prepare his defense.<sup>24</sup> Merely evidentiary facts, however, need not be stated.<sup>25</sup>

In some states the affidavit may be made upon information and belief;<sup>26</sup> in others, while the affidavit may state generally the grounds of the application upon belief alone,<sup>27</sup> the grounds for that belief must be shown by a statement of facts with which the affiant is personally familiar,<sup>28</sup> or, in other words, of which he has sufficient knowledge to testify as a witness.<sup>29</sup> Where the affidavit is on information and belief, the sources of such information must be stated.<sup>30</sup> Where the writ is sought on the ground that the debtor withholds his money or secretes his property the affidavit should show that defendant had property or money that could be appropriated to the particular debt.<sup>31</sup> Grammatical errors which do not destroy the meaning of the words used will not render the affidavit defective.<sup>32</sup>

be with sufficient fullness, clearness and precision to inform the debtor of the nature and particulars of the transaction to be proved against him, and to enable him to prepare his defense. *Frost's Case*, 127 Mass. 550.

24. *Frost's Case*, 127 Mass. 550, in which the court reasoned from the analogous question of the sufficiency of charges of fraud in this respect upon an application for discharge as an insolvent, as to which, see *infra*, II, C, 15, 1, (II), g.

[a] In *Radovsky v. Sperling*, 187 Mass. 202, 72 N. E. 949, the court, in speaking of an allegation in an affidavit attempting to set up the ground of fraud, says: "While this charge is very general, and, before pleading, the debtor might be entitled to have specifications filed, if he seasonably requested, yet in the absence of such a request, or where the charge can be made specific by its reference to the action or otherwise, the charge may be regarded as sufficiently definite for the purpose of the examination thereon." And, to the same effect, *Noyes v. Manning*, 162 Mass. 14, 37 N. E. 768.

Averments of fraud to secure provisional arrest, see 2 STANDARD PROC. 946, 963.

25. *Luhrig v. Ludlum*, 69 Ohio St. 311, 69 N. E. 562, 100 Am. St. Rep. 675.

26. *Peebles v. Foote*, 83 N. C. 102; *Gates v. Maxon, Kerr & Co.*, 2 Ohio Dec. (Reprint) 132, in a case of fraud. Compare 2 STANDARD PROC. 936, 939.

27. *Proctor v. Prout*, 17 Mich. 473.

28. *Badger v. Reade*, 39 Mich. 771; *Proctor v. Prout*, 17 Mich. 473. See

also *Luton v. Newaygo Circuit Judge*, 70 Mich. 152, 38 N. W. 13, a case of provisional arrest, where the court, in holding an affidavit to be insufficient says: "The affiant neither states facts positively nor states the circumstances upon which he has good reason to believe that they exist. This must be done in order to give the court jurisdiction."

[a] Where such personal knowledge cannot fairly be presumed from the facts and circumstances related, it should, "in some manner, be affirmatively shown in the affidavit" that the affiant possessed the requisite personal knowledge of the facts averred. *Proctor v. Prout*, 17 Mich. 473. Compare 2 STANDARD PROC. 939.

29. *Badger v. Reade*, 39 Mich. 771; *Proctor v. Prout*, 17 Mich. 473. See 2 STANDARD PROC. 929, et seq.

[a] The hearsay rule of evidence must not be violated in the affidavit. *Proctor v. Prout*, 17 Mich. 473.

As to who may make this affidavit, see *infra*, II, C, 8, b, (III).

30. *Peebles v. Foote*, 83 N. C. 102. See also *De Weerth v. Feldner*, 16 Abb. Pr. (N. Y.) 295, 25 How. Pr. 419; *Cook v. Roach*, 21 How. Pr. (N. Y.) 152; and 2 STANDARD PROC. 939.

31. *Tuttle v. Wilson*, 24 Ill. 553; *Gorton v. Frizzell*, 20 Ill. 291. Compare *Fergus v. Hoard*, 15 Ill. 357, where it is said that it is to be implied that the debtor has property from a statement that he refused to surrender "his property."

32. *Stearns v. Hemenway*, 162 Mass. 17, 37 N. E. 766; *Kellogg v. Leach*, 162

(III.) **Who May Make.**—In case a creditor is incapable of taking the required oath the affidavit of one who appears for him in the action,<sup>33</sup> or who manages such creditor's concerns,<sup>34</sup> will be sufficient. Thus, where the creditor is a corporation such an affidavit may be made by its agent.<sup>35</sup> So where the creditor does not personally know the requisite facts he may present an affidavit by one who does know the facts.<sup>36</sup> In the absence of some such incapacity on the part of the creditor, the right of an agent to make such an affidavit is restricted to an averment of the amount of the debt.<sup>37</sup> although it has been held that an affidavit of a creditor which is, standing alone, inadequate, may be supplemented by affidavits of his agents.<sup>38</sup>

The creditor's attorney is authorized by the statutes of some states to make the necessary affidavit.<sup>39</sup>

(IV.) **Who May Administer Oath.**<sup>40</sup>—The officer before whom the affidavit may be sworn to depends upon special or general statutes governing such matters.<sup>41</sup>

(V.) **Amended and Supplemental Affidavits.**<sup>42</sup>—Any merely formal de-

Mass. 45, 37 N. E. 767; *Abbott v. Tucker*, 4 Allen (Mass.) 72.

[a] **An Illustration.**—An affidavit which states that "the defendants," naming them, "has property . . . which he does not intend to apply," is to be construed distributively, and as if it had said that "each of the defendants has property." *Kellogg v. Leach*, 162 Mass. 45, 37 N. E. 767; *Abbott v. Tucker*, 4 Allen (Mass.) 72.

As to amendments of the affidavit in such a case, see *infra*, II, C, 8, b, (V).

33. *Ex parte Sargeant*, 17 Vt. 425, under a statute requiring that the plaintiff file an affidavit "stating that he believes."

[a] **Where the creditor is an idiot** the necessary affidavit may be made by his guardian by whom the action is being prosecuted. *Ex parte Sargeant*, 17 Vt. 425.

34. *Ex parte Sargeant*, 17 Vt. 425. Compare 2 STANDARD PROC. 929.

[a] **The principle** upon which this rule rests is expressed by the court in *Ex parte Sargeant*, 17 Vt. 425, which was decided under a statute which provided that the plaintiff should make affidavit that "he" believed, etc. It was there said: "But when there is no such person who can take the oath, the statute will engraft an exception on itself in favor of the agent or head of the corporation."

35. *Ex parte Sargeant*, 17 Vt. 425. See 2 STANDARD PROC. 930.

36. *Badger v. Reade*, 39 Mich. 771; *Proctor v. Prout*, 17 Mich. 473. Compare 2 STANDARD PROC. 929, 930.

37. *Hill v. Hunt*, 20 N. J. L. 476.

38. *In re Heath*, 40 Kan. 333, 19 Pac. 926. Compare 2 STANDARD PROC. 929, n. 20; 930, n. 26.

[a] **Creditor's Affidavit Must Be Filed.**—Whether supplemented by the affidavit of others or sufficient in itself the affidavit of the creditor must be filed. *In re Heath*, 40 Kan. 333, 19 Pac. 926.

As to amended and supplemental affidavits generally, see *infra*, II, C, 8, b, (V).

39. See generally the statutes, and the following: *In re Heath*, 40 Kan. 333, 19 Pac. 926; *Shaw v. Silverstein*, 21 R. I. 500, 44 Atl. 931.

[a] **Agent Not an Attorney.**—Such a statute, however, furnishes no such authority to an agent who is not an attorney. *In re Heath*, 40 Kan. 333, 19 Pac. 926.

40. **Before whom affidavit for provisional arrest** may be taken, see 2 STANDARD PROC. 932.

41. See 2 STANDARD PROC. 932, and the title "Oath and Affirmation."

[a] **Before Clerk of Court.**—*Fergus v. Hoard*, 15 Ill. 357; *Atkinson v. Micheaux*, 1 Humph. (Tenn.) 312, Act of 1831, ch. 40, §6.

42. **Supplementing and amending affidavit for provisional arrest**, see 2 STANDARD PROC. 961.

feets in the affidavit may be amended.<sup>43</sup> Facts justifying an arrest which are not set up in the original affidavit or complaint, may be shown by an amendment thereof or a supplement thereto, according as the facts alleged were or were not in existence at the time of filing the original pleading.<sup>44</sup>

c. *Certificate of Wilful and Malicious Act.*—(I.) **General Statement.** In some jurisdictions the issuance of the execution in an action of trespass or trespass on the case is predicated upon a certificate of the court that the cause of action arose through the wilful and malicious act of the defendant.<sup>45</sup>

(II.) **How Obtained.**—The practice in obtaining this certificate is usually regulated by statutes which must be closely followed.<sup>46</sup> It is obtained upon a motion addressed to the trial court,<sup>47</sup> and may not be made by a court sitting as an appellate tribunal.<sup>48</sup> Notice in a prescribed form is sometimes required to be given to the debtor, requiring him to appear and submit to an examination as to the charges brought against him.<sup>49</sup> A notice of this sort is not necessary, however, to answer the constitutional requirement of "due process of law,"<sup>50</sup> and need not be given unless required by statute.<sup>51</sup>

43. *Doty v. Colton*, 90 Ill. 453.

[a] A mistake in the date of the jurat and the omission of notarial seal is a mere clerical error, not affecting the substance of the affidavit, and therefore, amendable. *Doty v. Colton*, 90 Ill. 453.

44. *Davis v. Robinson*, 10 Cal. 411; *In re Heath*, 40 Kan. 333, 19 Pac. 926. Compare 2 STANDARD PROC. 961.

45. **Mass.**—*Williams v. Shillaber*, 153 Mass. 541, 27 N. E. 767; *Webber v. Davis*, 5 Allen 393. **N. H.**—*Leighton v. Bills*, 75 N. H. 566, 78 Atl. 643; *Cooley v. Eastman*, 57 N. H. 503; *Samson v. Young*, 50 N. H. 62; *Nelson v. Ladd*, 47 N. H. 343. **Vt.**—*Adams v. Wait*, 42 Vt. 16; *Soule v. Austin*, 35 Vt. 515.

[a] That the cause of action arose in another state is immaterial in such a case. *Nelson v. Ladd*, 47 N. H. 343.

[b] In Massachusetts an exception is made in the case of an execution for costs. Rev. St., 1902, ch. 168, §26.

46. *Williams v. Shillaber*, 153 Mass. 541, 27 N. E. 767; *Nichols v. Packard*, 16 Vt. 147.

[a] Customary practice, especially when in conflict with statutory regulations, will not be permitted to validate proceedings to obtain this certificate which do not conform to the practice as expressly provided by statute. *Wil-*

*iams v. Shillaber*, 153 Mass. 541, 27 N. E. 767.

47. *Leighton v. Bills*, 75 N. H. 566, 78 Atl. 643. And see *Cooley v. Eastman*, 57 N. H. 503; *Samson v. Young*, 50 N. H. 62; *Nichols v. Packard*, 16 Vt. 147.

48. *Nichols v. Packard*, 16 Vt. 147.

49. Mass. Rev. Laws, 1902, ch. 168, §18, and the following cases: *Williams v. Shillaber*, 153 Mass. 541, 27 N. E. 767; *Atwood v. Wheeler*, 149 Mass. 96, 21 N. E. 232; *Way v. Brigham*, 138 Mass. 384; *Stewart v. Griswold*, 134 Mass. 391; *Carleton v. Akron Sewer Pipe Co.*, 129 Mass. 40; *Frost's Case*, 127 Mass. 550.

[a] Where two grounds are charged, and only one requires this notice, a certificate issued without any such notice will be deemed to have been predicated on the charge which required no notice. *Way v. Brigham*, 138 Mass. 384.

[b] **Length of Notice.**—See *Stewart v. Griswold*, 134 Mass. 391.

[c] In case of a default by the defendant, the court may, where the language of the declaration charges, in substance, that the cause of action is one within the contemplation of the statute, issue this certificate thereupon. *Nelson v. Ladd*, 47 N. H. 343.

50. *In re Keene*, 15 R. I. 294, 3 Atl. 418.

51. *In re Keene*, 15 R. I. 294, 3 Atl. 418.

(III.) **Formal Requisites.**—Such a certificate which follows the phraseology of the statute is sufficient.<sup>52</sup>

d. *Order of Court.*<sup>53</sup>—In some jurisdictions an execution against the person issues only upon an order of court.<sup>54</sup> Usually, however, where the debtor has been provisionally arrested,<sup>55</sup> or where facts necessarily appearing in the complaint would have entitled the creditor to such an order of arrest,<sup>56</sup> no order directing the issuance of the writ is required. But where the facts appearing from the record would not have authorized a provisional order of arrest, it being necessary to present additional facts by affidavit, an order must be obtained.<sup>57</sup> In some states, however, a *capias ad satisfaciendum* issues on a judgment in an action of tort,<sup>58</sup> or on a judgment for alimony,<sup>59</sup> without a previous order of court. The court should recite the manner in which the findings or conclusions therein contained were arrived at.<sup>60</sup>

52. *Webber v. Davis*, 5 Allen (Mass.) 393.

[a] **Signature.**—Where the certificate is made by the court, in contradistinction to a judge thereof, it may be signed by the clerk upon order of the court. *Leighton v. Bills*, 75 N. H. 566, 78 Atl. 643.

53. **As to order for provisional arrest**, see 2 STANDARD PROC. 966.

54. **Cal.**—*Stewart v. Levy*, 36 Cal. 159. See *Davis v. Robinson*, 10 Cal. 411. **N. C.**—*Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969. See also *Huntley v. Hasty*, 132 N. C. 279, 43 S. E. 844. **Ohio.**—See *Hyatt v. Robinson*, 15 Ohio 372. **R. I.**—*In re Keene*, 15 R. I. 294, 3 Atl. 418.

[a] **In Kentucky** it is only in the actions for tort mentioned in §1, art. 3, ch. 38, Gen. St., 1873, that the court must note at the foot of the judgment that the writ may issue. *Purdy v. Squires*, 14 Ky. L. Rep. 271.

55. **U. S.**—*Norman v. Manciette*, 1 Sawy. 484, 18 Fed. Cas. No. 10,300. **Ky.**—*Purdy v. Squires*, 14 Ky. L. Rep. 271. See also *Long v. Wood*, 78 Ky. 392, involving Ky. Gen. St., ch. 92, art. 11, §18, and a *capias pro fine*. **N. Y.**—*Elwood v. Gardner*, 45 N. Y. 349, 10 Abb. Pr. (N. S.) 238; *Smith v. Knapp*, 30 N. Y. 581; *Bull v. Melliss*, 13 Abb. Pr. 241; *Lovee v. Carpenter*, 3 Abb. Pr. (N. S.) 309; *Crowell v. Brown*, 9 Abb. Pr. 107, 17 How. Pr. 68; *Ginochio v. Figari*, 2 Abb. Pr. 185, 4 E. D. Smith 227. See also *Cheney v. Garbutt*, 1 Code Rep. (N. S.) 166, 5 How. Pr. (N. Y.) 467. **N. C.**—*Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43. **Ore.**—*Banning v. Roy*, 47 Ore.

119, 82 Pac. 708, 114 Am. St. Rep. 908. **S. D.**—*Hormann v. Sherin*, 8 S. D. 36, 65 N. W. 434, 59 Am. St. Rep. 744.

[a] **Where no such order is necessary a motion therefor** should not be denied but should be dismissed. *Bull v. Melliss*, 13 Abb. Pr. (N. Y.) 241.

56. **N. Y.**—*Corwin v. Freeland*, 6 N. Y. 560; *Ginochio v. Figari*, 4 E. D. Smith 227; *Kloppenburgh v. Neefus*, 4 Sandf. 655; *Lockwood v. Van Slyke*, 18 How. Pr. 45; *Cooney v. Van Rensselaer*, 1 Code Rep. 38; *People ex rel. Burroughs v. Willett*, 26 Barb. 78. **N. C.**—*Peebles v. Foote*, 83 N. C. 102. **S. D.**—*Winton v. Knott*, 7 S. D. 179, 63 N. W. 783; *Hormann v. Sherin*, 8 S. D. 36, 65 N. W. 434, 59 Am. St. Rep. 744. **Vt.**—*Adams v. Wait*, 42 Vt. 16.

[a] **Provided** the complaint has been properly verified, and that the judgment was not had upon a default. *Peebles v. Foote*, 83 N. C. 102.

57. *People ex rel. Burroughs v. Willett*, 26 Barb. (N. Y.) 78; *Alden v. Sarson*, 4 Abb. Pr. (N. Y.) 102; *Humphrey v. Brown*, 17 How. Pr. (N. Y.) 481; *Banning v. Roy*, 47 Ore. 119, 82 Pac. 708, 114 Am. St. Rep. 908.

58. *Kintzel v. Olsen* (N. J. L.), 73 Atl. 962.

59. *Bailey v. Bailey*, 166 Mass. 226, 44 N. E. 143.

**As to the enforcement of judgments for alimony generally**, see 7 STANDARD PROC. 814.

60. *Bowne v. Titus*, 30 N. J. L. 340.

[a] **An order which states that proof** was made to his satisfaction that the defendant had fraudulently contracted

e. *Verdict in Action in Tort.*—In some jurisdictions an execution against the person may be predicated upon a verdict for the plaintiff in an action in tort, stating that in committing the tort the defendant was guilty of either malice, fraud or wilful deceit.<sup>61</sup>

f. *Trial and Determination of Grounds of Arrest.*—Where the defendant is charged in the complaint with a fraud involved in the cause of action,<sup>62</sup> or collateral thereto,<sup>63</sup> he is entitled to a jury trial. Charges preferred by affidavit of facts extraneous to the cause of action,<sup>64</sup> as

a debt and that he "had property or rights or credits, moneys or effects, either in his own possession, or in the possession" of others, is defective. *Bowne v. Titus*, 30 N. J. L. 340.

[b] The order should certify that probable cause is shown by the affidavit. *Hurd's Rev. St. (Ill.)*, 1909, §62.

61. See generally the statutes, and the following: *Mitchell v. Crowl*, 57 Colo. 405, 140 Pac. 793; *Coryell v. Lawson*, 25 Colo. App. 432, 139 Pac. 25.

[a] *On Default.*—Under statutes providing that the relief awarded in case no answer be filed shall not exceed that expressly asked for in the complaint, it is improper to order the issuance of an execution against the defendant's person unless demand therefor be made in the complaint. *Jahl v. Lewis*, 57 Colo. 109, 139 Pac. 1113.

[b] The verdict need not be in the exact terms of the statute; it is enough that it clearly appears therefrom that the jury considered the defendant as being guilty of some cause of arrest provided for therein. *Mitchell v. Crowl*, 57 Colo. 405, 140 Pac. 793.

62. *Cal.*—*Davis v. Robinson*, 10 Cal. 411. *N. Y.*—See *Corwin v. Freeland*, 6 How. Pr. 241. *N. C.*—*Copeland v. Fowler*, 151 N. C. 353, 66 S. E. 215; *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969.

As to necessity making such charge in the complaint and as to manner of its averment generally, see *supra*, II, C, 8, b.

[a] In California there is a distinction to be observed in this regard between cases where the arrest is sought on execution and an arrest pending the action. In the latter case a determination of the facts by a jury is not demandable. *Davis v. Robinson*, 10 Cal. 411.

[b] In Illinois it is not necessary

that a judgment in the justice's court be based upon a verdict by a jury in order to support an execution against the person. Where this writ is sought on a ground not inhering in the cause of action, but one arising from some extraneous and subsequent conduct on the part of the defendant, the writ may issue upon an affidavit. Whether the allegations in the affidavit are true is a matter upon which the defendant is entitled to a hearing and a jury trial. The imprisonment cannot be continued except under the verdict of a jury. *Boos v. White*, 64 Ill. App. 177.

63. *Ledford v. Emerson*, 143 N. C. 502, 527, 51 S. E. 42.

64. *N. J.*—*Bowne v. Titus*, 30 N. J. L. 340; *Hill v. Hunt*, 20 N. J. L. 476. *Ohio.*—See *Hyatt v. Robinson*, 15 Ohio 372, 401. *R. I.*—*In re Keene*, 15 R. I. 294, 3 Atl. 418. See also *Shaw v. Silverstein*, 21 R. I. 500, 44 Atl. 931.

[a] In Michigan (1) the facts upon which the execution issues are presented by affidavit and passed upon *ex parte*. *Proctor v. Prout*, 17 Mich. 473. See also *Badger v. Reade*, 39 Mich. 771. (2) "The warrant issues and the respondent is brought in. He may controvert the allegation and verify his denial by affidavit. The whole issue is upon the allegations of the complainant and the result depends upon those and their truth, which is held admitted if not denied." *Badger v. Reade*, *supra*.

[b] *Due Process of Law.*—"The statute, however (referring to R. I. Pub. Stat., 1909, cap. 222, §14) does not prescribe any notice, and to give one would, in many cases, defeat the purpose of the statute. Notice was not necessary to answer the constitutional requirement of 'due process of law,' the judgment having been duly recovered." *In re Keene*, 15 R. I. 294, 3 Atl. 418. See also *Shaw v. Silverstein*, 21 R. I. 500, 44 Atl. 931.

well as all questions of law<sup>65</sup> may be determined by the court.

Where the execution is issued upon a certificate of the court declaring the cause of action to have arisen from the wilful and malicious act or neglect of the defendant, the allowance or refusal thereof becomes a matter of discretion,<sup>66</sup> to be exercised after a consideration of all the facts as disclosed at the trial.<sup>67</sup> Furthermore it is a question solely within the province of the court; the opinion of the jury that the act or omission of the defendant was not wilful and malicious is not material.<sup>68</sup> It is considered unnecessary for the court to separately hear and determine the grounds of arrest.<sup>69</sup> Where the charges upon which the debtor's arrest is sought are to be submitted to a jury and are set out with the cause of action, a special issue thereon should be framed and submitted to the jury,<sup>70</sup> unless the cause of action is of such a nature that the questions of debt and cause for arrest can be tried in one issue so as to have a clear and intelligible finding as to each of them.<sup>71</sup> Under the statutes in some states the proof may be made either before the court or a commissioner,<sup>72</sup> whose duty it is to decide upon the legality and credibility<sup>73</sup> as well as the sufficiency<sup>74</sup> of the evidence.<sup>75</sup>

*g. Mandamus To Compel Issuance.*<sup>76</sup>—The issuance of a *capias* may be compelled by *mandamus* in a proper case for such a writ,<sup>77</sup> but not otherwise.<sup>78</sup>

65. *Huntington v. Metzger*, 158 Ill. 272, 288, 41 N. E. 881.

[a] For example, the question of the sufficiency of the affidavit for arrest or of the return of the sheriff upon the execution against the property, being questions of law, cannot be submitted to a jury. *Huntington v. Metzger*, 158 Ill. 272, 288, 41 N. E. 881.

66. *Soule v. Austin*, 35 Vt. 515, 519; *Robinson v. Wilson*, 22 Vt. 35, 52 Am. Dec. 77.

As to when the execution issues upon a certificate of the court, see *supra*, II, C, 8, e.

67. *Stowe v. Powell*, 46 Vt. 471.

68. *Robinson v. Wilson*, 22 Vt. 35, 52 Am. Dec. 77.

[a] Affidavits of the jurors that they did not consider the act or omission of the defendant wilful or malicious will not be received by the court in determining this question. *Robinson v. Wilson*, 22 Vt. 35, 52 Am. Dec. 77.

69. *Robinson v. Wilson*, 22 Vt. 35, 52 Am. Dec. 77.

[a] A further and separate hearing is not improper, however, and, should the mind of the court be unsatisfied at the close of the trial, a further hear-

ing may be had, its necessity resting in the sound discretion of the court. *Robinson v. Wilson*, 22 Vt. 35, 52 Am. Dec. 77. See also *Ledford v. Emerson*, 143 N. C. 502, 527, 51 S. E. 42.

70. *Davis v. Robinson*, 10 Cal. 411; *Ledford v. Emerson*, 143 N. C. 502, 527, 51 S. E. 42, expressly repudiating the dictum to the contrary in *Peebles v. Foote*, 83 N. C. 102.

As to special issues to the jury, see generally the title "Issues in Pleading and Practice."

71. N. H.—*Cooley v. Eastman*, 57 N. H. 503. N. Y.—*Elwood v. Gardner*, 45 N. Y. 349, 10 Abb. Pr. (N. S.) 238. N. C.—*Ledford v. Emerson*, 143 N. C. 502, 527, 51 S. E. 42.

72. *Hill v. Hunt*, 20 N. J. L. 476.

73. *Bowne v. Titus*, 30 N. J. L. 340.

74. *Hill v. Hunt*, 20 N. J. L. 476.

75. An attorney of record in the cause may not sit as a master in chancery to determine these matters. *McGregor v. Crane*, 98 Mass. 530.

76. See generally the title "Mandamus."

77. *People v. Greer*, 43 Ill. 213.

78. *People v. Healy*, 128 Ill. 9, 20 N. E. 692, 15 Am. St. Rep. 90, refusing to compel the issuance of an alias writ.

**9. Form and Sufficiency of Writ.**<sup>79</sup> — a. *In General.* — The form of the writ of execution against the person is prescribed by statute in a number of jurisdictions,<sup>80</sup> and in such case need contain no more than the statute requires.<sup>81</sup> A substantial and not a literal compliance with the prescribed forms is all that is necessary.<sup>82</sup> But any substantial

**79. Form for Execution Against the Person.**—(Title of court and cause.) The state of \_\_\_\_\_ (or the people of the state of \_\_\_\_\_), To the sheriff of \_\_\_\_\_ county \_\_\_\_\_, greetings: Whereas, judgment was rendered on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, in an action between \_\_\_\_\_, as plaintiff, and \_\_\_\_\_, as defendant, in favor of the said plaintiff, and against the said defendant, for the sum of \_\_\_\_\_ dollars, as damages, and \_\_\_\_\_ dollars as costs, as appears by the judgment roll in the office of the clerk of said court (as to necessity of conforming to the judgment, see *infra*, II, C, 9, b); and whereas, the said judgment was docketed in this county on the \_\_\_\_\_ day of \_\_\_\_\_, 19— (as to necessity of recital as to docketing, see *infra*, II, C, 9, d, [II], [C]); and the sum of \_\_\_\_\_ dollars as damages and \_\_\_\_\_ dollars as costs are now due thereon, with interest on \_\_\_\_\_ dollars from the \_\_\_\_\_ day of \_\_\_\_\_, 19—, at the rate of \_\_\_\_\_ percentum per annum; and whereas an execution against the property of the said \_\_\_\_\_ (the debtor) has been duly issued to you and returned unsatisfied (as to the necessity of recital of issuance and return of prior execution against property, see *infra*, II, C, 9, d, [I]):

“You are therefore commanded to arrest the said \_\_\_\_\_, the defendant herein, and have his body before said court at its next term to be held for the county of \_\_\_\_\_ at the courthouse in \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, and commit him to the jail of the county, until he shall pay the judgment, or be discharged, according to law, and make due return of the execution to this court, and how this writ was executed.”

Herein fail not, and have you then and there this writ.

Issued on the \_\_\_\_\_ day of \_\_\_\_\_, 19—.

(Signed) \_\_\_\_\_

Clerk of (here insert name of court).

In commenting on this form, the court

in *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43, says: “It would have been well, also, . . . to have made brief reference to the cause of arrest, although, perhaps, this is not essential.”

For additional forms see 9 STANDARD PROC. 937-940, and the following: *Ind.* *Huntington v. Metzger*, 158 Ill. 272, 41 N. E. 881. **N. Y.**—Wait’s Pr., vol. 4, p. 122. See involving the same, *Hutchinson v. Brand*, 9 N. Y. 208; *Fullerton v. Fitzgerald*, 18 Barb. 441. **N. C.** *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43.

Writ or warrant for provisional arrest, see 2 STANDARD PROC. 966.

Form and sufficiency of execution against property, see 15 STANDARD PROC. 790, et seq.

80. See the following: **Ala.**—Civ. Code, 1907, §4077. **Ark.**—Dig. St., 1904, §3204. **Conn.**—Gen. St., 1902, §898. **Ill.**—Hurd’s Rev. St., 1909, ch. 79, §123. **Ky.**—St., 1915, §1651. **Mo.**—Rev. St., 1909, §2173. **N. H.**—Pub. St., 1901, ch. 231, §11. **N. C.**—Houston & Co. v. Walsh, 79 N. C. 35. **R. I.**—Gen. Laws, 1909, ch. 303, §12.

[a] **In Illinois.**—The sufficiency of such an execution issuing out of a justice’s court is discussed in *Subim v. Isador*, 88 Ill. App. 96.

81. **Ill.**—*Subim v. Isador*, 88 Ill. App. 96. **Mich.**—*Fruitport v. Circuit Judge*, 90 Mich. 20, 51 N. W. 109. **N. Y.**—*Hutchinson v. Brand*, 9 N. Y. 208, affirming 6 How. Pr. 73; *O’Shea v. Kohn*, 38 Hun 149.

[a] **Limiting Time of Imprisonment.** Where statutes provide that a debtor shall not, in certain designated cases, be imprisoned beyond a given length of time, but no mention of this is made in the statute which directs what the writ shall contain, it is not necessary that the writ should limit the time of imprisonment. *Subim v. Isador*, 88 Ill. App. 96. As to discharge from custody at the expiration of such period see *infra*, II, C, 15, h.

82. *Webster v. Farley*, 6 Blackf. (Ind.) 163; *Hutchinson v. Brand*, 9 N.

departure therefrom will invalidate the writ.<sup>83</sup> Mere clerical mistakes,<sup>84</sup> or trivial irregularities,<sup>85</sup> or the presence of harmless surplusage,<sup>86</sup> will not affect the validity of the writ, nor will defects which are not only nonprejudicial, but are, instead, actually beneficial to the debtor.<sup>87</sup> The general requirements are that the writ issue in the name of the state,<sup>88</sup> and that the sheriff arrest the judgment debtor,<sup>89</sup> and commit him to the jail of the county, until he pays the judgment or is discharged according to law.<sup>90</sup> The execution should further require

Y. 208, *affirming* 6 How. Pr. 73, under §289, Code Civ. Proc.

[a] **An execution commencing** "state of \_\_\_\_\_" is a substantial compliance with a constitutional provision requiring the style of all process to be "The state of \_\_\_\_\_." Webster v. Farley, 6 Blackf. (Ind.) 163.

[b] **Omission of Provision as to Discharge.**—The omission in the mandatory clause of such process of the words, "or be discharged," was held not to lessen the power of the sheriff to arrest and commit the debtor, nor to throw any obstacles in the way of the debtor's discharge, provided any event short of payment should occur, entitling him to his discharge. Hutchinson v. Brand, 9 N. Y. 208.

83. Finley v. Smith, 15 N. C. 95.

84. Ga.—Jordan v. Porterfield, 19 Ga. 139, 63 Am. Dec. 301. Me.—Blake v. Blanchard, 48 Me. 297. Mass.—Currier v. Bartlett, 122 Mass. 133.

[a] **Manifest Mistake in Date of Judgment.**—Currier v. Bartlett, 122 Mass. 133.

[b] **A clerical mistake in the date of the teste of the capias** will not affect its validity. Jordan v. Porterfield, 19 Ga. 139, 63 Am. Dec. 301.

[c] **Where Name of One of Several Debtors Is Misspelled.**—In such a case the writ is valid and regular as to the debtors whose names appear therein correctly and as to the others the error may be corrected by an amendment. Blake v. Blanchard, 48 Me. 297.

[d] **A mistake in the name of the town where the jail is situated** is merely a clerical error and does not render the execution void. Avery v. Lewis, 16 Vt. 332, 33 Am. Dec. 203.

[e] **Where a different venue is laid in the margin of an execution** from that appearing in the body thereof this will not vitiate the execution. Avery v. Lewis, 16 Vt. 332, 33 Am. Dec. 203.

As to amendment of the writ to correct such errors, see *infra*, II, C, 9, h.

85. Ala.—Stewart v. Cunningham, 22 Ala. 626. Ga.—Jordan v. Porterfield, 19 Ga. 139, 63 Am. Dec. 301. Ind.—Webster v. Farley, 6 Blackf. 163. Kan. *In re* Heath, 40 Kan. 333, 19 Pac. 926.

86. Stewart v. Cunningham, 22 Ala. 626.

87. *In re* Heath, 40 Kan. 333, 19 Pac. 926.

[a] **Amount of Costs Left Blank.** Since this defeated the right to collect costs it was a benefit to the defendant. *In re* Heath, 40 Kan. 333, 19 Pac. 926.

88. Webster v. Farley, 6 Blackf. (Ind.) 163; Houston & Co. v. Walsh, 79 N. C. 35. Compare 2 STANDARD PROC. 967.

89. See generally the statutes and the following: Cal.—Code Civ. Proc., §682. Idaho.—Rev. Code, 1908, §4471. Ind.—Ann. St., 1914, §724. Kan.—Gen. St., 1909, §6102. Ky.—Long v. Wood, 78 Ky. 392, involving a capias pro fine. Mont.—Rev. Codes, 1907, §6814. N. Y.—Code Civ. Proc., §1372; Hutchinson v. Brand, 9 N. Y. 208; Fisher v. Young, 41 Misc. 552, 85 N. Y. Supp. 115, *affirmed*, 95 App. Div. 619, 88 N. Y. Supp. 1101. N. C.—Revisal of 1905, §627; Kinney v. Laughenour, 97 N. C. 325, 2 S. E. 43; Finley v. Smith, 15 N. C. 95. N. D.—Rev. Codes, 1905, §7104. Ore.—Lord's Laws, 1910, §215. S. C.—Code Civ. Proc., 1902, §308. S. D.—Code Civ. Proc., 1910, §334. Utah.—Comp. Laws, 1907, §3233. Wash.—Rem. & Bal. Code, §513. Wis.—St., 1898, §2969.

[a] **When an execution is issued against a corporation** it should specify by name the directors or officers if it is desired to take their persons in execution; the words "president, directors, and company" are not the description of any individual persons. Nichols v. Thomas, 4 Mass. 232. See also Wilmarth v. Burt, 7 Mete. (Mass.) 257, 260.

90. See generally the statutes cited in preceding notes and the following: Hutchinson v. Brand, 9 N. Y. 208;

the sheriff to make due return thereof,<sup>91</sup> but a failure to direct the time of such return will not render the writ void.<sup>92</sup>

Though it is better practice to recite on the face of the execution the nature of the action,<sup>93</sup> it is not necessary to do so,<sup>94</sup> especially where, by a reference to the judgment, it appears that the execution is regular in all other respects.<sup>95</sup> Unless statutes provide otherwise the seal of the court issuing the writ is indispensable to its validity.<sup>96</sup>

b. *Conformity to Judgment.*—(I.) *General Statement.*—The general rule is that a writ of execution against the person should in all respects follow the judgment which it is to satisfy.<sup>97</sup>

(II.) *Joint Debtors and Creditors.*—Accordingly an execution against the person must run against all the defendants,<sup>98</sup> and be in the name

Fisher v. Young, 41 Miss. 552, 85 N. Y. Supp. 115, *affirmed*, 95 App. Div. 619 88 N. Y. Supp. 1101; Kinney v. Laughenour, 97 N. C. 325, 2 S. E. 43; Finley v. Smith, 15 N. C. 95.

[a] The payment of the judgment contemplated in the writ should be to the plaintiff and not to the state. Abbott v. Daniel, 3 Mete. (Ky.) 339.

As to discharge, see *infra*, II, C, 15.

91. Kinney v. Laughenour, 97 N. C. 325, 2 S. E. 43; Houston & Co. v. Walsh, 79 N. C. 35. Compare 2 STANDARD PROC. 967.

92. Benedict, etc. Mfg. Co. v. Thayer, 20 Hun (N. Y.) 547, 59 How. Pr. 272; Fake v. Edgerton, 3 Abb. Pr. (N. Y.) 229, 5 Duer 681; Douglas v. Haberstro, 2 N. Y. Civ. Proc. 186. Compare, Houston & Co. v. Walsh, 79 N. C. 35, where the court says that "this defect seems to be substantial."

93. Fullerton v. Fitzgerald, 18 Barb. (N. Y.) 441, 10 How. Pr. (N. Y.) 37; Kinney v. Laughenour, 97 N. C. 325, 2 S. E. 43. Compare 2 STANDARD PROC. 968.

94. Fullerton v. Fitzgerald, 18 Barb. (N. Y.) 441, 10 How. Pr. (N. Y.) 37; Kinney v. Laughenour, 97 N. C. 325, 2 S. E. 43.

95. Fullerton v. Fitzgerald, 18 Barb. (N. Y.) 441, 10 How. Pr. 37.

96. Ark.—See Woolford v. Dugan, 2 Ark. 131, 35 Am. Dec. 52. N. H. Hutchins v. Edson, 1 N. H. 139. N. C. Finley v. Smith, 15 N. C. 95.

97. Ala.—Stewart v. Cunningham, 22 Ala. 626. Cal.—Davis v. Robinson, 10 Cal. 411. Conn.—Palmer v. Palmer, 2 Conn. 462. Del.—Fromberger v. Karsner, 1 Houst. 290. La.—Casson v. Cureton, 12 Mart. O. S. 435. Mass.—Thomson v. Sleeper, 168 Mass. 373, 47 N. E.

106. N. Y.—Farmers', etc. Bank v. Crane, 15 Abb. Pr. (N. S.) 434. N. C. Judson v. McLelland, 44 N. C. 262; Howzer v. Dellinger, 23 N. C. 475. R. I.—Taylor v. Ames, 5 R. I. 361. Tenn.—Saunders v. Gallaher, 2 Humph. 445. Eng.—Pennoir v. Brace, 1 Salk. 319, 91 Eng. Reprint 282.

See 15 STANDARD PROC. 798, 811.

[a] The Christian names of the defendants need not appear in writ if they are not to be found in the judgment. Wall v. Jarrott, 25 N. C. 42.

98. Ala.—Stewart v. Cunningham, 22 Ala. 626. Del.—Fromberger v. Karsner, 1 Houst. 290. Mass.—Hamilton v. Lyman, 9 Mass. 14; Bowdoin v. Jordan, 9 Mass. 160. N. Y.—Farmers', etc. Bank v. Crane, 15 Abb. Pr. (N. S.) 434; Whitman v. James, 1 Civ. Proc. 235, 62 How. Pr. 132. N. C.—Judson v. McLelland, 44 N. C. 262; Howzer v. Dellinger, 23 N. C. 475. Tenn.—Saunders v. Gallaher, 2 Humph. 445. Eng. Pennoir v. Brace, 1 Salk. 319, 91 Eng. Reprint 282.

See 2 Tidd Pr. \*1027; and 15 STANDARD PROC. 798, et seq.

[a] "This principle," it has been said, "though drawn from the books of the common law of England, must be recognized as grounded on the soundest basis. The clerk is a mere ministerial officer; he has no authority but the judgment, to issue the writ, which is to deprive a man of his property or liberty. He must, therefore, strictly and closely follow the judgment." Casson v. Cureton, 12 Mart. O. S. (La.) 435.

[b] "The reason of this rule is apparent when we consider that, all the defendants are, if any one, liable to be charged in execution in such an

of all the plaintiffs.<sup>99</sup> Under statutes in some states, however, this general rule is departed from, the execution issuing in a proper case against only one of several joint debtors,<sup>1</sup> as for example, where the right of the plaintiff to enforce an execution against one of the defendants has been lost.<sup>2</sup>

c. *To Whom Directed*.—An execution against the person should be directed to the sheriff or other proper officer.<sup>3</sup> Modern practice and statutes permit the issuance of an execution against the person<sup>4</sup> to

action." *Whitman v. James*, 1 N. Y. Civ. Proc. 235, 62 How. Pr. 132.

[c] If a separate execution against the body of one defendant is issued upon a joint judgment against two defendants, the execution will be set aside, and the defendants arrested under it will be discharged. *Farmers', etc. Bank v. Crane*, 15 Abb. Pr. N. S. (N. Y.) 434.

99. *Farmers', etc. Bank v. Crane*, 15 Abb. Pr. N. S. (N. Y.) 434. See *Hamilton v. Lyman*, 9 Mass. 14, and 15 STANDARD PROC. 798, et seq.

[a] Where one of two plaintiffs dies before execution (1) the general rule still applies. The execution may issue in the name of both (*Hamilton v. Lyman*, 9 Mass. 14). (2) However, upon a suggestion thereof to the court an order may be made directing the writ to issue in the name of the surviving plaintiff. *Bowdoin v. Jordan*, 9 Mass. 160.

1. Mass.—*Thomson v. Sleeper*, 163 Mass. 373, 47 N. E. 106. N. Y.—*Whitman v. James*, 10 Daly 490, where a provisional order for arrest of one of the joint debtors remains in force. Tenn.—*Saunders v. Gallaher*, 2 Humph. 445.

[a] The reason for this departure is that "when a positive statutory provision has been enacted, the substantial benefits of which cannot be attained in some instances, without a modification of or a departure from the common-law forms, that modification must be adopted, or that departure made, to the extent only, that may be necessary to give effect to the legislative will. To insist that the *capias ad satisfaciendum* as to the number of defendants, must pursue the judgment, would deprive the creditor of the use of that process in many instances, where the fraudulent conduct of his debtor would by the terms of the statute entitle him, because such debtor

might be associated as a defendant with those against whom he could not file an affidavit. One defendant is totally insolvent, but altogether honest; the other fraudulently withholds his money or conveys his property; if under our statute the process cannot depart from the judgment the latter defendant is effectually protected by his connection, with the former . . . ; or, as has been suggested, one female defendant may protect any number of fraudulent co-defendants." *Saunders v. Gallaher*, 2 Humph. (Tenn.) 445.

2. *Thomson v. Sleeper*, 163 Mass. 373, 47 N. E. 106.

[a] Only Against Those Personally Served With Process.—N. Y. Code Civ. Proc., §1935. And see *Whitman v. James*, 10 Daly (N. Y.) 490.

3. *Davis v. Richmond*, 14 Mass. 473. See also *Fisher v. Young*, 41 Misc. 552, 85 N. Y. Supp. 115; and 2 STANDARD PROC. 967.

[a] Constables.—(1) Under statutes authorizing issuance of the writ by justices of the peace the writ may be directed to a constable. *Gwinn v. Hubbard*, 3 Blackf. (Ind.) 14. (2) And in Massachusetts he may lawfully act where, by payments made thereon the amount of the judgment has been reduced below three hundred dollars. *Dalton-Ingersoll Co. v. Hubbard*, 174 Mass. 307, 54 N. E. 862.

[b] A general statutory provision that an execution shall be directed to the sheriff is applicable to an execution against the person. *Fisher v. Young*, 41 Misc. 552, 85 N. Y. Supp. 115, under §1362, Code Civ. Proc.

4. Ala.—*Ex parte Cleveland*, 36 Ala. 306. Ky.—*Scott v. Maupin*, Hard. 122. N. Y.—Code Civ. Proc., §1365; *Wood v. Henry*, 40 N. Y. 124 (under §288, Code Civ. Proc.); *Fisher v. Young*, 41 Misc. 552, 85 N. Y. Supp. 115 (*affirmed*), 95 App. Div. 619, 88 N. Y. Supp. 1101; *Spilker v. Abrahams*, 121 N. Y. Supp.

any county within the jurisdiction of the court;<sup>5</sup> it may be issued to a county where he is temporarily residing.<sup>6</sup>

d. *Recitals*.<sup>7</sup> — (I.) As to Prior Execution Against Property. — The issuance and return unsatisfied of a prior execution against the property, where an essential prerequisite,<sup>8</sup> should be recited in the writ,<sup>9</sup> as well as the name of the county to which it issued.<sup>10</sup>

(II.) As to the Judgment. — (A.) GENERAL STATEMENT. — Where the writ must contain a description of the judgment, it is sufficient to state the amount of the judgment, the time of its rendition, the court rendering it and the parties thereto.<sup>11</sup> Unless required by statute the

818; *Segelke v. Finan*, 5 N. Y. Supp. 671, 22 Abb. N. C. 458. S. C.—Code Civ. Proc., 1902, §307.

[a] At Common Law to the Sheriff of County of Venue.—Ky.—*Scott v. Maupin*, Hard. 122. N. J.—*Cockran v. Drake*, 18 N. J. L. 9. Eng.—*Dudlow v. Watchorn*, 16 East 39, 104 Eng. Reprint 1003, 2 Tidd's Pr. \*1027, 1 Archb. Pr 290.

[b] Issuing Several Writs to Different Counties.—Such statutes are an authority for the issuing of different executions to different counties, as necessity may require. But a sheriff under an execution to one county cannot execute the same in another, though an execution will issue to that county. *Fisher v. Young*, 41 Misc. 552, 85 N. Y. Supp. 115, *affirmed*, 95 App. Div. 619, 88 N. Y. Supp. 1101.

5. *Noe v. Christie*, 15 Abb. Pr. N. S. (N. Y.) 346.

6. *Spilker v. Abrahams*, 121 N. Y. Supp. 818.

[a] It need not issue to the county of defendant's legal residence.—*Spilker v. Abrahams*, 121 N. Y. Supp. 818.

7. As to recitals generally, see 15 STANDARD PROC. 58.

8. See *supra*, II, C, 2, b.

9. *Turner v. Walker*, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329; *People ex rel. Brack v. Reilly*, 58 How. Pr. (N. Y.) 218; *Fisher v. Young*, 41 Misc. 552, 85 N. Y. Supp. 115 (*affirmed*, 95 App. Div. 619, 88 N. Y. Supp. 1101); *Bergman v. Noble*, 45 Hun (N. Y.) 133, 19 Abb. N. C. 62, 12 Civ. Proc. 256; *O'Shea v. Kohn*, 38 Hun (N. Y.) 149; *Walker v. Isaacs*, 36 Hun (N. Y.) 233.

[a] The object of the statutes requiring that the writ recite the issuing and return of an execution against the property "is to prevent the arrest of a judgment debtor on a body execution before the remedy against his property

is exhausted, and to enable him to obtain appropriate relief if any objection can be taken to any of the anterior proceedings." *Walker v. Isaacs*, 36 Hun (N. Y.) 233. See *Fisher v. Young*, 41 Misc. 552, 85 N. Y. Supp. 115.

10. *People ex rel. Brack v. Reilly*, 58 How. Pr. (N. Y.) 218; *Eads v. Wynne*, 79 Hun 463, 29 N. Y. Supp. 983 (name of county left in blank); *Fisher v. Young*, 41 Misc. 552, 85 N. Y. Supp. 115; *Bergman v. Noble*, 45 Hun (N. Y.) 133, 19 Abb. N. C. 62, 12 Civ. Proc. 256; *O'Shea v. Kohn*, 38 Hun (N. Y.) 149; *Walker v. Isaacs*, 36 Hun (N. Y.) 233; *People ex rel. Utley v. Seaton*, 25 Hun (N. Y.) 305.

[a] When an execution against the property of a debtor has been issued in the county where the debtor resides, an execution against the person may be issued to any county, where the debtor may happen to be, without the issuance of an execution against property therein; it need not be recited in the writ that execution against the property of the debtor was issued and returned. *O'Shea v. Kohn*, 38 Hun (N. Y.) 149.

[b] A recital of issuance to the "proper county" is insufficient. *People ex rel. Brack v. Reilly*, 58 How. Pr. (N. Y.) 218. See *People ex rel. Utley v. Seaton*, 25 Hun (N. Y.) 305.

[c] A recital of issuance to the county where the "debtor resides," is not necessarily insufficient, since it is not open to the objection that the debtor was not informed as to the county. See *Walker v. Isaacs*, 36 Hun (N. Y.) 233, *distinguishing* *People ex rel. Brack v. Reilly*, 58 How. Pr. (N. Y.) 218, on the ground that in the latter case the language, "the proper county" gave no information to the defendant, as required under the statute. See *Eads v. Wynne*, 29 N. Y. Supp. 983.

11. *In re Banfill*, 70 N. H. 132, 45

writ need not state that the judgment was recovered in an action in tort,<sup>12</sup> nor refer to the cause of arrest.<sup>13</sup>

(B.) THE AMOUNT. — The writ should state definitely the amount of the judgment to be satisfied.<sup>14</sup> The fact that the judgment has been paid in part does not invalidate a writ for the full amount.<sup>15</sup>

(C.) DOCKETING. — A recital that the judgment has been docketed in the county where the debtor resides, need not be made in a writ to another county.<sup>16</sup>

(III.) As to Oath or Affidavit. — Unless required by statute,<sup>17</sup> the making of the prerequisite oath<sup>18</sup> or affidavit<sup>19</sup> need not be recited in the writ.

(IV.) As to Order Directing Issuance. — A previous order of court, even when an essential prerequisite,<sup>20</sup> need not be recited in the writ.<sup>21</sup>

e. *Directions as to Return.* — The writ should direct a return by the officer.<sup>22</sup> Under some statutes it must contain a direction or recital as to the time within which it is returnable,<sup>23</sup> and this is the best practice even in the absence of statute.<sup>24</sup> A direction as to the time for return should specify the exact time provided by the statute,<sup>25</sup> though a defect in this respect is not fatal.<sup>26</sup> Neither is the

Atl. 1088; *Hutchinson v. Brand*, 9 N. Y. 208.

12. *Fruitport v. Muskegon Circuit Judge*, 90 Mich. 20, 51 N. W. 109.

13. *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43, where the court adds that as a matter of good practice it would be well to show briefly the cause of arrest.

14. Fla.—See *Ex parte Peacock*, 25 Fla. 478, 6 So. 473. Kan.—*In re Heath*, 40 Kan. 333, 19 Pac. 926. N. J.—*Jernee v. Jernee* (N. J. Eq.), 31 Atl. 716, where the writ issued to recover alimony, the amount of which was not specified, and five dollars for the use of the state. The court held that the writ could not be considered wholly void because of uncertainty as to amount because it was valid so far as it related to the five dollars. N. Y. See *O'Shea v. Kohn*, 38 Hun 149. Vt. *Ex parte Hunt*, 85 Vt. 345, 82 Atl. 178, holding that an execution which issues for the amount shown by the record to be due is not void but only irregular if some of this amount has, in fact, been paid.

15. *Ex parte Hunt*, 85 Vt. 345, 82 Atl. 178; *Perry v. Ward*, 20 Vt. 92.

[a] But where the clerk has official knowledge from the record that the judgment had been satisfied in part, an execution against the person for the full amount thereof is irregular. *In re*

*Hunt*, 85 Vt. 345, 82 Atl. 178; *Fairbanks v. Devereaux*, 48 Vt. 550.

16. *O'Shea v. Kohn*, 38 Hun (N. Y.) 149, docketing there presumed from issuance and return of execution against the property there.

17. See Mass. Rev. Laws, 1902, ch. 168, §17.

18. *Lattin v. Smith*, 1 Ill. 361, it is presumed in the absence of a showing to the contrary.

19. *Street v. Vandervoot & Co.*, 7 Yerg. (Tenn.) 436. Compare 2 STANDARD PROC. 968.

20. See *supra*, II, C, 8, d.

21. *Hyatt v. Robinson*, 15 Ohio 372.

22. *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43.

As to returns generally, see *supra* II, B, 8, and the title "Returns."

23. See generally the statutes, and *Douglas v. Haberstro*, 88 N. Y. 611, 618. Compare *Fake v. Edgerton*, 3 Abb. Pr. (N. Y.) 229, 5 Duer 681.

24. *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43.

25. *People ex rel. Utley v. Seaton*, 25 Hun (N. Y.) 305.

[a] A direction that the writ be returned as required by law, is a defect in form. *People ex rel. Utley v. Seaton*, 25 Hun (N. Y.) 305. See *Douglas v. Haberstro*, 88 N. Y. 611, 618.

26. *Douglas v. Haberstro*, 88 N. Y. 611, 618; *Benedict, etc., Mfg. Co. v.*

writ vitiated by a failure to state the place of return,<sup>27</sup> such omission being a mere irregularity,<sup>28</sup> which may be amended<sup>29</sup> or disregarded.<sup>30</sup>

f. *Indorsement of Directions by Creditor.*—The statute sometimes provides that the sheriff need not make an arrest except upon a written direction to do so, endorsed upon the writ and signed by the creditor<sup>31</sup> or his attorney.<sup>32</sup> The officer may waive this requirement.<sup>33</sup> The proper method of relieving one of several defendants from arrest is by a direction to that effect endorsed on the writ, rather than by omitting such defendant from the writ.<sup>34</sup>

g. *Attestation.*—Though the statute may make a teste or attestation clause a part of the writ,<sup>35</sup> it may also provide that its omission shall not make the writ void,<sup>36</sup> such defect being a mere irregularity,<sup>37</sup> which may be amended<sup>38</sup> or disregarded.<sup>39</sup>

h. *Amendment of Writ.*<sup>40</sup>—Defects or irregularities in the writ which do not render it wholly void<sup>41</sup> are usually curable by amendment,<sup>42</sup> according to the general statutory provisions as to amend-

Thayer, 21 Hun (N. Y.) 614, 59 How. Pr. 272.

27. *Fake v. Edgerton*, 3 Abb. Pr. (N. Y.) 229, 5 Duer 681.

28. *Douglas v. Haberstro*, 88 N. Y. 611, 618.

29. *Douglas v. Haberstro*, 88 N. Y. 611, 618.

As to amendment of the writ generally see *infra*, II, C, 9, h.

30. *Douglas v. Haberstro*, 88 N. Y. 611, 618.

31. See generally the statutes, and *Stewart v. Leonard*, 103 Me. 128, 68 Atl. 638; *Dyer v. Tilton*, 71 Me. 413.

32. *Stewart v. Leonard*, 103 Me. 128, 68 Atl. 638; *Dyer v. Tilton*, 71 Me. 413.

33. *Stewart v. Leonard*, 103 Me. 128, 68 Atl. 638, by any acts and conduct indicating such intention.

34. *Farmers' etc., Bank v. Crane*, 15 Abb. Pr. N. S. (N. Y.) 434; *Fake v. Edgerton*, 3 Abb. Pr. (N. Y.) 229, 5 Duer 681.

35. *Douglas v. Haberstro*, 88 N. Y. 611.

36. *Douglas v. Haberstro*, 88 N. Y. 611, 618; *People ex rel. Brown v. Van Hoesen*, 62 How. Pr. (N. Y.) 76; *People ex rel. Utley v. Seaton*, 25 Hun (N. Y.) 305.

37. *Jordan v. Porterfield*, 19 Ga. 139, 63 Am. Dec. 301; *Douglas v. Haberstro*, 88 N. Y. 611, 618.

38. *Douglas v. Haberstro*, 88 N. Y. 611, 618.

Amendment of writ generally see *infra*, II, C, 9, h.

39. *Douglas v. Haberstro*, 88 N. Y. 611, 618.

40. Amendment of writ for provisional arrest, see 2 STANDARD PROC. 969.

41. See the preceding discussion of the writ.

Errors in recitals, see *supra*, IV, C, 9, d.

42. Ga.—*Saunders v. Smith*, 3 Ga. 121. Ky.—See also *Johnson v. Scott*, 134 Ky. 736, 121 S. W. 695. Mass.—*Chesebro v. Barme*, 163 Mass. 79, 39 N. E. 1033. N. Y.—*Douglas v. Haberstro*, 88 N. Y. 611, 618; *Gibbons v. Larcon*, 3 Wend. 303; *McIntire v. Rowan*, 3 Johns. 144; *Stone v. Martin*, 2 Denio 185; *McConkey v. Glen*, 1 Cow. (N. Y.) 141; *Holmes v. Williams*, 3 Caines 98; *Eads v. Wynne*, 79 Hun 463, 29 N. Y. Supp. 983; *Walker v. Isaacs*, 36 Hun 233; *Benedict & B. Co. v. Thayer*, 20 Hun 547. Eng.—*M'Cormack v. Melton*, 1 Ad. & El. 331, 110 Eng. Reprint 1232. Can.—*Anderson v. Johnson*, 6 Manitoba 113.

[a] *Teste.*—(1) A writ is amendable as to the name of the justice in whose name it is tested (*Ross v. Luther*, 4 Cow. [N. Y.] 158, 15 Am. Dec. 341), (2) and also as to the date of the teste. *Williams v. Hogeboom*, 22 Wend. (N. Y.) 648.

[b] *The Directions as to Return.* (1) The writ is amendable in respect to directions as to time of the return (*Saunders v. Smith*, 3 Ga. 121; *Stone v. Martin*, 2 Denio [N. Y.] 185; *Benedict & B. Co. v. Thayer*, 20 Hun [N. Y.] 547; *Douglas v. Haberstro*, 2 N. Y. Civ. Proc. 186), (2) and as to the place thereof. *McConkey v. Glen*, 1 Cow. (N. Y.) 141.

ments of any process or pleading.<sup>43</sup> With the issuance of a writ, however, it passes from the control of the clerk and he may not thereafter amend it except upon an order of court,<sup>44</sup> or with the consent of the execution plaintiff.<sup>45</sup>

i. *Waiver of Defects.* — Irregularities in the writ may be waived by conduct showing an intention to disregard them.<sup>46</sup> Thus, by giving a bond under the insolvent laws a judgment debtor taken in execution is considered as having waived, not only his privilege from arrest,<sup>47</sup> but his objections to the judgment,<sup>48</sup> and to defects in the writ as well.<sup>49</sup> Likewise, by giving a bond to obtain his temporary release the debtor is considered as having waived any irregularities in the writ under which he is in custody.<sup>50</sup>

Where it is necessary that the debtor be notified to appear and answer the charges upon which his arrest is sought,<sup>51</sup> his appearance without actual knowledge of existing errors or irregularities in the proceedings, will not amount to a waiver thereof.<sup>52</sup> The invalidity of the writ is not waived by the defendant's remaining for a time in custody thereunder.<sup>53</sup>

10. *Alias and Pluries Writs.* — a. *When Issued.*<sup>54</sup> — In accordance with the general rule as to executions in general, an alias writ of execution against the person will not issue<sup>55</sup> until the first execution against

[c] **Defects or mistakes in the names of the parties** (1) may be corrected by amendment. *Anderson v. Johnson*, 6 Manitoba (Can.) 113. (2) And, involving similar amendments, see *Douglas v. Haberstro*, 88 N. Y. 611, 618; *McIntire v. Rowan*, 3 Johns. (N. Y.) 144; *Holmes v. Williams*, 3 Caines (N. Y.) 98.

[d] **Costs incorrectly stated** may be corrected by amendment. *Holmes v. Williams*, 3 Caines (N. Y.) 98.

[e] **Mistakes in amount of judgment** may be corrected by amendment. *McCormack v. Melton*, 1 Ad. & El. 331, 110 Eng. Reprint 1232.

[f] **Nunc Pro Tunc Amendments.** The execution may be amended upon motion as to defects of form, nunc pro tunc. *People ex rel. Utley v. Seaton*, 25 Hun (N. Y.) 305.

43. *Walker v. Isaacs*, 36 Hun (N. Y.) 233.

**Amendment of process**, see the title "Process."

44. *Johnson v. Scott*, 134 Ky. 736, 121 S. W. 695.

45. *Johnson v. Scott*, 134 Ky. 736, 121 S. W. 695.

46. *Kitson v. Ellinger*, 35 Ill. App. 55.

47. *Jersey City Mill. Co. v. Kettner*, 21 N. J. L. J. 376; *Winder v. Smith*, 6

*Watts & S. (Pa.)* 424. And see *Kelly v. McCormick*, 28 N. Y. 318. See generally the title "Privilege."

48. *Dobbin v. Gaster*, 26 N. C. 71.

49. *Bryan v. Brooks*, 51 N. C. 580; *Nixon v. Nunnery*, 31 N. C. 28; *Freeman v. Lisk*, 30 N. C. 211.

50. *Saunders v. Gallaher*, 2 Humph. (Tenn.) 445.

51. See *supra*, II, C, 8, e, (II); II, C, 8, f.

52. *Williams v. Shillaber*, 153 Mass. 541, 27 N. E. 767; *Atwood v. Wheeler*, 149 Mass. 96, 21 N. E. 232.

[a] **A presumption** that the debtor had such knowledge is not enough. *Williams v. Shillaber*, 153 Mass. 541, 27 N. E. 767.

53. *Goodwin v. Griffis*, 88 N. Y. 629.

54. **As to rearrest on the original writ**, see *infra*, II, C, 17.

55. *Noe v. Christie*, 15 Abb. Pr. N. S. (N. Y.) 346; *Jenkins v. Mayrant*, 3 McCord (S. C.) 560. See *supra*, II, C, 2, b.

[a] **In Massachusetts**, although it is considered improper to arrest on an alias writ before the return day of the original, it is nevertheless considered proper to *issue* the alias before that day. *Chesebro v. Barme*, 163 Mass. 79, 39 N. E. 1033.

the person has been returned unsatisfied in whole or in part,<sup>56</sup> and where a fieri facias and a capias ad satisfaciendum were taken out together, both must be returned before another may issue.<sup>57</sup> An alias writ may issue where the first writ has been returned "not found,"<sup>58</sup> or where the debtor was discharged by reason of some irregularity in the writ,<sup>59</sup> or the service thereof,<sup>60</sup> or where he was illegally discharged.<sup>61</sup> Where a former execution was improperly returned,<sup>62</sup> or where the first execution was so defective as to be illegal and void the person of the debtor may be retaken.<sup>63</sup> An alias writ may also issue when a defendant who has been taken into custody under a prior execution has escaped before satisfaction of the judgment,<sup>64</sup> not necessarily by the use of force, but by cunning, fraud or intimidation as well,<sup>65</sup> or with the consent,<sup>66</sup> or through the negligence of his

56. *McCrillis v. Sisson*, 1 R. I. 143.

[a] As to a pluries writ for balance of judgment, see *Kimball v. Parker*, 7 Mete. (Mass.) 63.

[b] Should the execution be returned without certificate of service, and without receipt or memorandum thereon, this is prima facie an execution unsatisfied and the clerk may, within the proper time, issue an alias. *McCrillis v. Sisson*, 1 R. I. 143.

57. *Jenkins v. Mayrant*, 3 McCord (S. C.) 560.

58. *Goldis v. Gately*, 168 Mass. 300, 47 N. E. 96; *People v. Kehl*, 15 Mich. 330.

[a] Reissuance of Original Writ. In such a case, if not actually wrong, it is, at least, not good practice to re-issue the original writ. *Goldis v. Gately*, 168 Mass. 300, 47 N. E. 96.

59. Conn.—*Woods v. Brzezinski*, 57 Conn. 471, 18 Atl. 252. N. J.—*David v. Blundell*, 39 N. J. L. 612. N. Y.—*Ginochio v. Figari*, 4 E. D. Smith. 227, 2 Abb. Pr. 185. Eng.—*Merchant v. Frankis*, 3 Q. B. 1, 43 E. C. L. 603, 114 Eng. Reprint 407.

60. *David v. Blundell*, 39 N. J. L. 612.

61. *Freeman v. Smith*, 7 Ind. 582.

62. *Windrum v. Parker*, 2 Leigh (29 Va.) 361.

63. *Woods v. Brzezinski*, 57 Conn. 471, 18 Atl. 252.

64. Conn.—*Munson v. Hills*, 2 Root 324. Mass.—*Coburn v. Palmer*, 10 Cush. 273. N. H.—*Cheever v. Mirrick*, 2 N. H. 376. N. J.—*David v. Blundell*, 40 N. J. L. 372; *David v. Blundell*, 39 N. J. L. 612. N. Y.—*Wesson v. Chamberlain*, 3 N. Y. 331; *Thompson v. Lockwood*, 15 Johns. 256; *Campbell v. Clark*,

2 How. Pr. 257; *Humphrey v. Cumming*, 5 Wend. 90; *Armstrong v. Garrow*, 6 Cow. 465; *Sharp v. Caswell*, 6 Cow. 65 (under 1 R. L. 426, §24); *Mumford v. Armstrong*, 4 Cow. 553; *Eads v. Wynne*, 79 Hun 463, 29 N. Y. Supp. 983. N. C.—*Ballard v. Averitt*, 1 N. C. 147, 3 N. C. 110. Ohio.—*Bowrell v. Zigler*, 19 Ohio 362. Pa.—*Long v. Cherington*, 161 Pa. 248, 28 Atl. 1086. Va.—*Fawkes v. Davison*, 8 Leigh (25 Va.) 554; *Carthrae v. Clarke*, 5 Leigh (32 Va.) 268; *Windrum v. Parker*, 2 Leigh (29 Va.) 361. Eng.—*Buxton v. Home*, 1 K. B. Show. 174, 89 Eng. Reprint 520; *Basset v. Salter*, 2 Mod. 136, 86 Eng. Reprint 985; *Allanson v. Butler*, 1 Sid. 330, 82 Eng. Reprint 1138.

As to rearrest in such case on the original process, see *infra*, II, C. 17.

[a] A debtor taken from the custody of the sheriff upon a warrant from a justice of the peace is considered as having escaped within the meaning of this rule. *Eads v. Wynne*, 79 Hun 463, 29 N. Y. Supp. 983.

65. Mass.—*Coburn v. Palmer*, 10 Cush. 273. N. J.—*David v. Blundell*, 39 N. J. L. 612. Pa.—*Long v. Cherington*, 161 Pa. 248, 28 Atl. 1086.

[a] Fraud in procuring the consent of the creditor to the debtor's discharge is within the scope of this rule. *Coburn v. Palmer*, 10 Cush. (Mass.) 273.

66. *Cheever v. Mirrick*, 2 N. H. 376; *Wesson v. Chamberlain*, 3 N. Y. 331.

[a] Where a third person undertakes with the sheriff to pay the debt and, without the plaintiff's knowledge, the debtor is permitted to go at large, an escape has occurred within the mea-

custodian,<sup>67</sup> after the debtor's application under the insolvent act has failed, and though he has given a bond,<sup>68</sup> or where the sureties on a debtor's bond surrender him.<sup>69</sup> But a discharge of a debtor in execution, with the consent of the plaintiff,<sup>70</sup> or upon the giving of new security,<sup>71</sup> or on the ground that it was not a proper case for the issuance of the writ,<sup>72</sup> or because the arrest was not made within the required time,<sup>73</sup> is a bar to another execution in the same action. But a discharge on the ground of insanity does not bar an alias writ when the debtor recovers his sanity.<sup>74</sup>

b. *How Procured*.—At common law an alias or pluries writ was secured by means of a scire facias.<sup>75</sup> The more modern practice, however, is to give a notice of motion for a second execution.<sup>76</sup>

c. *Requisites*.<sup>77</sup>—A pluries writ must be dated and signed, otherwise it is void.<sup>78</sup> It is not necessary that an alias execution recite that it is an alias, where the original writ was void.<sup>79</sup> The alias writ may

ing of this rule. *Wesson v. Chamberlain*, 3 N. Y. 331.

67. *Munson v. Hills*, 2 Root (Conn.) 524; *David v. Blundell*, 40 N. J. L. 372.

[a] If the escape of the debtor be through the neglect or with the consent of the sheriff the officer may not retake him under the same writ but the creditor may have an alias writ and the debtor may be taken into custody thereunder. *Munson v. Hills*, 2 Root (Conn.) 324.

68. *David v. Blundell*, 40 N. J. L. 372 (*overruling*, in this respect, *David v. Blundell*, 39 N. J. L. 612); *Palethorpe v. Leshner*, 2 Rawle (Pa.) 272. Compare dictum to the contrary in *Thomson v. Sleeper*, 168 Mass. 373, 47 N. E. 106.

69. *Bartlett v. Falley*, 5 Mass. 373.

70. Conn.—See *Bulkley v. Finch*, 37 Conn. 71. Mass.—*Coburn v. Palmer*, 10 Cush. 273. N. J.—*David v. Blundell*, 40 N. J. L. 372. Pa.—*Long v. Cherington*, 161 Pa. 248, 28 Atl. 1086, alias execution is void in such case. Va. *Windrum v. Parker*, 2 Leigh (29 Va.) 361.

[a] *Reservation of Right To Rearrest*.—This is true even where the creditor's consent is given upon the express undertaking that the debtor shall be liable to be again taken in execution if he fail to comply with certain terms or conditions agreed upon. *Coburn v. Palmer*, 10 Cush. (Mass.) 273; *David v. Blundell*, 39 N. J. L. 612, *overruled* on other grounds in *David v. Blundell*, 40 N. J. L. 372.

71. *Coburn v. Palmer*, 10 Cush. (Mass.) 273; even though it prove worthless.

[a] Unless the creditor was circumvented by fraud, in which case the debtor may be retaken on an alias writ. *Coburn v. Palmer*, 10 Cush. (Mass.) 273.

72. *People v. Healy*, 128 Ill. 9, 20 N. E. 692, 15 Am. St. Rep. 90.

73. *Barnes v. Viall*, 6 Fed. 661; *Masters v. Edwards*, 1 Caines (N. Y.) 515.

74. *Bush v. Pettibone*, 4 N. Y. 300, 1 Code Rep. (N. S.) 264.

75. Ky.—See *Scott v. Maupin*, Hard. 122. Mass.—*Coburn v. Palmer*, 10 Cush. 273. Va.—*Fawkes v. Davison*, 8 Leigh (35 Va.) 554. Eng.—Anonymous, 12 Mod. 230, 88 Eng. Reprint 1282; *Allanson v. Butler*, 1 Sid. 330, 82 Eng. Reprint 1138.

76. *Fawkes v. Davison*, 8 Leigh (35 Va.) 554.

[a] The facts must be first found by the court before the clerk can issue an alias writ where it is sought on the ground that the debtor has committed a breach of a recognizance given on application for the poor debtor's oath. *Thomson v. Sleeper*, 168 Mass. 373, 47 N. E. 106.

77. *Requisites of execution against the person generally*, see *supra*, II, C, 9.

78. *Hickam v. Larkey*, 6 Gratt. (47 Va.) 210.

79. *Woods v. Brzezinski*, 57 Conn. 471, 18 Atl. 252.

include the costs of issuing the original writ where the first was returned non est.<sup>80</sup>

**Amendment of Alias Writs.**—In accordance with the general rule, any mere irregularities in an alias writ may be corrected or supplied by amendments.<sup>81</sup>

**11. Executing the Writ.**—a. *Making the Arrest.*—(I.) **In General.**<sup>82</sup>—To constitute a legal arrest under an execution it is not necessary that the officer should touch the person against whom the writ has issued, where such person submits to the arrest,<sup>83</sup> nor employ any actual force.<sup>84</sup> It is sufficient, if, being in the debtor's presence, the officer shall inform him that he has such a writ directed against him,<sup>85</sup> and the debtor shall, expressly or impliedly, submit to the officer's authority.<sup>86</sup> On the other hand, should the officer merely inform the debtor that he has such a writ calling for the latter's arrest,<sup>87</sup> or without such a statement merely put his hands on him,<sup>88</sup> this will not constitute an arrest. There must be an intention to arrest,<sup>89</sup> coupled with an actual restraint of the liberty of the person against whom the writ is directed, that is to say, a taking into custody.<sup>90</sup>

80. *Peyton v. Brooke*, 3 Cranch (U. S.) 92, 2 L. ed. 376.

81. *Eads v. Wynne*, 79 Hun 463, 29 N. Y. Supp. 983.

As to amendments of the writ generally see *supra*, II, C, 9, h.

82. As to rearrest, see *infra*, II, C, 17.

83. **Ky.**—See *Legrand v. Bedinger*, 4 Mon. 539. **Mass.**—*Mowry v. Chase*, 100 Mass. 79. **N. H.**—*Emery v. Chesley*, 18 N. H. 198; *Pike v. Hanson*, 9 N. H. 491. **N. J.**—*Browning's Exr. v. Rittenhouse*, 40 N. J. L. 230. **N. Y.** *Bissell v. Gold*, 1 Wend. 210, 19 Am. Dec. 480. **N. C.**—*Jones v. Jones*, 35 N. C. 448. **R. I.**—See *McCrillis v. Sisson*, 1 R. I. 143.

[a] Compare *Lawson v. Buzines*, 3 Harr. (Del.) 416, where the court says: "To constitute a legal arrest the officer must lay his hand on the defendant, or otherwise take possession of his person. He must make him his prisoner in an unequivocal form."

84. *Browning's Exr. v. Rittenhouse*, 40 N. J. L. 230.

85. **N. J.**—*Browning's Exr. v. Rittenhouse*, 40 N. J. L. 230. **N. C.**—*Jones v. Jones*, 35 N. C. 448. **R. I.**—*McCrillis v. Sisson*, 1 R. I. 143.

86. **N. J.**—*Browning's Exr. v. Rittenhouse*, 40 N. J. L. 230. **N. Y.**—*Bissell v. Gold*, 1 Wend. 210, 19 Am. Dec. 480. **N. C.**—*Jones v. Jones*, 35 N. C.

448. **R. I.**—*McCrillis v. Sisson*, 1 R. I. 143.

[a] Producing one (1) who agrees to become security for the debtor's appearance is a sufficient submission to the officer's authority to make out an arrest. *Browning's Exr. v. Rittenhouse*, 40 N. J. L. 230. (2) But such an act will not complete an arrest where the officer did not signify to the debtor that the latter was in custody, *i. e.*, where an officer informed the debtor that unless he paid the demand on which the execution was issued he would commit him, and the debtor entered into a bond with sureties for the payment of the judgment, there was no arrest because of the absence of a present intention to detain. *McCrillis v. Sisson*, 1 R. I. 143.

87. *Jones v. Jones*, 35 N. C. 448.

88. *Jones v. Jones*, 35 N. C. 448.

89. **N. H.**—*Emery v. Chesley*, 18 N. H. 198. **N. C.**—*Jones v. Jones*, 35 N. C. 448. **R. I.**—*McCrillis v. Sisson*, 1 R. I. 143.

[a] "If the intention to make the arrest, and the power of doing so in form, coexist, and are made known to the party who does not resist, . . . no more is required." *Emery v. Chesley*, 18 N. H. 198.

90. *French v. Bancroft*, 1 Metc. (Mass.) 502; *McCrillis v. Sisson*, 1 R. I. 143.

A debtor who is already a prisoner may be arrested by placing the writ in the hands of the officer having such debtor then in charge.<sup>91</sup>

(II.) **By Whom Made.**—Generally the writ should be executed by the officer to whom it is addressed,<sup>92</sup> unless he is interested or a party.<sup>93</sup>

(III.) **Where Made.**—The operation of the writ is not, in the absence of statutes, confined to the county of the defendant's residence,<sup>94</sup> but the arrest must be made within the jurisdiction of the arresting officer.<sup>95</sup> In accordance with the general rule elsewhere discussed<sup>96</sup> there are certain places where such process cannot be served.<sup>97</sup>

(IV.) **Time of Arrest.**—The particular time prior to the return day, at which the arrest shall be made is a matter for the discretion of the officer.<sup>98</sup> Generally it may be made in the night as well as in the daytime.<sup>99</sup> But statutes sometimes provide<sup>1</sup> that arrests shall not be

[a] But it is not necessary that the officer succeed in preventing the debtor from departing, any laying on of hands with the intention of taking the debtor into custody is sufficient. *Mass.*—Whithead v. Keyes, 3 Allen 495, 81 Am. Dec. 672. *N. H.*—Huntington v. Blaisdell, 2 N. H. 317. *Eng.*—Genner v. Sparkes, 1 Salk. 79, 91 Eng. Reprint 74.

91. *Robertson v. Shannon*, 2 Strobb. (S. C.) 419; *Warner v. Lowry*, 1 Aik. (Vt.) 55.

92. See 15 STANDARD PROC. 908, and the titles "Service of Process and Papers;" "Warrants." But see *Purcell v. Richardson*, 4 Hen. & M. (14 Va.) 404.

93. *In re Stephanian*, 25 R. I. 541, 56 Atl. 1034; *Denton v. Adams*, 6 Vt. 40.

[a] When such a writ is directed against the sheriff of the county it may be executed by the coroner. *Chaffe & Sons v. Handy*, 36 La. Ann. 22.

94. *Ex parte Cleveland*, 36 Ala. 306.

95. *Del.*—*Lawson v. Buzines*, 3 Harr. 416. *Me.*—*Emery v. Brann*, 67 Me. 39. *N. Y.*—*Fisher v. Young*, 41 Misc. 552, 85 N. Y. Supp. 115; *People ex rel. Bicicelli v. Dunn*, 54 N. Y. Supp. 194.

[a] An arrest by a constable must be made within his township. *Lawson v. Buzines*, 3 Harr. (Del.) 416.

96. See the titles "Service of Process and Papers;" "Warrants."

97. **Legislative Chamber.**—*Andrews v. Lembeck*, 46 Ohio St. 38, 18 N. E. 483, 15 Am. St. Rep. 547; *Hastings v. Columbus*, 42 Ohio St. 585.

[a] **Courts of Justice.**—*Andrews v. Lembeck*, 46 Ohio St. 38, 18 N. E. 483,

15 Am. St. Rep. 547; *Hastings v. Columbus*, 42 Ohio St. 591.

98. *Ky.*—*Johnson v. Scott*, 154 Ky. 736, 121 S. W. 695. *Me.*—*Wright v. Keith*, 24 Me. 158. *Vt.*—*Bramble v. Paultney*, 12 Vt. 342.

[a] For example, where the debtor is ill, the officer may, if he consider that such person is so ill that to take him into custody would endanger his life, defer making the arrest to a future time. *Bramble v. Paultney*, 12 Vt. 342.

[b] The reason for this rule is that "much precaution would be requisite in arresting some individuals; while, as to others, an officer would know that it could be done at any time, and without difficulty. The dwellings of some individuals must be approached stealthily for the purpose; and hence the evening would be selected, and aid also." *Wright v. Keith*, 24 Me. 158.

99. See *State v. Smith*, 1 N. H. 346, and the titles "Service of Process and Papers;" "Warrants."

1. See the statutes, and *Mass.*—*In re Stone*, 129 Mass. 156. *N. H.*—*Hubbard v. Sanborn*, 2 N. H. 468. *Ohio.*—*Andrews v. Lembeck*, 46 Ohio St. 38, 18 N. E. 483, 15 Am. St. Rep. 547; *Hastings v. Columbus*, 42 Ohio St. 591.

[a] Not between sunset and sunup, unless specially ordered by the court. *In re Stone*, 129 Mass. 156.

[b] Not on Sunday.—*Hubbard v. Sanborn*, 2 N. H. 468; *Hastings v. Columbus*, 42 Ohio St. 585.

[c] Arrest at common law on Sunday was valid. *Hastings v. Columbus*, 42 Ohio St. 585. See the titles, "Sunday and Holidays;" "Warrants."

made at specified times, an arrest in violation of such statutes being invalid.<sup>2</sup>

(V.) **What Force May Be Used.**—The officer may use such force as is reasonably necessary to accomplish his purpose.<sup>3</sup> But generally he may not break open the outer door of the debtor's dwelling.<sup>4</sup> Some authorities, however, qualify this general statement by adding that he may do so where, having requested that the door be opened and at the same time having made known his errand, admittance is refused him.<sup>5</sup> But in any event, having once properly passed the outer door, the officer may break open any inner door, closet or other such enclosure if necessary to execute the writ.<sup>6</sup>

b. *The Commitment and Disposition of Prisoner.*—(I.) **General Statement.**—Having arrested the judgment debtor, it is the duty of the arresting officer to retain him in custody until the judgment has been satisfied or he has been discharged by due process of law.<sup>7</sup> In making the commitment the debtor must be delivered at the proper jail,<sup>8</sup> to the officer in charge thereof, or someone authorized to confine the prisoner therein,<sup>9</sup> and the creditor may not direct the arresting officer to hold the debtor in custody in any other place or manner.<sup>10</sup> This commitment, moreover, should be made as soon as is possible, the

2. *Hubbard v. Sanborn*, 2 N. H. 468.

3. *Johnson v. Scott*, 134 Ky. 736, 121 S. W. 695; *Wright v. Keith*, 24 Me. 158. See the titles "Service of Process and Papers;" "Warrants."

4. III.—See *Snydaeker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551. Mass.—*Oystead v. Shed*, 13 Mass. 520, 7 Am. Dec. 172; *Ilsley v. Nichols*, 12 Pick. 270. N. H.—See *State v. Smith*, 1 N. H. 346. N. Y.—*Curtis v. Hubbard*, 4 Bill 437, 40 Am. Dec. 292. Vt.—*State v. Hooker*, 17 Vt. 658.

[a] The debtor may resist the arresting officer in such case although he may not take his life in so doing. *State v. Hooker*, 17 Vt. 658. To the same point, see *Hawkins v. Com.*, 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147.

[b] Where the state is party plaintiff this rule still applies. *Hawkins v. Com.*, 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147.

[c] "By the dwelling of the defendant is meant the house inhabited by him, the one in which he dwells, and though owned and also inhabited by another, or several others at the same time, it is nevertheless the dwelling of the defendant." *Hawkins v. Com.*, 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147.

[d] In case of an escape this rule does not apply. The officer may then, in pursuit of his prisoner, break open

the outer door after making known his purpose to arrest some one inside. *Allen v. Martin*, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564.

[e] A stranger within the dwelling will not be shielded by this rule. *Oystead v. Shed*, 13 Mass. 520, 7 Am. Dec. 172.

5. *Hawkins v. Com.*, 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147.

[a] Buildings which are not dwelling houses, as out buildings, may be broken into by the officer in executing the writ. *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145; *Fullerton v. Mack*, 2 Aik. (Vt.) 415.

6. See *Hubbard v. Mace*, 17 Johns. (N. Y.) 127; *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; *Lloyd v. Sandilands*, 8 Taunt. 250, 129 Eng. Reprint 379.

7. III.—*People v. Hanchett*, 111 Ill. 90. Ky.—*Johnson v. Scott*, 134 Ky. 736, 121 S. W. 695. La.—*Chaffe & Sons v. Handy*, 36 La. Ann. 22.

8. *Skinner v. White*, 9 N. H. 204. As to the place of commitment, see *infra*, II, C, 11, b, (II).

9. *Skinner v. White*, 9 N. H. 204.  
10. *French v. Bancroft*, 1 Metc. (Mass.) 502.

attending circumstances considered, after the arrest.<sup>11</sup>

In some states a debtor may at once apply for permission to take the poor debtor's oath, but unless the debtor asks that he be admitted to the benefits of this oath he may be committed without an examination.<sup>12</sup>

(II.) **Place of Commitment.**—In some jurisdictions it is required that the commitment be to the jail of the county where the arrest was made,<sup>13</sup> while in others it should be to the jail of the county from which the writ issued.<sup>14</sup>

(III.) **Close Confinement.**—Statutes sometimes provide that when a debtor is in custody under an execution against his person the court may, in its discretion, order him into close confinement.<sup>15</sup> The creditor is a proper party to ask that this be done,<sup>16</sup> and his application should be in the form of a motion,<sup>17</sup> made after notice to the adverse party,<sup>18</sup> and within the time prescribed by statute.<sup>19</sup>

(IV.) **Length of Time of Commitment.**—Imprisonment under a *capias ad satisfaciendum* does not end with the return of the writ.<sup>20</sup> Statutes in some states limit a time<sup>21</sup> beyond which a debtor may not be im-

11. *French v. Bancroft*, 1 Mete. (Mass.) 502.

[a] A creditor may not lawfully require an officer to take the debtor into custody, without commitment to prison, pending further instructions in that regard. *French v. Bancroft*, 1 Mete. (Mass.) 502.

[b] Reasonable opportunity to obtain a bond is usually given the debtor by the arresting officer. Forty-eight hours was considered such in *United States v. Hudson*, 1 Hask. 527, 26 Fed. Cas. No. 15,412.

12. *Hart v. Adams*, 7 Gray (Mass.) 581.

As to release on bond to take benefit of insolvent laws, see *infra*, II, C, 15, m.

13. *Avery v. Seely*, 3 Watts & S. (Pa.) 494; *Ex parte Hunt*, 85 Vt. 345, 82 Atl. 178.

[a] If there is no legal jail in that county, the commitment may be made to an adjoining county. *Ex parte Hunt*, 85 Vt. 345, 82 Atl. 178.

14. *Long v. Wood*, 78 Ky. 392; *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43.

15. See *Frisbie v. Fowler*, 3 Conn. 87; *Pitkin v. Munsell* (Vt.), 97 Atl. 657; *Flanders v. Mullin*, 80 Vt. 124, 66 Atl. 789; *Mullin v. Flanders*, 73 Vt. 95, 50 Atl. 813; *Sheeran v. Rockwood*, 67 Vt. 82, 30 Atl. 689; *Watson v. Goodno*, 66 Vt. 229, 28 Atl. 987; *Judd v. Ballard*, 66 Vt. 668, 30 Atl. 96; *Melendy v.*

*Spaulding*, 54 Vt. 517; *Soule v. Austin*, 35 Vt. 515; *Styles v. Shanks*, 46 Vt. 612.

[a] **Reconsideration.**—The court which heard the motion may reconsider its decision thereupon. *Vermont Life Ins. Co. v. Dodge*, 48 Vt. 156.

[b] **Review.**—Such an order will not be disturbed on appeal unless made in an illegal manner. *Soule v. Austin*, 35 Vt. 515.

16. *Frisbie v. Fowler*, 3 Conn. 87.

17. *Frisbie v. Fowler*, 3 Conn. 87. And see *Melendy v. Spaulding*, 54 Vt. 517.

18. *Frisbie v. Fowler*, 3 Conn. 87.

19. *Yatter v. Miller*, 61 Vt. 147, 17 Atl. 850.

20. *People v. Hanchett*, 111 Ill. 90.

21. See generally the statutes and the following cases: U. S.—*Bank of United States v. Weisiger*, 2 Pet. 331, 7 L. ed. 441, involving a Kentucky statute. Colo.—*Jahl v. Lewis*, 57 Colo. 109, 139 Pac. 1113; *Howard v. Mitchell*, 27 Colo. App. 45, 146 Pac. 486. Del.—*In re Fortner*, 2 Harr. 461. Ill.—*Subim v. Isador*, 88 Ill. App. 96. N. H.—See *Randall's Case*, 23 N. H. 255. N. Y.—*People ex rel. Lust v. Grant*, 10 Civ. Proc. 158; *Padreshefsky v. Walton*, 65 App. Div. 432, 72 N. Y. Supp. 979; *Ryan v. Parr*, 16 N. Y. Supp. 829; *In re Coyne*, 13 N. Y. Supp. 797.

[a] Such provision may be waived, as by applying for a discharge under a statute providing for such relief for

prisoned. Other statutes provide that in certain cases the imprisonment must continue for a specified time.<sup>22</sup>

c. *Effect of Arrest and Imprisonment as Satisfaction of Judgment.*<sup>23</sup> — (I.) Generally.—The levy of an execution upon the body of a judgment debtor, and his imprisonment thereunder, does not operate as an absolute satisfaction of the judgment.<sup>24</sup> It operates as a prima facie satisfaction, however, at least so long as the imprisonment continues,<sup>25</sup> barring the creditor from all other remedies for the collection of the debt while the debtor is in custody,<sup>26</sup> and sus-

insolvent debtors. The latter relief being more general and effectual, it has been said, will be presumed to have been chosen by the debtor in lieu of the former. *In re Fortner*, 2 Harr. (Del.) 461.

[b] Where a debtor is in custody under a provisional order of arrest this statutory time has been held to run only from the date of the final process, not from the commencement of his confinement. *In re Coyne*, 13 N. Y. Supp. 797.

As to discharge from custody at the expiration of this time see *infra*, II, C, 15, h.

[c] It is the court's duty to fix the term for which the debtor shall be imprisoned. *Jahl v. Lewis*, 57 Colo. 109, 139 Pac. 1113; *Howard v. Mitchell*, 27 Colo. App. 45, 146 Pac. 486.

22. U. S.—*Moran v. Secord*, 15 Fed. 509, involving a New York statute. Mich.—*Funke v. Hurst*, 119 Mich. 182, 77 N. W. 695. Pa.—*Com. v. Sheriff & Jailor*, etc., 6 Pa. 445. *In re Norton*, 37 W. N. C. 64. R. I.—See *In re Kimball*, 20 R. I. 688, 41 Atl. 230.

[a] An application for discharge within such period is premature and must be denied. *Moran v. Secord*, 15 Fed. 509.

23. Effect of discharge from arrest and imprisonment as satisfaction of judgment, see *infra*, II, C, 15, b, (IV); II, C, 15, c, (III); II, C, 15, d, (IV); II, C, 15, k, (V); II, C, 15, l, (II), (J), (3).

Where debtor escapes, see *infra*, II, C, 16.

24. See the following: U. S.—*Taylor v. Thompson's Lessee*, 5 Pet. 358, 8 L. ed. 154. Ky.—*Scott v. Colmesnil*, 7 J. J. Marsh. 416. Me.—*Moor v. Towle*, 38 Me. 133. Mass.—*Raymond v. Butterworth*, 139 Mass. 471, 1 N. E. 126; *Kennedy v. Duncklee*, 1 Gray 65; *Clark v. Goodwin*, 14 Mass. 237; *Porter v. In-*

*graham*, 10 Mass. 88. Mo.—*Warrensburg v. Simpson*, 22 Mo. App. 695. N. Y. *Flack v. State*, 95 N. Y. 461; *Koenig v. Steckel*, 58 N. Y. 475; *Codwise v. Field*, 9 Johns. 263; *Hoyle v. McCrea*, 42 App. Div. 313, 59 N. Y. Supp. 200, by express provision of statute. S. C. *Hamilton v. Bredeman*, 12 Rich. L. 464; *Conner v. Winn*, 1 Brev. 185.

[a] See also *Freeman v. Smith*, 7 Ind. 582, holding that the doctrine that a levy upon property is prima facie a satisfaction of an execution does not apply to a case where a debtor is arrested upon execution, and the sheriff is compelled to accept such property as he tenders, not as a sufficiency to satisfy the debt, but with a view to his discharge upon an oath of insolvency.

[b] Pledge for Debt.—The person of a debtor, taken in execution, and imprisoned, is a pledge for the debt, but not a satisfaction of it. *Porter v. Ingraham*, 10 Mass. 88.

25. See the following: U. S.—*Rockhill v. Hanna*, 15 How. 189, 14 L. ed. 656; *Snead v. M'Coull*, 12 How. 407, 13 L. ed. 1043. Ill.—*Marshall Field & Co. v. Freed*, 191 Ill. App. 619. Mass. *Kennedy v. Duncklee*, 1 Gray 65, unless there be some statute to the contrary. N. J.—*Miller v. Miller*, 5 N. J. L. 508; *Strong v. Linn*, 5 N. J. L. 799. N. Y.—*Koenig v. Steckel*, 58 N. Y. 475; *Chapman v. Hatt*, 11 Wend. 41; *Beloit Bank v. Beall*, 7 Bosw. 611; *Fassett v. Tallmadge*, 15 Abb. Pr. 205; *Noe v. Christie*, 46 How. Pr. 496. S. C.—*Stover v. Duren*, 3 Strobb. 448, 51 Am. Dec. 634 (prima facie evidence of satisfaction to rebut which it must appear that the imprisonment ceased in some mode which, by law, constitutes an exception to the general inference of satisfaction from the taking of the body under the execution); *Osborne v. Bowman*, 2 Bay 208.

26. U. S.—*Rockhill v. Hanna*, 15

pending the lien of the judgment upon the real property of the defendant during such time.<sup>27</sup>

Statutes sometimes provide that imprisonment for a specified time shall operate as a satisfaction either in full or pro tanto.<sup>28</sup>

(II.) Arrest of One of Two Joint Defendants.—The arrest and commitment, under a body execution, of one of several joint defendants does not operate to satisfy the judgment as to the others;<sup>29</sup> but during the period of the commitment, the creditor's remedies against the other defendants are suspended.<sup>30</sup>

12. Return.<sup>31</sup> — a. *When Made*.—The statutes generally specify a time within which the writ is returnable.<sup>32</sup> It is sometimes required that the writ remain in the hands of the officer for a specified time be-

How. 189, 14 L. ed. 656; *Snead v. McCoull*, 12 How. 407, 13 L. ed. 1043; *Taylor v. Thomson's Lessee*, 5 Pet. 358, 8 L. ed. 154. III.—*Marshall, Field & Co. v. Freed*, 191 Ill. App. 619. Mass.—*Kennedy v. Duncklee*, 1 Gray 65. N. Y. *Flack v. State*, 95 N. Y. 461 (operates simply as a suspension for the time being of other remedies of the creditor); *Koenig v. Steckel*, 58 N. Y. 475 (during such period no action can be maintained by the judgment creditor against one standing as surety for the debtor or to enforce collateral securities held for the payment of the judgment); *Noe v. Christie*, 46 How. Pr. 496 (barring second execution against person during imprisonment on first); *Everall v. Stevens*, 158 App. Div. 723, 143 N. Y. Supp. 874. S. C.—*Hamilton v. Bredeman*, 12 Rich. L. 464.

27. *Rockhill v. Hanna*, 15 How. (U. S.) 189, 14 L. ed. 656; *Snead v. McCoull*, 12 How. 407, 13 L. ed. 1043; *Koenig v. Steckel*, 58 N. Y. 475; *Chapman v. Hatt*, 11 Wend. (N. Y.) 41.

[a] *Compare* *Queen Annes County v. Pratt*, 10 Md. 5, holding that the arrest of the defendant under a ca. sa. issued thereon prior to his marriage neither waives nor suspends the lien of the judgment so as to allow the widow's right of dower to attach to his lands.

28. See generally the statutes, and *Marshall Field & Co. v. Freed*, 191 Ill. App. 619; *Hanchett v. Weber*, 17 Ill. App. 114.

29. U. S.—*Hunter v. United States*, 5 Pet. 173, 8 L. ed. 86; *United States v. Stansbury*, 1 Pet. 573, 7 L. ed. 267. Conn.—*Morgan v. Chester*, 4 Conn. 387; *Sheldon v. Kibbe*, 3 Conn. 214, 8 Am. Dec. 176. Ky.—*Scott v. Colmesnil*, 7

J. J. Marsh. 416. Mass.—*Raymond v. Butterworth*, 139 Mass. 471, 1 N. E. 126; *Porter v. Ingraham*, 10 Mass. 88. N. J.—See *Strong v. Linn*, 5 N. J. L. 799. N. Y.—*Chapman v. Hatt*, 11 Wend. 41; *Hoyle v. McCrea*, 42 App. Div. 629, 59 N. Y. Supp. 200. Ohio.—*King v. Kerr's Admr.*, 5 Ohio 154, 22 Am. Dec. 777.

30. *Koenig v. Steckel*, 58 N. Y. 475; *Chapman v. Hatt*, 11 Wend. (N. Y.) 41; *Wakeman v. Lyon*, 9 Wend. (N. Y.) 241; *Sunderland v. Loder*, 5 Wend. (N. Y.) 58.

[a] Imprisonment of one of two co-partners, however, bars supplementary proceedings against the other during such time as it continues, even though there has been no execution against the person of the partner sought to be examined. *Everall v. Stevens*, 158 App. Div. 723, 143 N. Y. Supp. 874.

31. As to return of execution against property, see *supra*, II, B, 8.

32. III.—*People v. Hanchett*, 111 Ill. 90. Mass.—*Chesebro v. Barme*, 163 Mass. 79, 39 N. E. 1033; *Adams v. Cummiskey*, 4 Cush. 420. N. Y.—*People ex rel. Utley v. Seaton*, 25 Hun 305. Vt.—*Muzzy v. Howard*, 42 Vt. 23; *Turner v. Lowry*, 2 Aik. 72, *overruling* *Stevens v. Adams*, *Brayt*, 29, which held that the officer was to be allowed a reasonable time after the statutory period of sixty days in which to return the writ.

[a] Return to Adjourned Term.—A writ made returnable to a term which is thereafter adjourned to a later date, may be returned at this adjourned term. *Aycock v. Leitner*, 29 Ga. 197.

[b] In computing time the day upon which the execution was issued is excluded. *Bull v. Clarke*, 2 Mete. (Mass.) 587; *Muzzy v. Howard*, 42 Vt. 23.

fore return.<sup>33</sup> Otherwise, the return may be made at any time, subject to the qualification or provision that if the writ be returned into court before the return day, bail taken in the action cannot be held.<sup>34</sup> The sheriff may make a return of the writ any time before the return day when he has satisfied himself that the debtor is not within his district.<sup>35</sup> A return of an execution against the person made after the return day thereof had expired is, in some states, considered a false return,<sup>36</sup> especially where the effect of so doing would be to charge the bail on mesne process.<sup>37</sup>

b. *To Whom Returnable.*—The statutes variously require execution to be returned to the clerk, with whom the judgment-roll is filed,<sup>38</sup> or to a judge of the court which issued the writ.<sup>39</sup>

c. *How Made.*—(I.) *Generally.*—In making a return of an execution against the person the officer must not only endorse upon the writ his proceedings thereunder,<sup>40</sup> and must also deliver the writ, thus

33. See *Edwards v. Gunn*, 3 Conn. 316; *Stimmel v. Swan*, 17 Misc. 354, 39 N. Y. Supp. 1074.

[a] *At Common Law Four Days.* *Boggs v. Chichester*, 13 N. J. L. 209.

34. *Newton v. Bailey*, 36 Ga. 180; *Lichten v. Mott*, 10 Ga. 138; *Chesebro v. Barme*, 163 Mass. 79, 39 N. E. 1033; *Niles v. Field*, 2 Mete. (Mass.) 327; *Bacon v. Bowdoin*, 2 Mete. (Mass.) 591. See generally *supra*, II, B, 9.

[a] *A Distinction.*—"The officer's return of service upon the execution, and the return of the execution into court, are different matters. He may endorse upon the execution any true statement of his acts under it without waiting for the return day, or after that day; and there is no prohibition against returning the execution into court before or after the return day." *Chesebro v. Barme*, 163 Mass. 79, 39 N. E. 1033.

[b] *To charge the bail it is not necessary* that the return be made at any particular hour of the return day; it may be made at any time which is reasonable and convenient. *Bull v. Clarke*, 2 Mete. (Mass.) 587.

35. *Chesebro v. Barme*, 163 Mass. 79, 39 N. E. 1033; *Saunders v. Hughes*, 2 Bailey (S. C.) 504.

[a] *Sureties on a bail bond cannot complain of this rule* for they have undertaken to keep the body of the debtor to answer to the creditor in the district. "If he is not within it . . . sufficient favor is afforded to them, if, at the return term of the *seire facias*, or writ in debt on their bond, they are allowed to surrender their principal, on

payment of the costs of this new proceeding." *Saunders v. Hughes*, 2 Bailey (S. C.) 504.

36. *Cooper v. Ingalls*, 5 Vt. 508. Compare *Stimmel v. Swan*, 17 Misc. 354, 39 N. Y. Supp. 1074, where exception was taken to a body execution issued against one, S., on June 2, 1893, and returned on August 2, 1893, on the ground that it was not returned until sixty-one days after it was issued. The court held that the only requirement with reference to the return of executions as a prerequisite to an action against bail was that they should not be returned in less than fifteen days.

37. *Cooper v. Ingalls*, 5 Vt. 508.

38. See the statutes, and *Bull v. Clarke*, 2 Mete. (Mass.) 587.

See generally *supra*, II, B, 9.

39. *Avery v. Seely*, 3 Watts & S. (Pa.) 494.

40. *Wyer v. Andrews*, 13 Mc. 168, 29 Am. Dec. 497; *Turner v. Lowry*, 2 Aik. (Vt.) 72.

[a] *Return Defined.*—In *Turner v. Lowry*, 2 Aik. (Vt.) 72, the court in discussing the return of a *capias ad satisfaciendum* say: "A return of a process is literally the delivering back that process to the officer or office whence it came. The indorsement of the officer's proceedings is literally what accompanies his return, or goes back with the process. In common parlance it is called the return itself. But in reality, neither can avail as a foundation of after process without the other." See also *State v. Lawson*, 2 Gill (Md.) 62.

endorsed, back to the office or official whither it is, by the rules of practice, returnable;<sup>41</sup> neither constitutes a complete return without the other.<sup>42</sup> Where a former sheriff made the arrest, his successor, upon admitting the defendant to bail, should state that fact in addition to the former sheriff's return.<sup>43</sup>

(II.) **Requisites.**—Where the language of the return makes clear, beyond doubt, just what the officer has done in executing or attempting to execute the writ, it is sufficient.<sup>44</sup> If a statute directs the form of the return the use of language which is fully equivalent to that prescribed by the statute is sufficient.<sup>45</sup>

d. **Amendment.**—Upon application to the court from which an execution against the person issued,<sup>46</sup> made within a reasonable time,<sup>47</sup> the officer executing the writ may be allowed to amend his return where it clearly appears to have been made through mistake in regard to some matter of fact, which, from its nature, was not within his knowledge,<sup>48</sup> or where something has been omitted from the return which it would not be inequitable to permit the officer to supply by an amendment.<sup>49</sup> On the other hand an application to amend

41. *Turner v. Lowry*, 2 Aik. (Vt.) 72.

[a] **Transmission by Mail.**—Such writs, with the return of the executing officer thereon, may be transmitted by mail to the office or officer to whom the writ is returnable. *Avery v. Seely*, 3 Watts & S. (Pa.) 494.

[b] **The body of the debtor** need not accompany the return. *Avery v. Seely*, 3 Watts & S. (Pa.) 494.

42. *Turner v. Lowry*, 2 Aik. (Vt.) 72. See *supra*, II, B, 9.

43. *Richards v. Porter*, 7 Johns. (N. Y.) 137.

44. *Subim v. Isador*, 88 Ill. App. 96; *Orvis v. Isle La Mott*, 12 Vt. 195.

[a] **A return non est inventus** is sufficient which recites that the officer made "diligent search for the body of the within named defendant, (leg.) . . . 'and could not find it,' . . . 'to levy this ex. nor property, I therefore return this ex. unsatisfied.'" *Orvis v. Isle La Mott*, 12 Vt. 195.

[b] **Compliance with the mandate of a writ** is shown by any language from which this will substantially appear. Thus, compliance with a mandate to deliver the body of the debtor "to the keeper of the jail of said (Cook) county" is shown by a return that the officer "committed the said defendant to the common jail of Cook county." *Subim v. Isador*, 88 Ill. App. 96.

[c] **Customary practice** may influ-

ence the form of the return, and one made in accordance with such custom will be sufficient. *State v. Lawson*, 2 Gill (Md.) 62.

45. *Lichfelt v. Kopp*, 38 Mich. 312; *Wheeler v. Bouchelle's Admr.*, 27 N. C. 584.

[a] **A return that the debtor is "not found,"** has been held sufficient under a statute directing the return to be that the debtor "is not to be found." *Wheeler v. Bouchelle*, 27 N. C. 584.

46. *Scott v. Seiler*, 5 Watts (Pa.) 235.

47. *Scott v. Seiler*, 5 Watts (Pa.) 235; *Orvis v. Isle La Mott*, 12 Vt. 195.

[a] **What Is a Reasonable Time.** In *Scott v. Seiler*, 5 Watts (Pa.) 235, the court say that the officer will be allowed to amend his return because of a mistake of fact if application therefor be made "as soon as the mistake is discovered and the fact ascertained."

48. *Scott v. Seiler*, 5 Watts (Pa.) 235.

49. **Ky.**—*Malone v. Samuel*, 3 A. K. Marsh. 350, 13 Am. Dec. 172, where the officer's return on a *capias* of "no property found" was permitted to be amended by inserting in its stead "Defendant not found in my bailiwick." **Mass.**—*Hart v. Adams*, 7 Gray 581. **N. H.**—*Mahurin v. Brackett*, 5 N. H. 9, omission of return of *non est inventus*.

the return, made at a time at which it would be inequitable to grant it, will be denied.<sup>50</sup>

**13. Jail Fees.**—a. *General Statement.*<sup>51</sup>—By the early common law a prisoner was compelled to support himself, and, if unable to do so, was dependent upon the charity of the jailer or of others.<sup>52</sup> This rule has been modified by the courts, however, by placing this burden upon the creditor at whose suit he is in custody,<sup>53</sup> and statutes now generally provide expressly for this modification of the old common-law rule.<sup>54</sup> But even under statutes which make no provision for such a situation a creditor will not be compelled to maintain a debtor<sup>55</sup> who

50. *Lines v. State*, 6 Blackf. (Ind.) 464 (not after the close of the plaintiff's testimony in an action in debt for an escape predicated upon the return); *Orvis v. Isle La Mott*, 12 Vt. 195, not after expiration of life of writ.

51. As to discharge of debtor for failure of creditor to pay jail fees, see *infra*, II, C, 15, d.

52. *N. C.*—*Bunting v. McIlhenny*, 61 N. C. 579; *Veal v. Flake*, 32 N. C. 417. *Ohio.*—*Wadsworth v. Wetmore*, 6 Ohio 438. *Va.*—*Rose v. Shore*, 1 Call (5 Va.) 540.

53. *Irving v. Robertson*, 6 Rich. L. (S. C.) 228; *Robinson v. Simpson*, 3 Strobb. (S. C.) 161; *Furth v. Deloach*, 2 Spears (S. C.) 400; *Hyams v. Black*, 4 McCord (S. C.) 508; *Caldwell v. Boyd*, 2 Nott & McC. (S. C.) 377; *Moore v. Benbow*, 3 Brev. (S. C.) 390.

54. *Cal.*—*Ex parte Lamson*, 50 Cal. 306. *Del.*—*In re Harwood*, 4 Harr. 541. *Ga.*—*Haas v. Bradley*, 22 Ga. 345; *State v. Simpson*, R. M. Charl't. 122. *Me.*—*Spring v. Davis*, 36 Me. 399. *Mass.*—*Blood v. Austin*, 3 Pick. 259; *Chamberlain v. Mallard*, 2 Pick. 439. *N. H.*—*Buck v. Meserve*, 16 N. H. 422. *N. J.*—*Potter v. Robinson*, 40 N. J. L. 114; *State v. Stiles*, 12 N. J. L. 296. *N. C.*—*Faucet v. Adams*, 35 N. C. 235; *Veal v. Flake*, 32 N. C. 417. See also *Phillips v. Allen*, 35 N. C. 10. *Ohio.* *Gill v. Miner*, 13 Ohio St. 182. See also *Buttles v. Carlton*, 1 Ohio 32. *Pa.* *Com. v. Sheriff & Jailer, etc.*, 6 Pa. 445. *Va.*—*Rose v. Shore*, 1 Call. (5 Va.) 540.

[a] **Who Is an Insolvent Within the Meaning of Such Statutes.**—"It is clear that the word insolvent here, is not to be taken in the sense of insolvency, by having taken the oath prescribed by law. . . . This clause extends only to such prisoners as are un-

able to pay their ordinary prison-fees." *Rose v. Shore*, 1 Call (5 Va.) 540. And see *Blood v. Austin*, 3 Pick. (Mass.) 259, where this benefit was provided for a debtor "who claims relief as a pauper." It was there said that a debtor brings himself within the statute by representing to the jailer that he is unable to support himself and asking that he be provided for.

[b] **Where the debtor has property in another state** out of which he might maintain himself it has been held that the jailer may nevertheless require the creditor to defray the cost of keeping the debtor in custody. *Faucet v. Adams*, 35 N. C. 235. This case was under a statute, the language of which was, "if the prisoner be unable to discharge them (the jail fees)."

[c] **A solvent debtor**, or one able to maintain himself, is not within the purview of such statutes. *Turentine v. Murphey*, 5 N. C. 180.

[d] **Debtor Committed by Bail.** Under a statute providing for this liability on the part of the creditor when the debtor is committed "on mesne process or execution," the creditor is not liable for the keep of a debtor committed by bail after judgment. *Chamberlain v. Mallard*, 2 Pick. (Mass.) 439, under Mass. St., 1821, ch. 22. But by St., 1824, ch. 124 this was changed and a debtor committed by his bail is to be supported by his creditor.

[e] **In Ohio the creditor's liability** for the maintenance of his debtor is not, at least as between the sheriff and the creditor, dependent upon the debtor's inability to provide for himself; the creditor is liable in the first instance. *Gill v. Miner*, 13 Ohio St. 182.

55. *Ga.*—*Mason, Dickinson & Co. v. Carhart, Bro. & Co.*, 30 Ga. 917. *N. J.* *Potter v. Robinson*, 40 N. J. L. 114. *N. C.*—*Phillips v. Allen*, 35 N. C. 10.

has been released from actual custody, although there is authority to the contrary.<sup>56</sup>

The jailer need not accept security in place of actual payment,<sup>57</sup> except where provided for by statute.<sup>58</sup>

b. *Demand*.—Under some statutes a demand must be made upon the creditor before he may be charged with the maintenance of his debtor.<sup>59</sup> while under other statutes no demand is necessary.<sup>60</sup> Where a demand is thus required, it need not be in any particular form, so long as it is understood by the creditor.<sup>61</sup>

c. *Actions To Recover*.—The right of the jailer to sue for these fees is often expressly provided for by statute.<sup>62</sup> These suits must be brought clearly and unequivocally within the statutes providing therefor.<sup>63</sup> However, the pleader need not pursue the exact language of

[a] *By Escape*.—*Saxon v. Boyce*, 1 Bailey (S. C.) 66.

56. *Kirkup v. Stiekney*, 5 Ohio Dec. (Reprint) 499.

[a] *Where Debtor Released Within Prison Bounds*.—*Haas v. Bradley*, 23 Ga. 345.

57. *Haas v. Bradley*, 23 Ga. 345; *Field v. Slaughter*, 1 Bibb (Ky.) 160.

58. *Devine v. Stillings*, 196 Mass. 284, 52 N. E. 41.

[a] *In New Hampshire* this bond may be either "satisfactory security, or security approved by a justice of the peace, by bond." See *Buck v. Meserve*, 16 N. H. 422.

[b] *The bare word of the creditor's attorney* to repay the jailer is sufficient if the jailer chooses to accept it. *Devine v. Stillings*, 196 Mass. 284, 82 N. E. 41.

59. *Me*.—*Holmes v. Baldwin*, 17 Me. 398. *Mass*.—*Worcester v. Schlesinger*, 16 Gray 166. *Pa*.—*Com. v. Sheriff & Jailer, etc.*, 6 Pa. 445. *R. I*.—*Pub. St.*, ch. 270, March 10, 1882. And see *Casey v. Viall*, 17 R. I. 348, 21 Atl. 911; *Millard v. Willard*, 3 R. I. 42. *Va*.—See *Webb v. Elligood*, Jeff. 59.

[a] *Where a debtor has been out on bail and is given into custody by his bondsmen*, a notice thereof to the creditor is necessary before he can be compelled to pay for such debtor's keep. *Mason, Dickinson & Co. v. Carhart, Bro. & Co.*, 30 Ga. 917.

[b] *After demand* if the creditor does not request further imprisonment or promise to pay, he is no longer liable. *Worcester v. Schlesinger*, 16 Gray (Mass.) 166.

[c] *In the computation of time* (1) the day of service of notice or de-

mand on the creditor is usually excluded. *Casey v. Viall*, 17 R. I. 348, 21 Atl. 911; *Millard v. Willard*, 3 R. I. 42. (2) *Fractions of days* are not recognized. *Millard v. Willard*, 3 R. I. 42.

60. *Newcomb & Co. v. Weber*, 13 Ohio Dec. 386, 1 Cin. Sup. Ct. 12. See also *Buck v. Meserve*, 16 N. H. 422.

61. *Blood v. Austin*, 3 Pick. (Mass.) 259.

62. *N. H*.—*Buck v. Meserve*, 16 N. H. 422. *N. C*.—*Bunting v. McIlhenny*, 61 N. C. 579; *Faucet v. Adams*, 35 N. C. 235; *Veal v. Flake*, 32 N. C. 417. *S. C*.—*Robinson v. Simpson*, 3 Strobb. 161; *Love v. Lowry*, 1 McCord 181.

[a] *Right To Sue Wholly Statutory*. *Bunting v. McIlhenny*, 61 N. C. 579.

63. *Bunting v. McIlhenny*, 61 N. C. 579; *Irving v. Robertson*, 6 Rich. L. (S. C.) 228, an allegation by the jailer that the debtor had "no visible means" held not sufficient under a statute providing for such an action when a debtor "has no lands, tenements, goods, chattels, or choses in action, whereby his maintenance in jail can be defrayed."

[a] *Jailer may sue in own name* where by virtue of his arrangement with the sheriff he is entitled to the fees. *Love v. Lowry*, 1 McCord (S. C.) 181.

[b] *Action by Sheriff as Jailer's Principal*.—Under statutes rendering the creditor liable to reimburse the jailer for such charges, an action on that liability cannot be maintained by the sheriff as the jailer's principal. *Bunting v. McIlhenny*, 61 N. C. 579.

[c] *Escape defeats the right of ac-*

the statute; if the necessary matter be set forth in substance and effect, this is sufficient.<sup>64</sup>

A notice must, under some statutes, be given the creditor by the jailer before the latter may proceed in a civil action to recover such fees.<sup>65</sup> Where a town in which a destitute debtor is committed pays the jailer for his keep, such town may recover therefor in assumpsit from the town of the debtor's legal domicile,<sup>66</sup> and the latter may recover from the creditor.<sup>67</sup> A creditor may also recover in assumpsit from a debtor whom he has been compelled to maintain in custody.<sup>68</sup>

**14. Proceedings To Quash, Vacate or Set Aside Writ.**—a. *When May Be Taken.*—An execution against the person which is void will be set aside on proper application,<sup>69</sup> as will also one which was improperly issued.<sup>70</sup> Thus where the conditions precedent have not been complied with<sup>71</sup> or where the debtor was arrested in a manner unlawful,<sup>72</sup> or where the writ was not issued and delivered to the sheriff within the time prescribed by law,<sup>73</sup> unless under the circumstances, the delay is not chargeable to the creditor's neglect,<sup>74</sup> the writ will,

tion. *Saxon v. Boyce*, 1 Bailey (S. C.) 66.

64. *Irving v. Robertson*, 6 Rich. L. (S. C.) 228.

65. *Furth v. Delcath*, 2 Speers (S. C.) 400.

66. *Solon v. Perry*, 54 Me. 493; *Norridgewock v. Solon*, 49 Me. 385.

67. *Solon v. Perry*, 54 Me. 493.

68. *Spring v. Davis*, 36 Me. 399; *Plummer v. Sherman*, 29 Me. 555.

69. *Perry v. Kent*, 88 Hun 407, 34 N. Y. Supp. 843; *Hickman v. Larkey*, 6 Gratt. (47 Va.) 210.

[a] **Another Remedy.**—(1) It is better practice, where a writ of execution against the person has been issued, upon a ground wholly unauthorized by law (*People v. Gill*, 85 App. Div. 192, 83 N. Y. Supp. 135), (2) or where a writ has been issued by a court without jurisdiction (*Huntington v. Metzger*, 158 Ill. 272, 41 N. E. 881), (3) to move to set aside or quash the writ, than to move for a discharge. *Huntington v. Metzger*, *supra*; *People v. Gill*, *supra*.

70. Ill.—*Marshall Field & Co. v. Freed*, 191 Ill. App. 619. N. J.—*Bowne v. Titus*, 30 N. J. L. 340. N. Y.—*Smith v. Knapp*, 30 N. Y. 581, 589; *Bridgewater Paint Co. v. Messmore*, 15 How. Pr. 12. Can.—*Robinson v. Provincial Ex. Commission*, 32 Nova Scotia 216.

[a] **Where the cause of action** (1) is not one upon which arrest may be had (*Smith v. Knapp*, 30 N. Y. 581; *Bridgewater Paint Co. v. Messmore*, 15 How. Pr. [N. Y.] 12), (2) or is joined

with one upon which such writ will not issue. *Sherwood v. Pierce*, 18 Jones & S. (N. Y.) 378.

[b] **Where execution is issued against one only** of several joint debtors. *Farmers'* etc. *Bank v. Crane*, 15 Abb. Pr. N. S. (N. Y.) 434.

71. *Huntington v. Metzger*, 158 Ill. 272, 41 N. E. 881 (*reversing* 51 Ill. App. 222); *Noe v. Christie*, 15 Abb. Pr. N. S. (N. Y.) 346; *Sweet v. Norris*, 45 Hun (N. Y.) 595, *affirmed*, 110 N. Y. 668, 18 N. E. 481. See *supra*, II, C, 2.

72. *State v. Hooker*, 17 Vt. 658; *Stanley v. McClure*, 17 Vt. 253. See also *Bowne v. Titus*, 30 N. J. L. 340.

73. *Segelke v. Finan*, 22 Abb. N. C. (N. Y.) 458; *People v. Gill*, 85 App. Div. 192, 83 N. Y. Supp. 135; *Perry v. Kent*, 88 Hun 407, 34 N. Y. Supp. 843, (*affirmed*, 157 N. Y. 710, 53 N. E. 1130); *Levison v. Harris*, 134 N. Y. Supp. 12; *Gove v. Stewart*, 17 N. Y. Supp. 183 (lapse of twenty-six days after execution against the property); *Rodney v. Hoskins*, 2 Miles (Pa.) 465. See *Kelly v. Brownlow*, 22 Jones & S. (N. Y.) 129; *Longuemare v. Nichols*, 7 N. Y. Supp. 672, 27 N. Y. St. 266.

74. *Segelke v. Finan*, 22 Abb. N. C. (N. Y.) 458; *Lampman v. Smith*, 17 N. Y. Civ. Proc. 19, 7 N. Y. Supp. 922; *People ex rel. Crane v. Grant*, 13 N. Y. Civ. Proc. 209; *Ryan v. Crane*, 12 N. Y. Civ. Proc. 431; *Kelly v. Brownlow*, 22 Jones & S. (N. Y.) 129; *De Silver v. Holden*, 22 Jones & S. (N. Y.) 1; *Gove*

on a proper application, be set aside. Likewise a *capias ad satisfaciendum* will be quashed where the sheriff has in his possession property of the debtor taken under *feri facias*,<sup>75</sup> or the debtor is under arrest under a previous writ.<sup>76</sup> Application may be made to set aside an execution on the ground that it is not warranted by the facts.<sup>77</sup>

b. *When Improper*.—Mere irregularities will seldom induce the court to set aside an execution against the person which is otherwise proper.<sup>78</sup> Thus, proceedings cannot be maintained to vacate an execution granted on a judgment irregularly entered,<sup>79</sup> or on grounds which go to right to recover a judgment.<sup>80</sup>

c. *Necessity of Actual Custody*.—While in some jurisdictions it is not necessary that the debtor be in actual custody before he may make application to have an execution against his person set aside,<sup>81</sup> in others a contrary rule prevails.<sup>82</sup>

d. *How Taken*.—A motion to set aside an execution, issued against the person of a judgment debtor, is a proper remedy<sup>83</sup> in most

*v. Stewart*, 17 N. Y. Supp. 183; *Hobbs v. Bashford*, 10 N. Y. St. 389.

[a] **Pendency of proceedings supplemental to execution no excuse for delay.** *Newgas v. Solomon*, 20 Abb. N. C. (N. Y.) 175. See to the same point, *Kelly v. Brownlow*, 22 Jones & S. (N. Y.) 129.

[b] **Absence of creditor's attorney will not excuse delay.** *Kelly v. Brownlow*, 22 Jones & S. (N. Y.) 129.

[c] **Lack of knowledge that execution against the property had been returned, where the creditor moved promptly upon ascertaining the fact, has been considered a reasonable excuse.** *Ryan v. Crane*, 12 N. Y. Civ. Proc. 431.

75. *Wheeler v. Bouchelle's Admr.*, 27 N. C. 584.

[a] **Where Other Process Has Been Levied.**—*Baldwin v. Wright*, 3 Gill (Md.) 241.

76. *Noe v. Christie*, 15 Abb. Pr. N. S. (N. Y.) 346.

77. *Humphrey v. Brown*, 17 How. Pr. (N. Y.) 481; *Bridgewater Paint Co. v. Messmore*, 15 How. Pr. (N. Y.) 12.

78. **Md.**—*Docura v. Henry*, 4 Har. & M. 480, irregular teste. **N. J.**—*Ferguson v. State*, 31 N. J. L. 289, irregular indorsement of writ. **N. Y.**—*Whiting v. Putnam*, 16 Abb. Pr. 382. **N. C.**—See *Wheeler v. Bouchelle's Admr.*, 27 N. C. 584. **Va.**—*Purcell v. Richardson*, 4 Hen. & M. (14 Va.) 404, irregularity in service of writ.

[a] **Where there is nothing on the record to show that an execution is ir-**

regular it will not be set aside. *Haris v. Sheldon* (Pa.), 16 Atl. 828.

[b] **Although it does not appear on the face of an execution, issued against the person, that it was issued in an action wherein the party is liable to imprisonment, yet, if, by a reference to the judgment, it appears that the execution is regular, the writ will not be vacated or set aside on that ground.** *Fullerton v. Fitzgerald*, 18 Barb. (N. Y.) 441.

79. *Crosby v. Root*, 19 Misc. 359, 43 N. Y. Supp. 512; *Roeber v. Dawson*, 3 N. Y. Supp. 122.

[a] **The proper remedy in such case is a direct attack on the judgment itself.** *Crosby v. Root*, 19 Misc. 359, 43 N. Y. Supp. 512; *Roeber v. Dawson*, 3 N. Y. Supp. 122.

80. *Galena, etc., R. R. Co. v. Ennor*, 9 Ill. App. 159.

81. *De Silver v. Holden*, 22 Jones & S. (N. Y.) 1.

82. *Bryan v. Brooks*, 51 N. C. 580. See also *Dobbin v. Gaster*, 26 N. C. 71; *Stout v. Quinn*, 9 Pa. Super. 179.

83. **Md.**—See *Guthers v. Langton*, 3 Har. & M. 185. **N. Y.**—*Chapin v. Foster*, 101 N. Y. 1, 3 N. E. 786; *Neftel v. Lightstone*, 77 N. Y. 96; *Smith v. Knapp*, 30 N. Y. 581, 589; *Perry v. Kent*, 88 Hun 407, 38 N. Y. Supp. 407, (*affirmed*), 157 N. Y. 710, 53 N. E. 1130; *Walker v. Isaacs*, 36 Hun 233; *Levison v. Harris*, 134 N. Y. Supp. 12. **Pa.**—See *Rodney v. Hoskins*, 2 Miles 465. **Vt.**—*Stanley v. McClure*, 17 Vt. 253, motion or *audita querela*.

jurisdictions, especially when an execution is defective in form.<sup>84</sup>

e. *Jurisdiction*.—The motion should be addressed to the court which issued the writ.<sup>85</sup>

f. *Who May Apply for*.—The judgment debtors' bail may, where their liability as bondsmen is dependent upon the sufficiency of the writ, apply for the quashal thereof.<sup>86</sup>

g. *Time for*.—The motion may be made after the execution has been served and the defendant taken into custody,<sup>87</sup> but not after bail given and release thereon.<sup>88</sup> Thus, after a bond has been given to take the benefit of an insolvent debtor's act it is too late to seek to have set aside the execution.<sup>89</sup>

h. *Contents of Notice of Motion or Order To Show Cause*.—The notice of motion<sup>90</sup> or the order to show cause, when the case comes before the court on such an order,<sup>91</sup> should point out the irregularity, in the execution, upon which it is based.

i. *Determination*.—Collateral matters, such as the validity of the debtor's previous discharge as an insolvent,<sup>92</sup> may not be tried on the hearing of a motion to set aside the writ, though where the facts give rise to a presumption that the debtor's discharge was fraudulent, the court may direct an issue thereupon to be tried by a jury, staying further proceedings on the motion meanwhile.<sup>93</sup> The writ should be quashed where the nature of the action as presented by the pleadings make it doubtful whether the case is a proper one for arrest.<sup>94</sup> In some states a motion to quash a *capias ad satisfaciendum*

84. People *ex rel.* Utley v. Seaton, 25 Hun (N. Y.) 305, holding that a petition for a discharge on habeas corpus not proper in such a case.

85. Allen v. Roughan, 175 Ill. App. 395.

[a] In Illinois the county court has no jurisdiction to determine whether or not a *capias* was properly issued by the municipal court. "The proper place and manner of testing that question was in the municipal court upon a motion to quash." Allen v. Roughan, 175 Ill. App. 395.

86. Boggs v. Chichester, 13 N. J. L. 209, where the court say that in such a case the bail "have an interest in the proceeding. For it is in the nature of notice and they have a right to object to the irregularity in it."

87. Pinckney v. Hegeman, 53 N. Y. 31.

88. Crowell v. Brown, 17 How. Pr. (N. Y.) 68, refusing to follow dictum in Bridgewater Paint Mfg. Co. v. Messmore, 15 How. Pr. (N. Y.) 12, to the contrary. See also Stout v. Quinn, 9 Pa. Super. 179.

89. Kohm v. Neger, 16 N. J. L. J.

241; Jersey City Milling Co. v. Kettner, 21 N. J. L. J. 376.

[a] The reason for such a rule is that by the giving of the bond to apply for relief as an insolvent the debtor is considered to have waived all defects and irregularities of the proceedings by which he was taken into custody. Jersey City Milling Co. v. Kettner, 21 N. J. L. J. 376. As to waiver of irregularities in the writ generally, see *supra*, II, C, 9, i.

90. Montrait v. Hutchins, 49 How. Pr. (N. Y.) 105.

91. Montrait v. Hutchins, 49 How. Pr. (N. Y.) 105; Gove v. Stewart, 17 N. Y. Supp. 183.

[a] Waiver of objection on this score by resisting the proceedings, see Gove v. Stewart, 17 N. Y. Supp. 183.

92. Russell v. Packard, 9 Wend. (N. Y.) 431; Noble v. Johnson, 9 Johns. (N. Y.) 259; Stuart v. Salhinger, 14 Abb. Pr. (N. Y.) 291.

93. Stuart v. Salhinger, 14 Abb. Pr. (N. Y.) 291.

94. Neftel v. Lightstone, 77 N. Y. 96.

[a] It is competent in such a case

will not be heard if the defendant is not present in court.<sup>95</sup>

j. *Imposition of Terms.* — Where relief is discretionary<sup>96</sup> terms may be imposed upon granting it.<sup>97</sup> Accordingly, requirements that the defendant stipulate not to sue for the arrest,<sup>98</sup> or for any imprisonment on or by virtue of such an execution,<sup>99</sup> have been held a proper exercise of the power of the court.<sup>1</sup>

k. *Effect of Order.* — Upon the quashal of the writ the sheriff may release the debtor without further order or proceedings,<sup>2</sup> and all liability on the bond of the debtor ceases.<sup>3</sup> When the writ is discharged in this manner it is forever dead and cannot be revived,<sup>4</sup> or a new arrest made thereon.<sup>5</sup> But the judgment or order rendered on a motion to quash a writ of execution against the person is conclusive only as to what is necessarily and directly decided therein.<sup>6</sup>

15. *Release or Discharge.* — a. *General Statement.*<sup>7</sup> — The statutes usually provide for the discharge of a person arrested upon a body execution, upon a showing, in a proper manner, of grounds<sup>8</sup> there-

to show, upon a motion to set aside or quash the writ, upon what theory the case was tried and decided. *Neftel v. Lightstone*, 77 N. Y. 96.

95. *Guthers v. Langton*, 3 Har. & M. (Md.) 185.

96. *Chapin v. Foster*, 101 N. Y. 1, 3 N. E. 786, but not where relief is a matter of right. But see *Bearns v. Perchard*, 1 Morris Newf. Rep. (1854-64) 254.

97. *Walker v. Isaacs*, 36 Hun (N. Y.) 233; *Bearns v. Perchard*, 1 Morris Newf. Rep. (1854-64) 254.

98. *Walker v. Isaacs*, 36 Hun (N. Y.) 233.

[a] An amendment to the order cannot be made for the purpose of imposing terms after an action for the unlawful arrest has been started. *Catlin v. Adirondack Co.*, 22 Hun (N. Y.) 493.

99. *Walker v. Isaacs*, 36 Hun (N. Y.) 233; *Sherwood v. Pierce*, 18 Jones & S. (N. Y.) 378. See *People ex rel. Brack v. Reilly*, 58 How. Pr. (N. Y.) 218.

[a] Laches or misleading acts of the defendant were held to justify the imposition of a condition that the defendant should not prosecute for a false imprisonment. *Sherwood v. Pierce*, 18 Jones & S. (N. Y.) 378.

1. *Walker v. Isaacs*, 36 Hun (N. Y.) 233; *Sherwood v. Pierce*, 18 Jones & S. (N. Y.) 378.

2. *Pinckney v. Hegeman*, 53 N. Y. 31; *Perry v. Kent*, 88 Hun 407, 38 N. Y. Supp. 843, *affirmed* in 157 N. Y. 710, 53 N. E. 1130.

[a] A formal discharge by the sheriff is unnecessary. *Warne v. Constand*, 4 Johns. (N. Y.) 32.

3. *Mason v. Benson*, 9 Watts (Pa.) 287.

4. *Carrigan v. Washburn*, 9 N. Y. Supp. 541.

5. *Carrigan v. Washburn*, 9 N. Y. Supp. 541.

As to issuing an alias writ, see *supra*, II, C, 10.

As to rearrest, see *infra*, II, C, 16.

6. *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024; *Sawyer v. Nelson*, 44 Ill. App. 184.

7. As to discharge upon quashal or vacation of the writ, see *supra*, II, C, 14.

8. See generally the statutes.

[a] Where the plaintiff neglects to issue execution (1) against the person of the defendant within ten days after the return of the execution against the property, the defendant must, under the statute, upon his application, be discharged from custody or imprisonment. *Perry v. Kent*, 88 Hun 407, 134 N. Y. Supp. 843, *affirmed* in 157 N. Y. 710, 53 N. E. 1130. (2) This statute, however, only relates to cases in which an order of arrest has been previously issued. *People v. Gill*, 85 App. Div. 192, 83 N. Y. Supp. 135.

[b] "At the common law, the judgment creditor might seize the body of his debtor, under execution, and hold him until the debt was paid, and the debtor had no means of releasing his

for. In such proceedings the statutes must be closely followed.<sup>9</sup> Thus, the application may only be made to a magistrate authorized to hear the same or grant relief thereon.<sup>10</sup>

b. *On Consent of Creditor.* — (I.) *In General.* — Under the common law, a debtor may, at any time, be discharged from imprisonment under an execution against his person with the consent of the execution plaintiff.<sup>11</sup> And, by statute, after the required period of imprisonment,<sup>12</sup> the judgment creditor may require the officer to discharge the debtor from custody.<sup>13</sup>

(II.) *How Requested.* — The request of the judgment creditor for the discharge of the debtor may be made, under some statutes, by a written notice served upon the officer who has the debtor in custody.<sup>14</sup> In other states the consent of the creditor may be given by parol.<sup>15</sup>

(III.) *By Agent or Attorney.* — In the absence of statutory provision to the contrary, the powers of the plaintiff's attorney, strictly as such, do not include authority to order the defendant's discharge from custody unless the money called for in the judgment has actually been paid,<sup>16</sup> or unless the party whom he represents consent thereto.<sup>17</sup> The authority of a person acting in this matter as a special agent of the plaintiff, must be clear,<sup>18</sup> and must be strictly followed.<sup>19</sup>

(IV.) *Effect.* — At common law, the voluntary release with the con-

body except he paid the debt." *Strode v. Broadwell*, 36 Ill. 419.

9. **Ky.**—*Sowle Mfg. Co. v. Bernard*, 100 Ky. 658, 39 S. W. 239. **Mass.**—See *Com. v. Whitney*, 10 Pick. 434. **N. Y.** *Bullymore v. Cooper*, 46 N. Y. 236. See also *People ex rel. Harris v. Gill*, 83 N. Y. Supp. 135.

10. **Ill.**—*Allen v. Roughan*, 175 Ill. App. 395. **Ky.**—*Sowle Mfg. Co. v. Bernard*, 100 Ky. 658, 39 S. W. 239; *McGovern v. Maloney*, 30 Ky. L. Rep. 801, 99 S. W. 935. **Can.**—*Pelopolous v. Williams Co.*, 38 N. Bruns. 146.

11. **Conn.**—See *Seymour v. Harvey*, 11 Conn. 275. **Mass.**—*Nowell v. Waitt*, 121 Mass. 554. **N. Y.**—*Simonton v. Barrell*, 21 Wend. 362; *Poucher v. Holley*, 3 Wend. 184; *Green v. Young*, 21 N. Y. Supp. 255. **Va.**—*Carthrae v. Clarke*, 5 Leigh (32 Va.) 268.

12. *Hoyle v. Murray*, 42 App. Div. 313, 59 N. Y. Supp. 200; *Green v. Young*, 21 N. Y. Supp. 255. See *Ex parte Bergman*, 18 Nev. 331, 4 Pac. 209.

13. *Ex parte Bergman*, 18 Nev. 331, 4 Pac. 209; *Hoyle v. Murray*, 42 App. Div. 313, 59 N. Y. Supp. 200; *Green v. Young*, 21 N. Y. Supp. 255.

14. **Conn.**—See *Seymour v. Harvey*, 11 Conn. 275. **Nev.**—See *Ex parte Bergman*, 18 Nev. 331, 4 Pac. 209. **N. Y.**

*Hoyle v. Murray*, 42 App. Div. 313, 59 N. Y. Supp. 200.

[a] *Consent to a temporary discharge* where the debtor is dangerously ill, and on condition that the jailer be responsible for his return, is not a license to depart from the prison. *Seymour v. Harvey*, 11 Conn. 275.

15. *Spader v. Frost*, 4 Blackf. (Ind.) 190; *Bridge v. McLane*, 2 Mass. 520.

16. **Ind.**—*Neff v. Powell*, 6 Blackf. 420. **Me.**—*Jewett v. Wadleigh*, 32 Me. 110. **N. Y.**—*Vidrard v. Fradneburg*, 53 How. Pr. 339; *Simonton v. Barrell*, 21 Wend. 362; *Kellogg v. Gilbert*, 10 Johns. 220, 6 Am. Dec. 335; *Jackson v. Bartlett*, 8 Johns. 274; *Lovell v. Orser*, 1 Bosw. 349; *Eads v. Wynne*, 29 N. Y. Supp. 983. **Can.**—*Whittier v. Hands*, 19 U. C. Q. B. 170.

[a] *The most that he may do is to receive the money recovered by a ca. sa. and then acknowledge satisfaction.* *Jackson ex dem. McCrea v. Bartlett*, 8 Johns. (N. Y.) 361; *Payne v. Chute*, 1 Rolle 365, 81 Eng. Reprint 538.

17. *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335.

18. *Crary v. Turner*, 6 Johns. (N. Y.) 51.

19. *Crary v. Turner*, 6 Johns. (N. Y.) 51.

sent of the creditor of a judgment debtor charged in execution operates as a satisfaction of the judgment, on whatever terms made.<sup>20</sup> Accordingly, after such a voluntary release from custody, the right to imprisonment is gone, and the debtor cannot again be taken in execution for the same debt.<sup>21</sup> The same rule obtains by express provision of statute in some states.<sup>22</sup>

A discharge of one of several defendants, on the consent of the judgment creditor, discharges all of the defendants and absolves them from liability to arrest on the same judgment.<sup>23</sup> So where a party elects to sue the wrongdoers in a joint trespass separately, and recovers a judgment in both actions, the issuance of an execution upon one of the judgments against a defendant, who is imprisoned thereon,

20. **U. S.**—*Magniac v. Thomson*, 15 How. 281, 14 L. ed. 696; *United States v. Watkins*, 4 Cranch C. C. 271, 28 Fed. Cas. No. 16,650; *United States v. Smith*, 3 Cranch C. C. 66, 27 Fed. Cas. No. 16,327; *Slocum v. Hathaway*, 1 Paine 290, 22 Fed. Cas. No. 12,952. **Conn.** *Terrell v. Smith*, 8 Conn. 426; *Loomis v. Storrs*, 4 Conn. 440. See *Seymour v. Harvey*, 11 Conn. 275. **Ind.**—*Wakeman v. Jones*, 1 Ind. 517; *Prentiss v. Hinton*, 6 Blackf. 35. **Mass.**—*Norvell v. Waitt*, 121 Mass. 554; *Kennedy v. Dunclee*, 1 Gray 65. See *Appleby v. Clark*, 10 Mass. 59. **N. J.**—*Allen v. Craig*, 14 N. J. L. 102. **N. Y.**—*Simon-ton v. Barrell*, 21 Wend. 362; *Poucher v. Holley*, 3 Wend. 184; *Ransour v. Keyes*, 9 Cow. 128; *Lathrop v. Briggs*, 8 Cow. 171; *Powers v. Wilson*, 7 Cow. 274; *Yates v. Van Rensselaer*, 5 Johns. 364; *Bonesteel v. Garlinghouse*, 60 Barb. 338; *Savage v. Sully*, 153 N. Y. Supp. 532; *Green v. Young*, 21 N. Y. Supp. 255. **Pa.**—*Bamford v. Keefer*, 68 Pa. 389. **Vt.**—*Foster v. Collamer*, 10 Vt. 466; *Enos v. Fenno*, Brayt. 36. **Va.** *Carthrae v. Clarke*, 5 Leigh (32 Va.) 268; *Windrum v. Parker*, 2 Leigh (29 Va.) 361. **Eng.**—*Clarke v. Clement*, 6 Term Rep. 525, 101 Eng. Reprint 683; *Jaques v. Withy*, 1 Term Rep. 557, 99 Eng. Reprint 1249; *Walker v. Alder*, Style 117, 82 Eng. Reprint 575, Trin. 24 Car. B. R. 1671. **Can.**—*Robinson v. Provincial Ex. Commission*, 32 Nova Scotia 216.

[a] See also *Abat v. Whitman*, 7 Mart. N. S. (La.) 162, recognizing that such was rule at common law, but denying its application in Louisiana, since no such consequence followed the discharge of a debtor from imprisonment by the laws in force antecedent to the

change of government and no statute had repealed in express terms the previously existing law.

As to relief on motion on this ground, see *infra*, II, C, 15, g.

[b] "The reason for the rule was that in the eye of the law the arrest of the judgment debtor was deemed to be a satisfaction of the judgment, so that there no longer remained any judgment upon which an execution could issue." *Savage v. Sully*, 153 N. Y. Supp. 532.

[c] Although it was not the intention of the plaintiff to discharge the debt, a voluntary discharge by a creditor of his debtor from the limits of the jail discharges the judgment and the debt. *Poucher v. Holley*, 3 Wend. (N. Y.) 184.

[d] As to Guarantors.—A distinction should be observed between this technical satisfaction of the debt and payment or actual satisfaction thereof. The former operates between the creditor and debtor only and is not a bar to an action against guarantors of the debt as would be a payment or actual satisfaction thereof. *Terrell v. Smith*, 8 Conn. 426.

21. *Vidrad v. Fradneburg*, 53 How. Pr. (N. Y.) 339; *Poucher v. Holley*, 3 Wend. (N. Y.) 184; *Yates v. Van Rensselaer*, 5 Johns. (N. Y.) 364; *Blackburn v. Stupart*, 2 East 243, 102 Eng. Reprint 362. See also *Hooker v. Daniels*, Brayt. (Vt.) 32.

22. See generally the statutes, and *Ex parte Bergman*, 18 Nev. 331, 4 Pac. 209.

23. **U. S.**—*Slocum v. Hathaway*, 1 Paine 290, 22 Fed. Cas. No. 12,952. **Mass.**—*Putnam v. Needham*, 2 Dane Abr. 650. **N. J.**—*Allen v. Craig*, 14 N.

and the subsequent discharge therefrom, operates not only to discharge the judgment upon which such defendant was charged in execution, but also the judgment against the other joint trespasser.<sup>24</sup>

c. *On Payment or Satisfaction.*—(I.) *General Statement.*—It is the right of a debtor in custody under an execution against his person to be discharged upon payment of the judgment and fees,<sup>25</sup> or the portion thereof which has not been satisfied by the term of his imprisonment.<sup>26</sup>

(II.) *Manner of Making Payment.*<sup>27</sup>—An officer can receive nothing in satisfaction of a *capias ad satisfaciendum* but money, or its equivalent.<sup>28</sup> Receiving a promissory note,<sup>29</sup> or a draft,<sup>30</sup> is not a payment sufficient to justify the officer in discharging the defendant,

J. L. 102. **N. Y.**—Vidrard *v.* Fradneburg, 53 How. Pr. 339; Kasson *v.* People, 44 Barb. 347; Ransom *v.* Keyes, 9 Cow. 128. **Vt.**—Bailey *v.* Kimbal, 1 D. Chip. 151.

[a] See also Abat *v.* Whitman, 7 Mart. N. S. (La.) 162, recognizing common-law rule, but denying its application in Louisiana.

[b] Where judgment was for costs only as to one of several joint debtors, the release of such debtor upon payment of the costs will not operate to entitle the other defendants to their release, such other defendants being in custody not for the costs but for the debt. McLean *v.* Whiting, 8 Johns. (N. Y.) 339.

[c] Such consent must be given before the discharge; a consent given after escape will not operate to discharge the obligors on the defendant's jail limits bond. Slocum *v.* Hathaway, 1 Paine 290, 22 Fed. Cas. No. 12,952. See also Kelly *v.* Thompson, 35 N. Bruns. (Can.) 718.

[d] *Stipulation Not To Sue a Condition.*—The court may require those debtors remaining after discharge of one to stipulate, as a condition to their discharge, that they will not bring an action on account of their arrest and imprisonment. Allen *v.* Craig, 14 N. J. L. 102.

24. Kasson *v.* People, 44 Barb. (N. Y.) 347.

[a] *Reason.*—The plaintiff in the judgments is entitled to but one satisfaction for the injury he has sustained by the trespass committed by the defendants in the two judgments; and that he has, by imprisonment of one of them, and his discharge therefrom.

Kasson *v.* People, 44 Barb. (N. Y.) 347.

25. **U. S.**—*In re Cavan*, 5 Fed. Cas. No. 2,528. **Ky.**—Prather *v.* Beeler, 3 Bibb 375; Field *v.* Slaughter, 1 Bibb 160. **Me.**—See Wilson *v.* Russ, 20 Me. 421. **N. H.**—Rogers *v.* McDermid, 7 N. H. 506. **N. J.**—Smith *v.* Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33. **Va.** Com. *v.* Webster, 8 Gratt. (49 Va.) 702.

[a] Such a discharge is one "by due course of law," within the meaning of a bond conditioned to keep the jail limits until thus discharged. Smith *v.* Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33.

26. Hanchett *v.* Weber, 17 Ill. App. 114.

Effect of imprisonment as discharge or partial discharge, see *supra*, II, C, 11, c.

27. As to manner of making payment generally, see the title "Judgments, Satisfaction of."

28. Mumford *v.* Armstrong, 4 Cow. (N. Y.) 553; Codwise *v.* Field, 9 Johns. (N. Y.) 263.

As to discharge by tendering or surrendering property, see *infra*, II, C, 15, l.

[a] An agreement between the sheriff and the defendant that the sheriff will pay the judgment debt in consideration of a debt due from the sheriff to the defendant in the judgment is not an absolute payment or satisfaction in money, constituting a discharge. Codwise *v.* Field, 9 Johns. (N. Y.) 263.

29. Townsend *v.* Olin, 5 Wend. (N. Y.) 207; Armstrong *v.* Garrow, 6 Cow. (N. Y.) 465.

30. Mumford *v.* Armstrong, 4 Cow. (N. Y.) 553.

unless the plaintiff ratifies such act of the officer.<sup>31</sup> Statutes sometimes alter this rule,<sup>32</sup> and it does not apply where the terms of the writ authorize payment of the judgment in some other manner.<sup>37</sup>

(III.) **The Effect.** — When thus discharged the judgment is satisfied and the debtor may not be re-arrested thereon.<sup>34</sup>

d. *For Failure of Creditor To Pay Jail Fees.* — (I.) **General Statement.** The statutes commonly provide that the failure or refusal of a creditor to pay the jail fees of his insolvent debtor shall constitute sufficient grounds for the discharge of such debtor.<sup>35</sup> Where security for the expense of supporting the debtor may be demanded<sup>36</sup> the refusal to give it within the required time, justifies the discharge of the debtor from arrest.<sup>37</sup> And even after giving security, if the creditor fail to pay, upon demand, the debtor may be released.<sup>38</sup> The jailer may, however, hold the debtor in custody in spite of the non-payment of such fees and expenses.<sup>39</sup>

(II.) **Notice.** — By statute<sup>40</sup> and in some states, even in the absence of statute, the creditor<sup>41</sup> or his attorney,<sup>42</sup> should be notified before the discharge of the debtor for failure to pay jail fees,<sup>43</sup> though notice is not required in some jurisdictions before discharging the debtor.<sup>44</sup>

31. *Townsend v. Olin*, 5 Wend. (N. Y.) 207.

32. *Bates v. Butler*, 46 Me. 387.

33. *McCauley v. Kelly*, 2 W. N. C. (Pa.) 30.

34. *Rogers v. McDearmid*, 7 N. H. 506.

35. **Ga.**—*State v. Simpson*, R. M. Charl. 122. **Mass.**—*Phillips v. Gray*, 1 Allen 492; *Blood v. Austin*, 3 Pick. 259. **N. H.**—*Buck v. Meserve*, 16 N. H. 422. **N. Y.**—*People ex rel. Riedman v. McCue*, 18 Hun 53. **Ohio.** *Gill v. Miner*, 13 Ohio St. 182. **R. I.** *Casey v. Viall*, 17 R. I. 348, 21 Atl. 911. **S. C.**—*Furth v. Deloach*, 2 Speers 400.

[a] In Rhode Island the jailer is required upon discharging a debtor in such a case to state "in his formal discharge on the jail-book the reason therefor." *Casey v. Viall*, 17 R. I. 348, 21 Atl. 911.

[b] Where the debtor is at liberty under a prison limits bond the court will not order his discharge on this ground. *Ex parte Wilson*, 2 Cranch C. C. 7, 30 Fed. Cas. No. 17,779.

36. See *supra*, II, C, 13.

37. *Blood v. Austin*, 3 Pick. (Mass.) 259. See *Webb v. Elligood*, Jeff. (Va.) 59.

38. *Field v. Slaughter*, 1 Bibb (Ky.) 160.

39. *Ex parte Lamson*, 50 Cal. 306.

40. *Stroheim v. Deimel*, 77 Fed. 802,

23 C. C. A. 467 (involving Ill. Rev. St., 1916, ch. 72, §30); *McPheters v. Morrill*, 66 Me. 123.

41. *Lucky v. Brandon*, 1 Ohio 49.

42. *Lucky v. Brandon*, 1 Ohio 49.

43. *Lucky v. Brandon*, 1 Ohio 49. See also *Kirkup v. Stickney*, 5 Ohio Dec. (Reprint) 499. *Contra*, *Newcomb & Co. v. Weber*, 13 Ohio Dec. 386, 1 Cin. Sup. Ct. 12.

[a] The reason for this requirement is that "a creditor cannot be said to neglect or refuse to support the prisoner, when he has no knowledge that such support is required of him." *Lucky v. Brandon*, 1 Ohio 49.

[b] When the residence of both the creditor and his attorney or other agent is unknown and cannot be ascertained, the notice may be dispensed with. *Lucky v. Brandon*, 1 Ohio 49.

[c] Notice should be given in a reasonable manner, so as to produce effect. *Lucky v. Brandon*, 1 Ohio 49.

44. *Mason, Dickinson & Co. v. Carhart, Bro. & Co.*, 30 Ga. 917. See *Buck v. Meserve*, 16 N. H. 422.

[a] In Georgia no notice is required, except where the debtor has been surrendered by bail, "then he cannot be discharged for failure to secure jail fees without ten days' notice to the plaintiff." *Mason, Dickinson & Co. v. Carhart, Bro. & Co.*, 30 Ga. 917. To the same effect see *Field v. Putman*, 22

(III.) **Order.**—In some jurisdictions no order of court for the discharge is necessary;<sup>45</sup> in others an application to the court and an order for discharge is essential.<sup>46</sup>

(IV.) **Effect.**—A discharge on this ground does not operate as a satisfaction of the judgment.<sup>47</sup>

e. *On Certificate of Falsity of Affidavit.*—Some statutes provide that the arrested debtor may cause himself to be brought before the court or magistrate to have the truth or falsity of the facts set forth in the plaintiff's affidavit determined, and upon a certificate of their falsity he must be discharged from custody.<sup>48</sup>

f. *On Habeas Corpus.*<sup>49</sup>—(I.) **When Proper.**—The writ of habeas corpus will, in a proper case, afford the debtor relief from imprisonment under civil process,<sup>50</sup> but in accordance with the general rule habeas corpus will not lie when some direct method of redress as writ of error or appeal is available to the debtor,<sup>51</sup> or where he may

Ga. 93; McKenzie, etc. Co. v. Hargrove & Co., 22 Ga. 119.

45. Ky.—Field v. Slaughter, 1 Bibb 160. Mass.—Blood v. Austin, 3 Pick. 259. Ohio.—Gill v. Miner, 13 Ohio St. 182; Kirkup v. Stickney, 5 Ohio Dec. (Reprint) 499.

[a] "At once on failure of the party, at whose instance he is confined, to make the payment required, the debtor is entitled to his liberty," and it would frustrate the intentions of the law to require an order from a court or judge before he can obtain his freedom. People *ex rel.* Riedman v. McCue, 18 Hun (N. Y.) 53.

46. State v. Stiles, 12 N. J. L. 296, application need not be in writing.

[a] **No notice** of the application need be given. State v. Stiles, 12 N. J. L. 296.

47. Lambert v. Wiltshire, 144 Ill. 517, 33 N. E. 538; Strode v. Broadwell, 36 Ill. 419; Marshall Field & Co. v. Freed, 191 Ill. App. 619; Tatem v. Potts, 5 Blackf. (Ind.) 534. But see Strawnsine v. Salisbury, 75 Mich. 542, 42 N. W. 966.

48. *In re* Proctor, 27 Vt. 118; *Ex parte* Davis, 18 Vt. 401.

[a] **The debtor may waive his right** to the protection of such a statute by procuring his release upon bail. *Ex parte* Davis, 18 Vt. 401.

[b] **The debtor must give notice** to the officer when he is taken into custody, of his intention to avail himself of the statute, and must thereafter give a like notice to the creditor. *Ex parte* Davis, 18 Vt. 401.

[c] **The terms or language of the**

judge's certificate should follow the language of the affidavit and negative so much of it as would support the order for the issuance of the writ under which the debtor was taken into custody. *In re* Proctor, 27 Vt. 118.

49. See generally 10 STANDARD PROC. 908.

50. Com. v. Keeper of County Prison, 14 Phila. (Pa.) 396; Hecker v. Jarret, 3 Binn. (Pa.) 404; Com. v. Lecky, 1 Watts (Pa.) 66, 26 Am. Dec. 37.

[a] **As to necessity of actual custody**, see People *ex rel.* Robinson v. Hanchett, 111 Ill. 90, where the court says: "During the pendency of the application for a discharge . . . under the writs of habeas corpus, he (the debtor) was at large under recognizance, and he was not in the custody of the sheriff when this writ was served on him. But respondent waives these objections."

[b] **Admission to Bail.**—After an appeal from an order refusing to vacate an execution, the debtor may compel his admission to bail by habeas corpus. State *ex rel.* Syverson v. Foster, 84 Wash. 58, 146 Pac. 169, L. R. A. 1915E, 340.

51. See Fleming v. Clark, 12 Allen (Mass.) 191; Com. v. Keeper of County Prison, 14 Phila. (Pa.) 396; Com. v. Lecky, 1 Watts (Pa.) 66, 26 Am. Dec. 37.

[a] **The reason for such a rule is** that to permit the debtor to make use of this remedy under any other condition "would be to bring different tribunals into collision, and to produce endless confusion." Com. v.

have relief through an application to the court in which the cause is pending.<sup>52</sup> But where these remedies have been lost to the litigant, as, for example, by lapse of time, relief may be had through the writ of habeas corpus.<sup>53</sup> When otherwise proper, relief may be had on habeas corpus when the arrest of the defendant, although predicated upon a regular and valid judgment, is in itself invalid,<sup>54</sup> as where the writ is so defective as to be void rather than merely voidable,<sup>55</sup> or the issuance is in a case in which such a writ is not authorized by law,<sup>56</sup> or where the process is not authorized by a judgment, order or decree of the court.<sup>57</sup>

(II.) *The Petition.*—The petition must present a case in which it is proper for the court to order the debtor's discharge on habeas corpus,<sup>58</sup> in accordance with general rules elsewhere discussed.<sup>59</sup>

(III.) *The Hearing and Determination.*—A notice of the hearing on the writ should be given to the creditor at whose instance the petitioner

Keeper of County Prison, 14 Phila. (Pa.) 396; *Com. v. Lecky*, 1 Watts (Pa.) 66, 26 Am. Dec. 37.

52. *Com. v. Lecky*, 1 Watts (Pa.) 66, 26 Am. Dec. 37.

[a] "Every court is the proper tribunal to judge of the regularity or abuse of its process." *Com. v. Lecky*, 1 Watts (Pa.) 66, 26 Am. Dec. 37.

53. *Com. v. Keeper of County Prison*, 14 Phila. (Pa.) 396.

54. III.—*Eisen v. Zimmer*, 254 Ill. 43, 98 N. E. 285, Ann. Cas. 1913B, 876. Mass.—*In re Davis*, 111 Mass. 288. N. J.—*State v. Ward*, 8 N. J. L. 120. Ore.—*In re Level*, 81 Ore. 298, 159 Pac. 558. Pa.—*Johnston v. Coleman*, 8 Watts & S. 69.

[a] Where the debtor has been discharged from a former arrest on an execution against his person as an insolvent he is thereafter exempt from rearrest, see *infra*, II, C, 15, k, (V), and his remedy is by habeas corpus. *Johnston v. Coleman*, 8 Watts & S. (Pa.) 69.

[b] The question of temporary privilege (1) from arrest cannot be tried by habeas corpus (*In re Lampert*, 21 Hun [N. Y.] 154), (2) unless the statute permits it. *Gill v. Miner*, 13 Ohio St. 182. See generally the title "Privilege."

55. Nev.—*Ex parte Bergman*, 18 Nev. 331, 4 Pac. 209. N. Y.—*People ex rel. Brack v. Reilly*, 58 How. Pr. 218; *People ex rel. Utley v. Seaton*, 25 Hun 305. Pa.—*Hecker v. Jarret*, 3 Binn. 404; *Com. v. Lecky*, 1 Watts 66, 26 Am. Dec. 37.

See 10 STANDARD PROC. 942.

[a] Where the writ fails to specify the county to which the execution against the property of the debtor ran, he is entitled to discharge on habeas corpus. *People ex rel. Brack v. Reilly*, 58 How. Pr. (N. Y.) 218.

56. *People ex rel. Burroughs v. Willett*, 26 Barb. (N. Y.) 78; *In re Level*, 81 Ore. 298, 159 Pac. 588.

[a] Where the action is one in which arrest is unauthorized the debtor may be discharged on habeas corpus, though the better practice would be to move to set aside the writ. *People ex rel. Harris v. Gill*, 85 App. Div. 192, 83 N. Y. Supp. 135, holding that "while a party cannot review a judgment or decree under the guise of a writ of habeas corpus, yet where his custody is unauthorized or unlawful, it seems quite clear that he has a right to that remedy to procure his discharge."

[b] Findings and conclusions of law not authorized by the pleadings will not support an execution against the debtor's body and such an execution predicated thereupon will be relieved against on habeas corpus. *In re Level*, 81 Ore. 298, 159 Pac. 558.

[c] If new facts should arise by which the debtor is entitled to have an execution issue against his property only, he may secure his release on habeas corpus. *Wright v. Hazen*, 24 Vt. 143.

57. *People ex rel. Burroughs v. Willett*, 26 Barb. (N. Y.) 78.

58. *McKenzie, Cadow & Co. v. Hargrove & Co.*, 22 Ga. 119.

59. See 10 STANDARD PROC. 920, et seq.

is in custody.<sup>60</sup> Statutes sometimes provide that when the petitioner's claim to relief is based upon some matter in pais it shall be determined by a jury.<sup>61</sup> The regularity and propriety of the arrest may be inquired into on habeas corpus,<sup>62</sup> as may also the sufficiency of the execution<sup>63</sup> and the affidavit upon which it was issued,<sup>64</sup> but if the imprisonment of the debtor is in all respects legal he will not be discharged on habeas corpus.<sup>65</sup>

g. *On Motion.*—(I.) *Grounds.*—Where the cause of action is one upon which arrest is not authorized,<sup>66</sup> or the arrest is made at a time when the debtor is exempt from process in civil cases,<sup>67</sup> or, under some statutes, where he is arrested for fraud or for concealing his property,<sup>68</sup> he may be discharged from imprisonment on motion.<sup>69</sup> When the creditor has consented to the discharge of one of several joint debtors the remaining debtors may have their discharge by showing this fact on motion.<sup>70</sup> The court cannot, however, discharge an imprisoned debtor because of ill-health,<sup>71</sup> or because the sheriff is not complying with the law as to the method of imprisonment, where a remedy of damages is provided.<sup>72</sup> Insanity of the debtor either before or after arrest, is not a ground for discharge,<sup>73</sup> except where the statute so provides.<sup>74</sup>

(II.) *Notice.*—Such a motion is made after a notice stating the grounds thereof,<sup>75</sup> served on the creditor<sup>76</sup> or his attorney.<sup>77</sup>

60. *Hecker v. Jarret*, 3 Binn. (Pa.) 404, holding that a failure to give such a notice invalidates the entire proceeding.

61. *Wallace Elliott & Co. v. Prott*, 4 Mackey (D. C.) 259, involving a statute giving the debtor the right to have the truth of the affidavit on which his arrest was procured determined by a jury on habeas corpus proceedings.

62. *Mass.*—*In re Blake*, 106 Mass. 501. *N. Y.*—*People ex rel. Burroughs v. Willett*, 26 Barb. 78. *Pa.*—*Johnston v. Coleman*, 8 Watts & S. 69.

As to questions which may be raised by habeas corpus, see *supra*, II, C, 15, f.

[a] "The question whether the prisoner was a person of such a description or condition as could be lawfully arrested on proceedings in the form adopted, is clearly open to proof upon a hearing on a writ of habeas corpus." *Blake's Case*, 106 Mass. 501, person under guardianship as a spendthrift, charged with fraudulently withholding his estate.

63. *In re Blake*, 106 Mass. 501. See *supra*, II, C, 15, f.

64. *In re Blake*, 106 Mass. 501.

65. *In re Leahey*, 58 Vt. 724, 5 Atl. 895.

66. *Smith v. Knapp*, 30 N. Y. 581, 591.

67. *Secor v. Bell*, 18 Johns. (N. Y.) 52; *Scotfield v. Krieser*, 61 Hun 368, 16 N. Y. Supp. 126, 21 Civ. Proc. 294. See generally the title "Privilege."

68. *In re Ennor*, 105 Ill. 105; *First Nat. Bank v. Sanford*, 83 Ill. App. 58, involving *Hurd's Rev. St. (Ill.)*, 1916, ch. 72, §5.

69. As to motion to quash the process, see *supra*, II, C, 14.

70. *Allen v. Craig*, 14 N. J. L. 102. See *supra*, II, C, 15, b, (IV).

71. *Moore v. McMahon*, 20 Hun (N. Y.) 44.

72. *Lockwood v. Mercereau*, 6 Abb. Pr. (N. Y.) 206.

73. *Bush v. Pettibone*, 4 N. Y. 300, 1 Code Rep. (N. S.) 264.

74. *Bush v. Pettibone*, 4 N. Y. 300, 1 Code Rep. (N. S.) 264.

[a] *Sending Debtor to Insane Asylum.*—Under a statute authorizing the discharge of an insane debtor and the sending him to an asylum, the latter is inseparably connected with the power to discharge, and an unconditional order of discharge in such a case is void. *Bush v. Pettibone*, 4 N. Y. 300, 1 Code Rep. (N. S.) 164.

75. *Allen v. Craig*, 14 N. J. L. 102.

76. *Allen v. Craig*, 14 N. J. L. 102.

77. *Allen v. Craig*, 14 N. J. L. 102.

(III.) **Imposition of Terms.**—The court may, in some cases, impose upon the applicant certain terms or conditions in granting him relief.<sup>78</sup>

h. *By Operation of Law and Lapse of Time.*—Upon the enactment of a statute providing that no one shall be detained in custody on an arrest in certain designated civil cases, a debtor in custody in such a case is entitled to his discharge at once.<sup>79</sup> So upon the lapse of the time beyond which imprisonment may not lawfully continue<sup>80</sup> the debtor is entitled to his release, whether a bond for the jail limits has been given,<sup>81</sup> or he be in actual custody.<sup>82</sup>

i. *On Taking an Appeal.*—Under some statutes the debtor may be released from custody on his bond given on appeal,<sup>83</sup> and it has been held that he should be admitted to bail pending an appeal from an order refusing to vacate the writ.<sup>84</sup> But a stay of proceedings granted upon the allowance of a writ of error will not operate as a supersedeas to discharge the debtor who has been committed.<sup>85</sup>

j. *On Bond for Jail Liberties.*—(I.) **Generally.**—Generally the imprisoned debtor is entitled to be admitted to the liberties of the jail upon delivering to the sheriff an approved undertaking,<sup>86</sup> except in

78. *Allen v. Craig*, 14 N. J. L. 102. And see generally the cases cited *infra*, this section.

[a] **Written stipulation not to sue for false imprisonment**, may be required. **N. J.**—*Allen v. Craig*, 14 N. J. L. 102. **N. Y.**—*Deyo v. Van Valkenburgh*, 5 Hill 242; *Davis v. Wiggins*, 1 How. Pr. (N. Y.) 159, not to sue plaintiff's attorney. **Can.**—*Bearns v. Perchard*, 1 Morris Newf. Rep. (1854-64) 254.

[b] **But where execution issued on a judgment previously paid in full**, terms may not be exacted. *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.) 242; *Mayer v. Rothschild*, 59 How. Pr. (N. Y.) 510.

79. *Sedgwick v. Knibloe*, 16 Conn. 219.

[a] **If he is at liberty under a bond for the prison limits he may depart therefrom, and will not be guilty of an escape.** *Sedgwick v. Knibloe*, 16 Conn. 219.

80. See *supra*, II, C, 11, b, (IV).

81. *Rosenzweig v. United States Fidelity, etc. Co.*, 151 N. Y. Supp. 237.

82. **U. S.**—*Stroheim v. Deimel*, 77 Fed. 802, 23 C. C. A. 467, involving Ill. Rev. St., 1916, ch. 72, §34. **Ill.** *Hanchett v. Weber*, 17 Ill. App. 114. **N. Y.**—*People ex rel. Lust v. Grant*, 18 Abb. N. C. 220; *Padreshefsky v. Walton*, 65 App. Div. 432, 72 N. Y. Supp. 979.

[a] **Without application to the court.** *Padreshefsky v. Walton*, 65 App. Div. 432, 72 N. Y. Supp. 979.

[b] **Upon filing the required schedule of his property.** *Subim v. Isador*, 88 Ill. App. 96.

83. *Mahler v. Sinsheimer*, 20 Ill. App. 401.

84. *State ex rel. Syverson v. Foster*, 84 Wash. 58, 146 Pac. 169, L. R. A. 1915E, 340.

[a] **His remedy is by habeas corpus if bail is denied him.** *State ex rel. Syverson v. Foster*, 84 Wash. 58, 146 Pac. 169, L. R. A. 1915E, 340. See *supra*, II, C, 15, f.

85. *Sherrill v. Campbell*, 21 Wend. (N. Y.) 287.

86. **Ky.**—*Prather v. Beeler*, 3 Bibb 375; *Barns v. Williams*, 2 Bibb 562; *Field v. Slaughter*, 1 Bibb 160; *Hubbard v. Harrison*, 1 Bibb 550. **Mass.** *Barker v. Ryan*, 1 Allen 72; *Lothrop v. Ide*, 13 Gray 93; *Brown v. Bartlett*, 5 Gray 461; *Dooley v. Cotton*, 3 Gray 496. **Mich.**—*Kruse v. Kingsbury*, 102 Mich. 100, 60 N. W. 443; *Gunn v. Geary*, 44 Mich. 615, 7 N. W. 235. **N. Y.** *Battle v. National Surety Co.*, 78 Misc. 253, 138 N. Y. Supp. 46. **N. C.**—*Norham v. Terry*, 30 N. C. 175. **S. C.** *Hurst v. Samuels*, 29 S. C. 476, 7 S. E. 822. **Tenn.**—*Sumner v. Henry*, 4 Yerg. 155. **Vt.**—*Lowrey v. Hine*, 2 D. Chip. 59.

[a] **The purpose of the bond is to**

those classes of cases where the statute otherwise provides.<sup>87</sup> No petition is required.<sup>88</sup>

(II.) **The Bond.**—(A.) **GENERAL REQUISITES.**—This bond should substantially comply with the statutory requirements,<sup>89</sup> in which event it is sufficient;<sup>90</sup> it need not follow the exact language thereof.<sup>91</sup> It should contain a concise statement of the facts which led up to its execution.<sup>92</sup> The conditions contained in the bond should be no more than is provided for by the statute under which such bond is given.<sup>93</sup> A bond which violates this requirement is void,<sup>94</sup> as is, also, a bond which contains conditions prohibited by statute.<sup>95</sup> But defects which do not reach the substance of the bond will not invalidate it,<sup>96</sup> nor will

indemnify the party at whose instance the prisoner is confined from the possibility of the satisfaction of the judgment being defeated by the escape of the prisoner. *Battle v. National Surety Co.*, 78 Misc. 253, 138 N. Y. Supp. 46.

[b] **Actual Custody.**—(1) It has been held under a statute providing for this relief for "persons . . . committed to prison," that the debtor must actually be in jail at the time of giving the bond; otherwise the bond is void. *Northam v. Terry*, 30 N. C. 175. (2) *Compare Doyle v. Boyle*, 19 Kan. 168, where, under statutes providing that "any person imprisoned, etc.," may apply for relief in this manner, it was held that the bond need not recite that the debtor is actually in jail; it is enough that it aver that the debtor is in the custody of the sheriff.

[c] **In United States Courts.**—As respects proceedings for this relief debtors in custody under United States process shall be dealt with in the same manner as prisoners under state process. *United States v. Knight*, 14 Pet. (U. S.) 301, 10 L. ed. 465; *United States v. Noah*, 1 Paine 368, 27 Fed. Cas. No. 15,894. See also *United States v. Anderson*, 2 Cranch C. C. 157, 24 Fed. Cas. No. 14,450. *Compare Bank of the United States v. Tyler*, 4 Pet. (U. S.) 366, 386, 7 L. ed. 888; *Knox v. Summers*, 2 Cranch C. C. 12, 14 Fed. Cas. No. 7,914. And see *supra*, II, C, 3.

87. *Vermont Life Ins. Co. v. Dodge*, 48 Vt. 156. See also as to close confinement, *supra*, II, C, 11, b, (III).

88. *Ex parte Canteay*, 11 Rich. L. (S. C.) 520.

89. *Miss.*—*Winchester v. Collins*, Walk. 535. *N. J.*—*Camp v. Allen*, 12 N. J. L. 1. *Can.*—*Kingan v. Hall*, 23 U. C. Q. B. 503.

90. *La.*—*Dunbar v. Owens*, 10 Rob. 139. *Mass.*—*Wiggin v. Peters*, 1 Mete. 127. *N. J.*—*Camp v. Allen*, 12 N. J. L. 1; *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33. *Tenn.*—*Sumner v. Henry*, 4 Yerg. 155. See also *Sharp v. Nelson*, 9 Yerg. 34.

91. *La.*—*Dunbar v. Owen*, 10 Rob. 139. *Miss.*—*Winchester v. Collins*, Walk. 535. *N. J.*—*Camp v. Allen*, 12 N. J. L. 1. *Can.*—*Kingan v. Hall*, 23 U. C. Q. B. 503, where the failure to insert the adjective "close" before the noun "custody," as per the language of the statute, was held not fatal.

[a] **If there is a verbal difference** from the form prescribed by statute but none in substance and effect, the bond is good. *Camp v. Allen*, 12 N. J. L. 1.

92. *Spader v. Frost*, 4 Blackf. (Ind.) 190.

[a] **The Reason.**—These statements are by way of showing a consideration for the instrument. *Spader v. Frost*, 4 Blackf. (Ind.) 190.

93. *Miss.*—*Winchester v. Collins*, Walk. 535. *N. J.*—*Camp v. Allen*, 12 N. J. L. 1. *N. Y.*—*Sullivan v. Alexander*, 19 Johns. 233. *Vt.*—*Lyon v. Ide*, 1 D. Chip. 49.

94. *Lyon v. Ide*, 1 D. Chip. (Vt.) 46.

[a] **The reason for this rule** is that a contrary rule "would open a wide door to extortion, and the most grievous oppression." *Lyon v. Ide*, 1 D. Chip. (Vt.) 46.

95. *Kingan v. Hall*, 23 U. C. Q. B. 503.

96. *Seymour v. Harvey*, 8 Conn. 63; *Wilcox v. Ismon*, 34 Mich. 268.

[a] **A substantial compliance** with the statute is sufficient. *Sumner v. Henry*, 4 Yerg. (Tenn.) 155. See also *Sharp v. Nelson*, 9 Yerg. (Tenn.) 34.

the use of language which, in effect, does not increase the obligor's liability.<sup>97</sup> That the bond does not impose all the statutory conditions is ground of complaint by the creditor,<sup>98</sup> but not by the debtor.<sup>99</sup>

**Joint debtors** thus in custody may give a joint bond to procure their release.<sup>1</sup>

(B.) **AMOUNT.**—The amount of the bond is generally determined by reference to the statute.<sup>2</sup>

(C.) **TO WHOM GIVEN.**—This bond should be payable to the sheriff<sup>3</sup> rather than to the jailer,<sup>4</sup> and it should run to the sheriff and his successors, rather than to the sheriff and his executors and administrators.<sup>5</sup> Statutes sometimes provide to whom the bond shall be given in case of vacancy in the sheriff's office.<sup>6</sup>

When a debtor is in the custody of a United States marshal, this bond should nevertheless be made to the sheriff to whom the debtor was delivered.<sup>7</sup>

[b] **Matter which amounts but to a repetition** of a condition already appearing in the bond is considered as surplusage and will not effect its validity. *Camp v. Allen*, 12 N. J. L. 1.

[c] **A bond bearing date before the commitment** is not invalid if in fact executed subsequent thereto. *Clark v. Kidder*, 12 Vt. 689.

97. *Winchester v. Collins*, Walk. (Miss.) 535.

98. *Clapp v. Hayward*, 15 Mass. 276.

99. *Seymour v. Harvey*, 8 Conn. 63; *Thacher v. Williams*, 14 Gray (Mass.) 324.

1. *McGuire v. Pierce*, 9 Gratt. (50 Va.) 167.

2. **Ala.**—*Croom v. Travis' Admr.*, 10 Ala. 237. **Ind.**—*Spader v. Frost*, 4 Blackf. 190. **Me.**—*Gooch v. Stephenson*, 15 Me. 129; *Coffin v. Herrick*, 10 Me. 121. **Mass.**—*Thacher v. Williams*, 14 Gray 324. **N. H.**—*Gordon v. Edson*, 2 N. H. 152. **N. Y.**—*Smith v. Jansen*, 8 Johns. 111; *Dole v. Moulton*, 2 Johns. Cas. 205. **R. I.**—*In re McManaman*, 16 R. I. 358, 16 Atl. 148, 1 L. R. A. 561, and note.

[a] **Determined by Jailer.**—*Udall v. Rice*, 1 Tyler (Vt.) 213.

[b] **The sheriff's fees for commitment** are not included in fixing the amount of this bond under statutes directing that it be in an amount double "the sum for which the debtor was imprisoned." *Gordon v. Edson*, 2 N. H. 152.

3. *Barns v. Williams*, 2 Bibb (Ky.) 562; *Field v. Slaughter*, 1 Bibb (Ky.)

160. See also *Hubbard v. Harrison*, 1 Bibb (Ky.) 550.

[a] **When the sheriff is in custody** he may give a bond to the officer in whose custody he is. *Denton v. Adams*, 6 Vt. 40.

[b] **When the sheriff is also the creditor** he may yet take a bond for the release of the debtor. The relationship of debtor and creditor will not affect the validity of the bond. *Lowrey v. Hine*, 2 D. Chip. (Vt.) 59.

[c] **To Under Sheriff.**—Under a statute providing that the bond shall be executed to the officer making the arrest this bond may be given to the under sheriff. *Wilcox v. Ismon*, 34 Mich. 268.

4. *Barns v. Williams*, 2 Bibb (Ky.) 562. See also *Field v. Slaughter*, 1 Bibb (Ky.) 160.

5. *Wilcox v. Ismon*, 34 Mich. 268; *Meredith v. Duval*, 1 Munf. (15 Va.) 76. And see *Kruse v. Kingsbury*, 102 Mich. 100, 60 N. W. 443, where it is pointed out that the bond is for the indemnification of the sheriff in his official capacity rather than as an individual. But see *Lyman v. Mower*, 2 Vt. 517.

6. *Wilcox v. Ismon*, 34 Mich. 268; *Denton v. Adams*, 6 Vt. 40.

7. *United States v. Noah*, 24 Fed. Cas. No. 15,894; *Winchester v. Collins*, Walk. (Miss.) 535; *Offutt v. Bowen*, Walk. (Miss.) 545. Compare, *Moore v. Allen*, 3 J. J. Marsh. (Ky.) 612; *Warren v. Russel*, 1 D. Chip. (Vt.) 193, holding that in such a case a bond given to the sheriff is void.

(D.) **APPROVAL.**—The statutes of some states require that this bond shall be approved by the creditor,<sup>8</sup> or by two justices of the peace.<sup>9</sup>

(E.) **EXECUTION, DELIVERY AND ACCEPTANCE.**—This bond should be executed by both the principal and his surety.<sup>10</sup> Delivery to the jailer is a sufficient delivery to the obligee.<sup>11</sup>

(III.) **Actions on Bond or Recognizance.**—(A.) **GENERALLY.**—An imperfect bond may be reformed,<sup>12</sup> and damages for a breach thereof awarded at the same time by a court of equity.<sup>13</sup>

(B.) **PARTIES.**—Suit may be brought by the sheriff in his own name,<sup>14</sup> or by his successor in office,<sup>15</sup> unless he has, on demand, assigned the bond to the creditor.<sup>16</sup> After such assignment the creditor is a proper party to sue upon the bond.<sup>17</sup>

[a] **The reason for such a rule is expressed in United States v. Noah, 1 Paine 368, 27 Fed. Cas. No. 15,894, decided under an act of congress declaring prisoners on civil process of the United States to be entitled to like privileges of the yards or limits as prisoners under state process. The court says: "So long as the state jails were to be used for the United States' prisoners under United States process, it was highly fit and proper they should be dealt with as prisoners under state process."**

8. Coffin v. Herrick, 10 Me. 121.

[a] **Creditor's approval may be before or after discharge of debtor, "for, if after, it is a ratification of the act done by the prison keeper, in releasing the debtor from his custody."** Coffin v. Herrick, 10 Me. 121. See generally the title "Justification of Sureties."

9. Coffin v. Herrick, 10 Me. 121, 125.

[a] **This requirement may be waived by the creditor.** Bartlett v. Willis, 3 Mass. 86.

10. Kan.—Hickman v. Fargo, 1 Kan. App. 695, 42 Pac. 381. La.—Curtis v. Moss, 2 Rob. 367. Mass.—Pratt v. Gibbs, 9 Cush. 82.

[a] **Though imperfect as a statutory bond, by reason of the failure of the principal to execute it, it may yet be good as a common-law obligation.** Ingram v. State, 10 Kan. 630; Hickman v. Fargo, 1 Kan. App. 695, 42 Pac. 381.

11. Kimball v. Preble, 5 Me. 353.

[a] **Acceptance of the bond may be implied from the conduct of the obligee.** Coffin v. Herrick, 10 Me. 121.

12. Bowen v. Gresham, 6 Blackf.

(Ind.) 452; Smith v. Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33.

[a] **Suit without reformation, see Bowen v. Gresham, 6 Blackf. (Ind.) 452.**

13. Smith v. Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33.

[a] **The equitable doctrine that equity will not aid in enforcing a penalty will not defeat such an action.** Smith v. Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33.

14. Kruse v. Kingsbury, 102 Mich. 100, 60 N. W. 443; Weeks v. Stevens, 7 Vt. 72; Lyman v. Mower, 2 Vt. 517; Lowrey v. Hine, 2 D. Chip. (Vt.) 59.

[a] **Payment Not Material.**—This is true whether he has paid anything to the creditor or not. Lyman v. Mower, 2 Vt. 517.

15. Kruse v. Kingsbury, 102 Mich. 100, 60 N. W. 443. See *supra*, II, C, 15, j, (II), (C). But see Lyman v. Mower, 2 Vt. 517, in case of death of sheriff.

[a] **No assignment to the successor is necessary.** Kruse v. Kingsbury, 102 Mich. 100, 60 N. W. 443.

[b] **In case the sheriff is bankrupt or attempts in bad faith to control the bond to the detriment of the creditor it has been said that the creditor might institute an action in the sheriff's name and prosecute it for his own benefit.** See Weeks v. Stevens, 7 Vt. 72.

16. See Kruse v. Kingsbury, 102 Mich. 100, 60 N. W. 443; Weeks v. Stevens, 7 Vt. 72.

17. See the following: Mich.—Kruse v. Kingsbury, 102 Mich. 100, 60 N. W. 443. N. J.—Smith v. Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33. Vt.—Lyman v. Mower, 2 Vt. 517.

(C.) **DECLARATION OR COMPLAINT.**—The declaration should aver not only the execution of the bond<sup>18</sup> and a breach of the condition thereof,<sup>19</sup> but should show, as well, the existence of a case in which the execution of such a bond was authorized by statute.<sup>20</sup>

The description of the judgment as given in the allegations with respect thereto, should not vary from that given in the bond as set forth in the declaration or complaint.<sup>21</sup> It is not necessary to allege a demand for payment of the bond.<sup>22</sup> Actual damages need not appear from the complaint,<sup>23</sup> except where the bond is considered an indemnity bond.<sup>24</sup> Surplusage will not vitiate an otherwise proper declaration,<sup>25</sup> unless it shows the imprisonment to be illegal.<sup>26</sup>

(D.) **PLEA OR ANSWER.**<sup>27</sup> — Defects which render illegal the proceedings prior to the commitment, should be specially pleaded,<sup>28</sup> unless they appear from the declaration or complaint.<sup>29</sup> Performance must be alleged in accordance with general rules elsewhere discussed,<sup>30</sup>

[a] **A joint debtor who has purchased the judgment cannot sue on the bond given by his co-debtor, since the debt is extinguished by the purchase.** *Allen v. Ogden*, 12 Vt. 9.

18. *Clark v. Kidder*, 12 Vt. 689.

[a] **The signing and sealing need not be alleged in express terms if they appear by fair intendment.** *Denton v. Adams*, 6 Vt. 40.

[b] **The date of the bond (1) need not be alleged by express averment; it is sufficient to allege that on a certain day, naming it, the defendants executed and delivered the bond.** *Clark v. Kidder*, 12 Vt. 689. (2) The date alleged must correspond with the bond itself, to avoid a fatal variance. *Clark v. Kidder*, 12 Vt. 689.

19. *Martin v. Kennard*, 3 Blackf. (Ind.) 430. See also *Bulkley v. Finch*, 37 Conn. 71.

20. *Martin v. Kennard*, 3 Blackf. (Ind.) 430; *Lowrey v. Barney*, 2 D. Chip. (Vt.) 11. See *United States Bank v. Tucker*, 7 Vt. 134, as to what need not be alleged.

[a] **The declaration should aver the existence of the judgment and execution.** *Martin v. Kennard*, 3 Blackf. (Ind.) 430. See also *United States Bank v. Tucker*, 7 Vt. 134.

[b] **Command of the Writ.**—An allegation that the sheriff committed the debtor to prison as he was by the writ commanded to do, is a sufficient allegation that he was properly commanded in the execution to keep the prisoner. *Dyer v. Cleveland*, 18 Vt. 241.

21. *Bowen v. Gresham*, 6 Blackf.

(Ind.) 452 (as to date or amount of judgment); *Sherwin v. Bliss*, 4 Vt. 96.

**As to relief by reformation and correction, see *supra*, II, C, 15, j, (III), (A), and generally the title "Reformation."**

22. *Bulkley v. Finch*, 37 Conn. 71; *Seymour v. Harvey*, 8 Conn. 63; *United States Bank v. Tucker*, 7 Vt. 134.

23. *Camp v. Allen*, 12 N. J. L. 1; *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33.

[a] **The reason for such a rule is that "this bond is not a bond of indemnity, strictly speaking. There is no necessity of showing an actual damnification. The bond is forfeited by the defendant's going off the prison limits."** *Smith v. Allen*, 1 N. J. Eq. 43.

24. *Barry v. Mandell*, 10 Johns. (N. Y.) 563. See also *Sedgwick v. Knibloe*, 16 Conn. 219.

25. *Bulkley v. Finch*, 37 Conn. 71; *Bank of United States v. Tucker*, 7 Vt. 134. See generally the title "**Surplusage and Scandal.**"

26. *Bank of United States v. Tucker*, 7 Vt. 134.

27. See the titles "**Answers;**" "**Denials;**" "**Pleas;**" and titles dealing with particular pleas or defenses.

28. *Bank of United States v. Tucker*, 7 Vt. 134.

29. See preceding section.

30. See 4 STANDARD PROC. 515, 516; 11 STANDARD PROC. 1019, et seq.

[a] **A general averment of performance is insufficient, unless the subject comprehends such a multiplicity of matter as would lead to great prolixity.** See *Tait v. Parkman*, 15 Ala. 253;

and the same is true as to discharge of the debtor.<sup>31</sup>

Set-offs in such actions are governed by general rules elsewhere treated.<sup>32</sup>

(E.) REPLICATION AND REJOINDER. — A replication<sup>33</sup> and rejoinder<sup>34</sup> should conform to general rules governing such pleadings.

(F.) TRIAL. — Irregularities in the issuance of the execution which do not render it void, cannot be inquired into in an action on a jail bond.<sup>35</sup> Neither may the sufficiency of the proceedings preliminary to the debtor's discharge on the bond, be questioned.<sup>36</sup> But any questions of fact properly in issue, are to be determined by the jury.<sup>37</sup>

(G.) REVIEW. — The general rules as to review by new trial<sup>38</sup> or upon appeal or error<sup>39</sup> are applicable to this action.

k. *As Poor Debtor.* — (I.) Terminology and Distinctions. — Relief under the various "poor debtor's" acts is not the same as is afforded by the acts respecting "insolvent debtors."<sup>40</sup> A discharge under the former acts merely discharges the debtor from imprisonment,<sup>41</sup> while a discharge under the latter releases the debtor also from his debts to all participating creditors.<sup>42</sup>

Morrow v. Parkman, 14 Ala. 769; Hayden v. Palmer, 24 Wend. (N. Y.) 364.

31. See generally 11 STANDARD PROC. 1012; and the titles "Payment;" "Release."

[a] Every fact (1) showing the legality of the discharge must be alleged. Tait v. Parkman, 15 Ala. 253. (2) But an averment that the statutes regulating the debtor's discharge were complied with is sufficient in this regard where a statement of all the facts would lead to great prolixity. Hayden v. Palmer, 24 Wend. (N. Y.) 364.

32. See the title "Set-Off, Counterclaim and Recoupment."

[a] In a suit by an assignee of the bond against the principal and surety thereon, a separate demand of the principal against such assignee may be pleaded by way of set-off. Brundridge v. Whitecomb, 1 D. Chip. (Vt.) 180.

33. See the title "Replication and Reply," and Spader v. Frost, 4 Blackf. (Ind.) 190.

34. Walker v. Riley, 10 Rich. L. (S. C.) 87. See generally the title "Rejoinder and Subsequent Pleadings."

35. Gibson v. Scott, 7 Vt. 147.

36. Hamilton v. Hamilton, 11 Rich. L. (S. C.) 351.

[a] The order for the debtor's discharge is conclusive until reversed, on all such questions. Hamilton v. Hamilton, 11 Rich. L. (S. C.) 351.

37. Morrow v. Weaver, 8 Ala. 288.

38. See Perkins v. Dana, 19 Vt. 589,

and generally the title "New Trial."

39. See the title "Appeals."

[a] The judgment will be set aside (1) on a writ of error when it appears that it was had on default and the complaint shows the debtor to have been committed after the life of the execution had expired (Roberts v. Wells, Brayt. [Vt.] 37), (2) as well as where the record fails to show affirmatively that a breach of the bond has occurred. Stewart v. Warfield, 37 Ala. 446.

40. Jordan, Marsh & Co. v. Hall, 9 R. I. 218, 11 Am. Rep. 245; Hurst v. Samuels, 29 S. C. 476, 7 S. E. 822, opinion of Norton, J.

[a] The operation of the insolvent acts, so far as they effect only a release from custody, is not suspended by the federal bankruptcy acts. *In re Jacobs*, 12 Abb. Pr. N. S. (N. Y.) 273. Compare 13 STANDARD PROC. 640.

41. Jordan, Marsh & Co. v. Hall, 9 R. I. 218, 11 Am. Rep. 245; Hurst v. Samuels, 29 S. C. 476, 7 S. E. 822, opinion of Norton, J.

[a] It affects none of his creditors except the prosecuting or committing creditor, otherwise than by the assignment which he is required to make. Jordan, Marsh & Co. v. Hall, 9 R. I. 218, 11 Am. Rep. 245.

42. Jordan, Marsh & Co. v. Hall, 9 R. I. 218, 11 Am. Rep. 245; Hurst v. Samuels, 29 S. C. 476, opinion of Norton, J. See *infra*, II, C, 15, m,

(II.) **Who Entitled to.**—A plaintiff, as well as a defendant, who is liable to arrest on a judgment for costs, may claim the benefit of the poor debtor's act.<sup>43</sup> But under some statutes the relief is not available where the liability is *ex delicto* and arose from the debtor's wilful and malicious act or neglect.<sup>44</sup> Where the statute makes such relief available only to one in actual custody, a debtor released on a jail limits bond cannot claim the relief.<sup>45</sup>

(III.) **The Bond.**—The bond must be executed by the debtor as well as by the sureties.<sup>46</sup> Its requisites are usually prescribed by statute,<sup>47</sup> and a failure to comply therewith renders the instrument invalid as a statutory bond,<sup>48</sup> though a substantial compliance is all that is necessary,<sup>49</sup> and a bond invalid under the statute may be good as a common-law bond.<sup>50</sup> A bond which shows on its face that it was given to secure release from an illegal arrest is void.<sup>51</sup>

The amount of the bond is generally fixed by statute,<sup>52</sup> which must

(III), and generally the title "*Insolvency*."

43. *Thompson v. Berry*, 5 R. I. 95.

44. See the statutes, and *Fisher v. Comr. of Jail Delivery*, 3 Vt. 328; *Hoar v. Comr. of Jail Delivery*, 2 Vt. 402.

[a] A minute thereof is required to be inserted in or certified upon the execution. *In re Wheelock*, 13 Vt. 375; *Barber v. Chase*, 3 Vt. 340.

[b] Where the record shows that the judgment was rendered in an action in *assumpsit*, although the certificate recites that it was recovered in an action of trespass on the case, the debtor's application should be heard, and mandamus will lie to compel a hearing. *Fisher v. Comr. of Jail Delivery*, 3 Vt. 328.

45. *Miller v. Strabbing*, 92 Mich. 300, 52 N. W. 453.

46. *Howard v. Brown*, 21 Me. 385.

47. *Ross v. Berry*, 49 Me. 434; *Bliss v. Kershaw*, 180 Mass. 99, 61 N. E. 823; *Snelling v. Coburn*, 10 Allen (Mass.) 344.

[a] Notice to the creditor of the time and place of the examination may properly be a condition prescribed in the bond. *Whittier v. Way*, 6 Allen (Mass.) 288.

[b] **Date of Arrest.**—Where the time within which the application is required to be made runs from the day of arrest, it is important that this date be made to appear from the bond. *Cushman v. Waite*, 21 Me. 540.

48. *Ross v. Berry*, 49 Me. 434; *MERCHANTS' Bank v. Lord*, 49 Me. 99; *Randall v. Bowden*, 48 Me. 37; *Clark v.*

*Metcalf*, 38 Me. 122; *Hatch v. Norris*, 36 Me. 419; *Howard v. Brown*, 21 Me. 385; *Stearns v. Veasey*, 33 N. H. 61.

49. *Keith v. Bolier*, 92 Me. 550, 43 Atl. 499; *Hatch v. Lawrence*, 29 Me. 480. See also *Wiggin v. Peters*, 1 Mete. (Mass.) 127.

[a] For example, where a condition required by the statute was that the debtor would "deliver himself into the custody of the keeper of the jail," a bond is good under the statute which is conditioned that the debtor will "deliver himself and go into close confinement." *Hatch v. Lawrence*, 29 Me. 480.

50. *Bell v. Furbush*, 56 Me. 178; *Ross v. Berry*, 49 Me. 434; *Clark v. Metcalf*, 38 Me. 122.

[a] A joint bond is invalid as a statutory instrument, though it is good as a common-law bond. *Hatch v. Norris*, 36 Me. 419.

51. *Gibson v. Ethridge*, 72 Me. 261; *Stearns v. Veasey*, 33 N. H. 61.

52. See generally the statutes of the various states and the following. *Bradley v. Pinkham*, 63 Me. 164; *Flowers v. Flowers*, 45 Me. 459; *Clark v. Metcalf*, 38 Me. 122; *Howard v. Brown*, 21 Me. 385.

[a] **Officer's Fees.**—Under a statute providing that bond shall be for double "the sum due" the fees of the arresting officer for executing the writ are to be included in the calculation. *Bradley v. Pinkham*, 63 Me. 164.

[b] **Interest on the judgment** (1) should not, unless a statute provides to the contrary, be included in calculating the penal amount of the bond

be substantially complied with in order to secure release.<sup>53</sup>

**Approval.** — Statutes sometimes regulate the approval of the bond<sup>54</sup> and they must be substantially followed.<sup>55</sup>

**Filing.** — Unless a statute provides to the contrary, it is not necessary that this bond be filed with the other papers in the cause.<sup>56</sup>

(IV.) **Proceedings To Obtain.** — (A.) **GENERALLY.** — The proceedings for relief as a poor debtor being summary and in derogation of common law,<sup>57</sup> the statutes must be closely followed to obtain a valid discharge.<sup>58</sup> But where the bond given is insufficient as a statutory obligation but good as a common-law obligation, its conditions must be complied with regardless of the statute.<sup>59</sup>

**Joinder.** — Joint judgment debtors may join in proceedings of this character.<sup>60</sup>

(B.) **TIME OF APPLICATION.** — The statute may prescribe a specified period of custody before application may be made.<sup>61</sup> Where the bond gives the debtor the option of applying for relief within a specified time or surrendering himself, the fact that he returns into custody does not prevent a subsequent application;<sup>62</sup> but if he does not surrender himself within the proper time, he may not thereafter be admitted to the oath,<sup>63</sup> even though proceedings on his disclosure were

(*Thacher v. Williams*, 14 Gray [Mass.] 324), (2) but where a statute directs the officer executing the writ to collect interest from the date of judgment this sum should be included. *Clark v. Metcalf*, 38 Me. 122.

53. *Flowers v. Flowers*, 45 Me. 459; *Clark v. Metcalf*, 38 Me. 122; *Howard v. Brown*, 21 Me. 385; *Pease v. Norton*, 6 Me. 229.

[a] A slight deviation or variance from the directions of the statute will not vitiate the undertaking. *Keith v. Bolier*, 92 Me. 550, 43 Atl. 499; *Gilmore v. Edmunds*, 7 Allen (Mass.) 360; *Thacher v. Williams*, 14 Gray (Mass.) 324.

54. See the statutes, and *Randall v. Bowden*, 48 Me. 37; *Battle v. Knapp*, 60 N. H. 361.

[a] This approval may be signed by the attorney for the creditors. *Scribner v. Mansfield*, 68 Me. 74; *Randall v. Bowden*, 48 Me. 37.

55. *Scribner v. Mansfield*, 68 Me. 74; *Randall v. Bowden*, 48 Me. 37. See also *Gould v. Ford*, 91 Me. 146, 39 Atl. 480. But see *Battle v. Knapp*, 60 N. H. 361.

[a] **Indorsing on the bond.** "We, the subscribers, do approve of the sureties named in the foregoing bond," is a sufficient approval. *Scribner v. Mansfield*, 68 Me. 74.

[b] **Waiver.** — See *Battle v. Knapp*, 60 N. H. 361.

See generally the title "Justification of Sureties."

56. *Thacher v. Williams*, 14 Gray (Mass.) 324.

57. *Marr v. Clark*, 56 Me. 542; *Paine v. Ely*, 1 D. Chip. (Vt.) 37; *Staniford v. Barry*, *Brayt. (Vt.)* 200.

58. *Hackett v. Lane*, 61 Me. 31; *Marr v. Clark*, 56 Me. 542; *Houghton v. Lyford*, 39 Me. 267; *Fales v. Goodhue*, 25 Me. 423; *Bunker v. Hall*, 23 Me. 26; *Knight v. Norton*, 15 Me. 337; *Haight v. Richards*, 3 Vt. 77; *Paine v. Ely*, 1 D. Chip. (Vt.) 37.

See the preceding section.

59. *Ross v. Berry*, 49 Me. 434.

[a] It is enough that the terms of the bond be complied with in such a case. *Bell v. Furbush*, 56 Me. 178.

60. *Stearns v. Hemenway*, 162 Mass. 17, 37 N. E. 766.

61. *Funke v. Hurst*, 119 Mich. 182, 77 N. W. 695.

[a] **Constructive custody** will not satisfy such a requirement. *Rusiewski v. Michalski*, 135 Mich. 530, 98 N. W. 1; *Miller v. Strabbing*, 92 Mich. 300, 52 N. W. 453.

62. *Somersworth Sav. Bank v. Wooster*, 64 N. H. 57, 5 Atl. 764.

63. *Scovell v. Holbrook*, 22 N. H. 269.

commenced before the expiration of the prescribed period and adjourned to a day beyond it,<sup>64</sup> unless such adjournment was with the consent of the creditor,<sup>65</sup> or was caused by the creditor, or by an act of God, or by the law.<sup>66</sup>

(C.) TO WHOM APPLICATION MADE.—The statutes variously require the debtor to make his application to a board of jail commissioners,<sup>67</sup> to a justice of the peace direct,<sup>68</sup> or where he is in custody, to the jailer, and through him to a justice of the peace,<sup>69</sup> or to the court which issued the writ under which he is detained,<sup>70</sup> or to some other tribunal.<sup>71</sup>

(D.) FORM AND CONTENTS OF APPLICATION.—Even where the statutes do not so specify, it is usually considered that the application should be in writing,<sup>72</sup> and should be signed by the debtor or by someone for him.<sup>73</sup> Only one application is required notwithstanding the debtor is to take the oath on two executions, where the accompanying notice indicates such contemplated action.<sup>74</sup> Where no form is prescribed it is sufficient if the petition contain a statement of facts entitling the applicant to the benefit of the oath,<sup>75</sup> describing the creditor<sup>76</sup> and that he is under arrest so as to be entitled to a discharge<sup>77</sup> and

[a] In computing time (1) from a specified date the first day is excluded. *Me.*—*Windsor v. China*, 4 Greenl. 298. *Mass.*—*Wiggin v. Peters*, 1 Metc. 127. *N. H.*—*Scovell v. Holbrook*, 22 N. H. 269; *Bell v. Adams*, 10 N. H. 181. (2) Fractions of days are not counted. *Clark v. Flagg*, 11 Cush. (Mass.) 539.

[b] Appearance of Creditor Not a Waiver.—*Scovell v. Holbrook*, 22 N. H. 269.

64. *Newton v. Newbegin*, 43 Me. 293.

65. *Newton v. Newbegin*, 43 Me. 293; *Fales v. Goodhue*, 25 Me. 423.

66. *Fales v. Goodhue*, 25 Me. 423.

67. *Allen v. Hall*, 8 Vt. 34; *Dean v. Lowry*, 4 Vt. 481.

68. *Winingder v. Diffenderffer's Lessee*, 5 Har. & J. (Md.) 181.

69. *Dalton-Ingersoll Co. v. Hubbard*, 174 Mass. 307, 54 N. E. 862; *Davis v. Putnam*, 5 Gray (Mass.) 321; *Stevens v. Edwards*, 12 Cush. (Mass.) 79; *Bruce v. Keogh*, 7 Cush. (Mass.) 536; *City Bank v. Fullerton*, 11 Metc. (Mass.) 73; *Jenkins v. Newell*, 9 Metc. (Mass.) 303.

[a] An application to the "under-keeper of the jail," is sufficient when this official is the one in whose immediate custody the debtor is. *Davis v. Putnam*, 5 Gray (Mass.) 321.

[b] In Maine, the debtor may apply to a justice of the peace for the

county in which he was arrested or, after commitment, to the jailer and thence to the justice of the county where he is committed. *Wing v. Hussey*, 71 Me. 185.

70. *Shaw v. Silverstein*, 21 R. I. 500, 44 Atl. 931; *Watson v. Fairbrother*, 7 R. I. 511.

71. *Sanborn v. Piper*, 64 N. H. 335, 10 Atl. 680; *Fernald v. Noyes*, 30 N. H. 39.

72. *Fernald v. Noyes*, 30 N. H. 39. See, however, *Keay v. Palmer*, 5 N. H. 43, where it is said that the word "petition" used in the statute, "by no means implies an application in writing."

73. *Neal v. Paine*, 35 Me. 158.

74. *Chesley v. Welch*, 10 N. H. 251.

75. *Me.*—*Smith v. Bragdon*, 48 Me. 101. *Mass.*—*Webster v. French*, 11 Cush. 304. *N. H.*—*Fernald v. Noyes*, 30 N. H. 39. *N. J.*—*Van Waggoner v. Coe*, 25 N. J. L. 197; *Stagg v. Austin*, 18 N. J. L. 82.

[a] In Rhode Island "the application of the debtor for this relief must state, that he has no estate, real or personal, wherewith to support himself in jail, or to pay prison fees." *Watson v. Fairbrother*, 7 R. I. 511.

76. *Peck v. Wilson*, 14 N. H. 587.

77. *Van Waggoner v. Coe*, 25 N. J. L. 197; *Stagg v. Austin*, 18 N. J. L. 82.

is unable to pay the judgment,<sup>76</sup> together with any apt words to indicate his desire to be admitted thereto.<sup>76</sup> It need not describe the statute under which relief is sought.<sup>80</sup> The application is not vitiated by clerical errors which do not mislead,<sup>81</sup> by omissions which may be supplied by the context,<sup>82</sup> nor by surplusage,<sup>83</sup> or by errors or irregularities occurring in such parts of the petition as may be rejected as redundant.<sup>84</sup>

**Return of Petition.** — The petition is sometimes required to be returned to the office of the clerk<sup>85</sup> with an endorsement showing the proceedings that have been had thereon.<sup>86</sup>

(E.) NOTICE. — (1.) *Generally.* — The statutes ordinarily require that notice to the judgment creditor be given of the application for discharge.<sup>87</sup> Where the execution is in favor of several creditors, all must

78. *Webster v. French*, 11 Cush. (Mass.) 304.

[a] But see *Eaton v. Miner*, 5 N. H. 542, where the petition did not state such facts, nor even attempt to, alleging merely the custody of the debtor and praying to be admitted to the benefits of the act. It was there said: "The application was not, perhaps, in the best form, which might have been adopted. But the statute prescribes no form, . . . and the very prayer to be admitted to take the oath is, in effect, an offer to swear to the facts which entitle the debtor to be discharged. We are, therefore, of opinion, that it is not essential to the validity of the application, that it should be in express terms alleged, that the debtor is destitute of property."

79. *Fernald v. Noyes*, 30 N. H. 39; *Ladd v. Deming*, 20 N. H. 487. See also *Bunker v. Nutter*, 9 N. H. 554.

80. *Ladd v. Deming*, 20 N. H. 487. [a] Even if the statute is misdescribed, this will not vitiate the application. *Ladd v. Deming*, 20 N. H. 487. See also *Bunker v. Nutter*, 9 N. H. 554.

81. *Fernald v. Noyes*, 30 N. H. 39; *Bunker v. Nutter*, 9 N. H. 554.

[a] Where the prayer of petition omitted the word "oath," but where the context made the meaning clear, the petition was held sufficient. *Fernald v. Noyes*, 30 N. H. 39.

[b] A misdescription of the nature of the action in which the judgment was rendered, will not defeat the application. *Osgood v. Hutchins*, 6 N. H. 374.

82. *Fernald v. Noyes*, 30 N. H. 39.

83. *Ladd v. Deming*, 20 N. H. 487.

84. *Ladd v. Deming*, 20 N. H. 487.

85. *Banks v. Johnson*, 12 N. H. 445; *Chesley v. Welch*, 10 N. H. 251.

86. *Banks v. Johnson*, 12 N. H. 445; *Chesley v. Welch*, 10 N. H. 251.

[a] The return need not recite the oath which was administered; it is enough that it show the oath prescribed by statute to be the one which was taken by the debtor. *Chesley v. Welch*, 10 N. H. 251.

87. *Mass.*—*Gilmore v. Edmunds*, 9 Allen 379; *Whittier v. Way*, 6 Allen 288; *Putnam v. Longley*, 11 Pick. 487. *N. H.*—*Sanborn v. Piper*, 64 N. H. 335, 10 Atl. 680; *Fernald v. Noyes*, 30 N. H. 39. *N. C.*—*Fertilizer Co. v. Grubbs*, 114 N. C. 470, 19 S. E. 597. *R. I.*—*Angell v. Robbins*, 4 R. I. 493. *Vt.*—*Dean v. Lowry*, 4 Vt. 481; *Raymond v. Southerland*, 3 Vt. 494.

[a] Notice or Citation by Jail Commissioners.—*Dean v. Lowry*, 4 Vt. 481; *Raymond v. Southerland*, 3 Vt. 494; *Paine v. Ely*, 1 D. Chip. (Vt.) 37.

[b] The order by the justices fixing time and place for hearing is the notice required. *Sanborn v. Piper*, 64 N. H. 335, 10 Atl. 680.

[c] Proceedings had without it are wholly void. *Sanborn v. Piper*, 64 N. H. 335, 10 Atl. 680; *Cameron v. Little*, 13 N. H. 23; *Raymond v. Southerland*, 3 Vt. 494.

[d] Record should show service of such notice. *Buckley v. Mitchell*, 165 Mass. 106, 42 N. E. 557.

[e] Knowledge Insufficient. — By legal notice is meant "something more than bare knowledge of a given fact; it is knowledge brought home to a party in a prescribed form." *Sanborn*

be notified.<sup>88</sup> A debtor who has been notified of the assignment of the creditor's claim should give such notice to the assignee.<sup>89</sup> The person upon whom service may be made is considered in a subsequent section.<sup>90</sup>

(2.) *Requisites*.—This notice being the foundation of the entire proceeding must be in substantial compliance with the statutory requirements.<sup>91</sup> The notice should contain the facts of which it is necessary that the party receiving it should have knowledge.<sup>92</sup> It should show that the debtor is unable to pay the judgment or debt,<sup>93</sup> give a description of the judgment and process to which it relates,<sup>94</sup> and declare the purpose of the debtor to seek relief therefrom.<sup>95</sup> It should inform the creditor of the time and place of the examination.<sup>96</sup> The

*v. Piper*, 64 N. H. 335, 10 Atl. 680.

[f] **Notice Required by Bond.** When a notice has been given and thereafter the debtor gives his bond, conditioned in the usual language to give notice and apply for relief, the former notice is no longer effectual; a new notice must be given according to the terms of the bond. *Williams v. McDonald*, 18 Me. 120.

[g] **Magistrate Interested.**—It is no objection to the validity of a notice in the form of a citation that the magistrate who issued the same was not disinterested, since his act is ministerial rather than judicial. *Gray v. Douglass*, 81 Me. 427, 17 Atl. 320.

88. *Putnam v. Longley*, 11 Pick. (Mass.) 487, irrespective of whether such persons are partners.

89. *Cameron v. Little*, 13 N. H. 23.

[a] **Actual Knowledge Sufficient.** Special notice of the assignment would seem to be unnecessary where it appears that the debtor had actual knowledge of the assignment. *Cameron v. Little*, 13 N. H. 23.

[b] **Assignee for the benefit of creditors** is entitled to such notice. *Hayes v. Kingsbury*, 22 Me. 400.

90. See *infra*, II, C, 15, k, (IV), (E), (5).

91. **Me.**—*Perry v. Plunkett*, 74 Me. 228; *Farrington v. Farrar*, 73 Me. 37. **Mass.**—*Hastings v. Partridge*, 124 Mass. 401; *Nash v. Coffey*, 105 Mass. 341; *Pierce v. Phillips*, 101 Mass. 313; *Carter v. Cloheey*, 100 Mass. 299. **N. H.** *Sanborn v. Piper*, 64 N. H. 335, 10 Atl. 680. **Vt.**—*Paine v. Ely*, 1 D. Chip. 37, must direct appearance before issuing justices.

92. *Hill v. Bartlett*, 124 Mass. 399; *Dana v. Carr*, 124 Mass. 397.

[a] Where the debtor is at large

under bond, the notice need not recite that the bond had not expired, especially where the date of the bond is given. *Farrington v. Farrar*, 73 Me. 37.

93. *Dunham v. Burlingame*, 2 Metc. (Mass.) 271.

94. *Farrington v. Farrar*, 73 Me. 37; *Smith v. Bragdon*, 48 Me. 101.

[a] **A variance** between this description as appears in the notification and the description in the execution which is not of such a character as to be misleading will not invalidate the notice. *Farrington v. Farrar*, 73 Me. 37.

[b] **The date of the judgment** need not be given if it is otherwise identified. *Rand v. Tobie*, 32 Me. 450.

[c] **The notice need not describe the execution** with greater particularity than to say that it is an execution at the creditor's suit. *Davis v. Putnam*, 5 Gray (Mass.) 321.

[d] **Where Two Executions in Favor of Creditor.**—If the debtor is arrested in such a case, his notice must specify which of the two executions he seeks relief from. *Merriam v. Haskins*, 7 Allen (Mass.) 346.

[e] **Relief From Two Executions.** Notice of intention to seek relief from two executions may be combined in one notice. *Chesley v. Welch*, 10 N. H. 251.

95. *Simpson v. Bowker*, 11 Cush. (Mass.) 306; *Dunham v. Burlingame*, 2 Metc. (Mass.) 271, 306.

96. *Way v. O'Sullivan*, 106 Mass. 118. See also *Danforth v. Knowlton*, 111 Mass. 76; *Sanborn v. Piper*, 64 N. H. 335, 10 Atl. 680. But see *Dunham v. Burlingame*, 2 Metc. (Mass.) 271.

[a] **Official Character of Magistrate.** A statutory requirement that the notice in such a case shall designate the

notice need not state the amount of the debt.<sup>97</sup>

Unimportant irregularities,<sup>98</sup> or defects of form<sup>99</sup> by which a party is not misled to his injury will not render a notice insufficient, and statutes in some states expressly so provide.<sup>1</sup> So, an error in the reference to the statute under which the debtor seeks relief,<sup>2</sup> the omission of the middle initial of the debtor's<sup>3</sup> or creditor's name,<sup>4</sup> or the insertion thereof where it was not contained in the execution,<sup>5</sup> a mistake in the statement of the costs,<sup>6</sup> and other similar errors which

official character of the magistrate issuing the same is not complied with by merely adding the word "magistrate" to the signature thereon. *Carter v. Clohecy*, 100 Mass. 299. See also *Nash v. Coffey*, 105 Mass. 341.

[b] **The hour of the day** must be fixed as well as the day itself; a notice which does not do this is invalid. *Sanborn v. Piper*, 64 N. H. 335, 10 Atl. 680.

[c] **Failure to give the street address** of the office where the disclosure is to be made, will not, at least in the absence of a showing that the creditor was prejudiced thereby, invalidate the proceedings. *Farrington v. Farrar*, 73 Me. 37.

97. *Davis v. Putnam*, 5 Gray (Mass.) 321.

98. **Me.**—*Clement v. Wyman*, 31 Me. 50. **Mass.**—*Calnan v. Toomey*, 129 Mass. 451; *Salmon v. Nation*, 109 Mass. 216; *Way v. O'Sullivan*, 106 Mass. 118; *Collins v. Douglass*, 1 Gray 167; *Bussey v. Briggs*, 2 Mete. 132. **N. H.** *Osgood v. Hutchins*, 6 N. H. 374.

[a] **Notice Addressed to One Not a Creditor.**—Where the only creditor was A., a notice is not invalid because it is addressed to A. and B. as creditors. *Clement v. Wyman*, 31 Me. 50.

99. **Me.**—*Perry v. Plunkett*, 74 Me. 328; *Farrington v. Farrar*, 73 Me. 37. **Mass.**—*Dwyer v. Winters*, 126 Mass. 186; *Dana v. Carr*, 124 Mass. 397; *Hill v. Bartlett*, 124 Mass. 399; *Pierce v. Phillips*, 101 Mass. 313; *Davis v. Putnam*, 5 Gray 321; *Dunham v. Burlingame*, 2 Mete. 271. **N. H.**—*Sanborn v. Piper*, 64 N. H. 335, 10 Atl. 680; *Fernald v. Noyes*, 30 N. H. 39; *Peck v. Wilson*, 14 N. H. 587; *Chesley v. Welch*, 10 N. H. 251; *Osgood v. Hutchins*, 6 N. H. 374; *Eaton v. Miner*, 5 N. H. 542, where originals instead of copies were served.

As to amendment of such defects see following section.

[a] **A Test.**—(1) "When its terms are so unambiguous and distinct that

the meaning cannot without negligence or inattention be misunderstood, the notice is sufficient." *Sanborn v. Piper*, 64 N. H. 335. (2) And see *Farrington v. Farrar*, 73 Me. 37, where it is said that "The essential thing is to give the creditor a notice, by inspection of which it can be judicially known that he could not have failed rightly to understand the person and case to which the proceeding related." To the same effect, see *Moore v. Bond*, 18 Me. 142.

[b] **Unsigned.**—Where the notice consists of an order by the justices, the fact that it is not signed does not defeat it. *Fernald v. Noyes*, 30 N. H. 39.

[c] **Describing the debtor** as "a prisoner in jail," when he was, in fact, at large under a recognizance is not fatal to the notice. *Davis v. Putnam*, 5 Gray (Mass.) 321.

[d] **Addressing the notice to the attorney** for the parties upon whom it is served does not vitiate it. *Pierce v. Phillips*, 101 Mass. 313.

[e] **Failure to mention one of the several joint creditors** does not vitiate a notice served on the attorney of all of them. *Dana v. Carr*, 124 Mass. 397.

1. *Perry v. Plunkett*, 74 Me. 328.

2. **Me.**—*Moore v. Bond*, 18 Me. 142. **Mass.**—*Bussey v. Briggs*, 2 Mete. 132, where a notice under an act entitled, in part, "of the relief of poor prisoners committed on execution for debt," referred to "an act for the relief of poor prisoners who are committed by execution for debt." **N. H.** *Ladd v. Deming*, 20 N. H. 487; *Bunker v. Nutter*, 9 N. H. 554; *Osgood v. Hutchins*, 6 N. H. 374.

3. *Collins v. Douglass*, 1 Gray (Mass.) 167.

4. *Peck v. Wilson*, 14 N. H. 587.

5. *Dwyer v. Winters*, 126 Mass. 186.

6. *Leach v. Hill*, 3 Mete. (Mass.) 173.

do not mislead<sup>7</sup> will not invalidate subsequent proceedings thereunder. But a notice giving wrong information so as to mislead the party upon whom it is served,<sup>8</sup> or is silent as to material information which the statute requires,<sup>9</sup> cannot be regarded as a valid notice.

(3.) *Amendment.* — Formal defects or irregularities in the bond may be cured by an amendment,<sup>10</sup> if a timely application therefor be made.<sup>11</sup>

(4.) *Length of Notice.* — The notice, to be effectual, must be for the prescribed length of time.<sup>12</sup> Where the length of notice is proportioned to the distance between the place of hearing and the place of service, the place of residence is immaterial.<sup>13</sup>

(5.) *Service.* — (a.) *By Whom Made.* — It is not necessary that service of this notice should be made by an officer,<sup>14</sup> although such service is quite proper.<sup>15</sup>

(b.) *Upon Whom Made.* — The statutes sometimes provide for the service of this notice on the adverse party or his attorney.<sup>16</sup> These

7. *Davis v. Putnam*, 5 Gray (Mass.) 321 (a description of the debtor as a "prisoner in jail" when, in fact, he is at liberty under an undertaking); *Green v. Wilbur*, 10 Cush. (Mass.) 439, a recital that the debtor is in custody under an execution, whereas, in fact, he is held under an alias writ.

[a] A failure to add the interest to the amount of the judgment on which the debtor is imprisoned. *Green v. Wilbur*, 10 Cush. (Mass.) 439.

8. *Sanborn v. Piper*, 64 N. H. 335, 10 Atl. 680. See also *Peck v. Wilson*, 14 N. H. 587; *Osgood v. Hutchins*, 6 N. H. 374.

[a] A misnomer of creditor may vitiate a discharge secured thereunder. *Slasson v. Brown*, 20 Pick. (Mass.) 436, where the notices described the creditor as "Ebenezer B. S.," when his true name was "Edward B. S."

9. *Sanborn v. Piper*, 64 N. H. 335, 10 Atl. 680.

10. *Perry v. Plunkett*, 74 Me. 328.

[a] When defect is discovered before service it may be at once corrected. *Eames v. Rice*, 157 Mass. 508, 32 N. E. 905.

11. *Perry v. Plunkett*, 74 Me. 328.

[a] After institution of suit on bond an amendment will not be permitted in an essential particular. *Perry v. Plunkett*, 74 Me. 324.

12. *Sanborn v. Piper*, 64 N. H. 335, 10 Atl. 680. See *Watson v. Willis*, 24 N. C. 17.

[a] Even an amended notice, pur-

porting to cure defects in the original notice, cannot be given for a period shorter than the statute provides. *Sanborn v. Piper*, 64 N. H. 335, 10 Atl. 680.

13. *Homer v. Sinnott*, 119 Mass. 191; *Carroll v. Rogers*, 4 Allen (Mass.) 70; *Smith v. Randall*, 1 Allen (Mass.) 456; *City Bank v. Fullerton*, 11 Mete. (Mass.) 73.

[a] But if service be made by leaving at the last usual place of abode, the party so served must be allowed twenty-four hours' time additional to that allowed for travel. *Central Nat. Bank v. O'Connor*, 123 Mass. 52; *Way v. Wheeler*, 112 Mass. 87.

14. *Osgood v. Hutchins*, 6 N. H. 374. And see *Rankin v. Nettleton*, 2 N. H. 305.

15. *Bliss v. Day*, 68 Me. 201.

[a] By Officer De Facto.—*Bliss v. Day*, 68 Me. 201. See also *Elliott v. Willis*, 1 Allen (Mass.) 461.

[b] Such a notice is not a writ or precept within the meaning of a statute which provides that a constable may only serve writs of precepts in certain actions. *Bliss v. Day*, 68 Me. 201.

16. See generally the statutes, and the following cases: *Callaghan v. Whitmarsh*, 145 Mass. 340, 14 N. E. 149; *Sanborn v. Piper*, 64 N. H. 335, 10 Atl. 680; *Fernald v. Noyes*, 30 N. H. 39.

To whom notice given, see *supra*, II, C, 15, k, (IV), (E), (1).

[a] In Maine, the service shall be

statutes are considered as referring to the attorney who represented the creditor in the action in which the debtor was committed.<sup>17</sup> When service is permitted to be made on the attorney it may be given to any one of a number who may have appeared.<sup>18</sup>

(c.) *Manner of.*—The manner of service provided by the statutes should be closely observed.<sup>19</sup> They sometimes provide for service by publication,<sup>20</sup> or by leaving a copy at the last and usual place of abode.<sup>21</sup> Unless so provided for, however, such service is insufficient.<sup>22</sup>

(6.) *Return of Service.*—A return of service should be made<sup>23</sup> in accordance with general rules elsewhere treated.<sup>24</sup> The requirements as to the form of the return are not exacting; if it show with reasonable clearness that a valid service was made it will be sufficient.<sup>25</sup> It should, however, specify the time of the service,<sup>26</sup> and should be returned before the proper officer.<sup>27</sup>

*Amendment.*—Great liberality is allowed in making amendments to the return to supply omissions or correct errors so as to sustain the proceedings.<sup>28</sup>

(F.) *OBJECTIONS AND EXCEPTIONS.*—All proper objections should be

upon the creditor if he is alive and within the state, otherwise upon the attorney in the suit. *Smith v. Bragdon*, 48 Me. 101.

[b] *Where the notice is to several joint creditors*, service upon one of them is sufficient. *Malendy v. Hungerford*, 5 Ga. 544; *Smith v. Brown*, 61 Me. 70.

17. *Priest v. Tarlton*, 3 N. H. 93.

[a] *Neither the death of the party nor the discharge of the attorney* will dissolve the relation, so as to prevent service upon such attorney. *Priest v. Tarlton*, 3 N. H. 93.

18. *Fernald v. Noyes*, 30 N. H. 39.

[a] *Where the appearance is by a firm of attorneys*, upon any member of such firm. *Knight v. Fifield*, 7 Cush. (Mass.) 263.

19. *Young v. Capen*, 7 Mete. (Mass.) 287.

20. *Ex parte Cantey*, 11 Rich. L. (S. C.) 520; *Mordecai v. La Risse*, 1 Rich. L. (S. C.) 192.

21. *Mass.*—*Central Nat. Bank v. O'Connor*, 123 Mass. 52; *Smith v. Randall*, 1 Allen 456; *Young v. Capen*, 7 Mete. 287. *N. H.*—*Madison v. Rano*, 4 N. H. 79. *N. J.*—*Hogan v. Hutton*, 20 N. J. L. 82.

[a] *Joint creditors living at the same dwelling* may be served by leaving one copy of the notice at such dwelling. *Niles v. Hancock*, 3 Mete.

(Mass.) 568; *Leach v. Hill*, 3 Mete. (Mass.) 173.

[b] *The mere reading of the notice by the officer to the creditor is not sufficient.* *Hanson v. Dyer*, 17 Me. 96; *Young v. Capen*, 7 Mete. (Mass.) 287.

22. *Madison v. Rano*, 4 N. H. 79. See also *Flanders v. Thompson*, 2 N. H. 421.

23. See notes and cases following.

[a] *Verification of the return is necessary unless it is made by an officer.* *Allen v. Bruce*, 12 N. H. 418; *Osgood v. Hutchins*, 6 N. H. 374.

[b] *Affidavit not conclusive, but return of sheriff is conclusive.* *Woods v. Blodgett*, 15 N. H. 569.

24. See generally the title "Returns."

25. *Smith v. Randall*, 1 Allen (Mass.) 456.

26. *Lord v. Skinner*, 9 Allen (Mass.) 176; *Smith v. Randall*, 1 Allen (Mass.) 456.

27. *Smith v. Huntington*, 2 Day (Conn.) 562.

28. *Shepherd v. Jackson*, 16 Gray (Mass.) 599. See generally the title "Returns."

[a] *Amendment after discharge* (1) to show proper service, is allowable (*Shepherd v. Jackson*, 16 Gray (Mass.) 599); (2) but not to show insufficient service. *Shepherd v. Jackson*, 16 Gray (Mass.) 599; *Davis v. Putnam*, 5 Gray (Mass.) 321.

promptly made, otherwise they may be lost by waiver.<sup>29</sup> Objections to the sufficiency of the notice should be made at the hearing of the application.<sup>30</sup>

**Charges of Fraud.**—Statutes permit the creditor to file, in opposition to his debtor's application for relief, charges of fraud on the part of the latter which, if sustained, will defeat the application.<sup>31</sup> The charges should be made in language substantially equivalent to that used in the statute,<sup>32</sup> and are sufficient if they are stated with such clearness and precision as to inform the debtor of the nature and particulars of the transaction to be proved against him.<sup>33</sup> The charges may be made on information and belief,<sup>34</sup> and may, for sufficient cause, be amended.<sup>35</sup>

**Waiver of Objections.**—Technical defects in the proceedings may be waived by a party.<sup>36</sup> Thus, irregularities in the notice of hearing which might otherwise have been available to the creditor are waived by appearing and contesting the application without specially objecting to the irregularities.<sup>37</sup> Waiver of such defects may also result

29. *Lewis v. Brewer*, 51 Me. 108; *Osgood v. Thorne*, 63 N. H. 375. See generally the title "Exhibits," *infra*, this section.

[a] **Objection to the justice of the peace** appointed by a supreme court justice to hear the matter, should be made to the latter and not at the hearing. *Osgood v. Thorne*, 63 N. H. 375.

30. *Lewis v. Brewer*, 51 Me. 108.

[a] **Where valid objections are overruled** relief may be had by certiorari. *Lewis v. Brewer*, 51 Me. 108. See generally 4 STANDARD PROC. 881, et seq.

31. See the statutes and the cases cited *infra*, this section.

[a] **One of several partners** may, on behalf of his firm, sign and swear to charges of fraud in such a proceeding. *Brown v. Tobias*, 1 Allen (Mass.) 385.

32. *Chamberlain v. Hoogs*, 1 Gray (Mass.) 172.

33. *Chapin v. Haley*, 133 Mass. 127; *Anderson v. Edwards*, 123 Mass. 273; *Stockwell v. Silloway*, 100 Mass. 287; *Chamberlain v. Hoogs*, 1 Gray (Mass.) 172. And see *Clatur v. Donegan*, 126 Mass. 28.

See generally the title "Fraud and Deceit."

[a] **The charge need not be in the form appropriate for an indictment or complaint in a criminal proceeding.** *Stockwell v. Silloway*, 100 Mass. 287.

[b] **Documents attached** may be referred to by way of specifying and completing the charge of fraud. *Stock-*

*well v. Silloway*, 100 Mass. 287. See generally the title "Exhibits,"

[c] **If they do not meet this test** the creditor may be required to specify further wherein the alleged fraud exists. *Noyes v. Manning*, 162 Mass. 14, 37 N. E. 768.

34. *Stockwell v. Silloway*, 100 Mass. 287.

35. *Stockwell v. Silloway*, 100 Mass. 287; *Brown v. Tobias*, 1 Allen (Mass.) 385.

36. **Ky.**—See *Bryant v. Crittenden*, 1 Ky. L. Rep. 59. **Me.**—*Fuller v. Davis*, 73 Me. 556; *Patten v. Kimball*, 73 Me. 497; *Page v. Plummer*, 10 Me. 334. **Mass.**—*Lord v. Skinner*, 9 Allen 376. **N. H.**—*Bunker v. Nutter*, 9 N. H. 554. [a] **Where the adverse party has been duly notified but fails to attend** he will be bound by the proceedings had although they are admittedly irregular. *Bryant v. Crittenden*, 1 Ky. L. Rep. 59.

37. *Fuller v. Davis*, 73 Me. 556; *Page v. Plummer*, 10 Me. 334; *Bunker v. Nutter*, 9 N. H. 554.

[a] **The creditor may appear specially**, so as to object to the insufficiency of the notice, in which case he waives nothing. *Williams v. Kimball*, 132 Mass. 214. See also *Fuller v. Davis*, 73 Me. 556.

[b] **Mere presence at the hearing**, without participation therein, is not a waiver. *Call v. Barker*, 27 Me. 97, where it is said that "If the creditor

from acceptance of the notice as good, by the creditor's attorney.<sup>38</sup> But the officer on whom the service is made cannot waive any of the creditor's rights,<sup>39</sup> unless specially authorized so to do;<sup>40</sup> nor does appearance of the creditor at the hearing to oppose it, waive the failure to institute the proceedings within the time prescribed by statute.<sup>41</sup>

(G.) HEARING AND DETERMINATION. — (1.) *Generally.* — The hearing must be had at the time,<sup>42</sup> and place<sup>43</sup> specified in the notice. If the hearing is before a justice of the peace, the parties have an hour after the time set within which to appear,<sup>44</sup> unless otherwise provided by statute; the justice loses jurisdiction if the debtor fails to appear within the hour.<sup>45</sup>

The order and mode<sup>46</sup> of the examination, as well as the ultimate disposition of the debtor's application for admission to the benefits of the act,<sup>47</sup> is usually left to the discretion of the court or official before whom the hearing is had. But where it appears that the applicant has complied with the requirements of the statute and is acting in good faith it is his right to be admitted to the benefit of the act.<sup>48</sup> Unless the statute provides otherwise,<sup>49</sup> if one of the magistrates who originally took jurisdiction is unable to be present, another may be called in.<sup>50</sup> The debtor should be required to answer such proper interrogatories as may be asked by the creditor.<sup>51</sup> Conversely, he may

or his attorney does not lead the debtor or the justices into any illegal course of proceeding, but merely sits in silence and allows them to pursue their own course, the rights of the creditor cannot be considered as thereby waived or forfeited."

38. *Patten v. Kimball*, 73 Me. 497 (where an express waiver was indorsed on the notice); *Page v. Plummer*, 10 Me. 334; *Mutual, etc. Fire Ins. Co. v. Woodward*, 8 Allen (Mass.) 148, error in the name.

[a] Defects in the manner of service waived by acceptance. *Williams v. Kimball*, 135 Mass. 411.

39. *Cutler v. Boyd*, 124 Mass. 181.

40. *Cutler v. Boyd*, 124 Mass. 181.

41. *Seovell v. Holbrook*, 22 N. H. 269.

42. *Banks v. Johnson*, 12 N. H. 445.

43. *Banks v. Johnson*, 12 N. H. 445.

44. See the title "Justices of the Peace," and the following cases: *Hills v. Jones*, 122 Mass. 412; *Sweetser v. Eaton*, 14 Allen (Mass.) 157; *Lord v. Skinner*, 9 Allen (Mass.) 376; *Phelps v. Davis*, 6 Allen (Mass.) 287; *Hobbs v. Fogg*, 6 Gray (Mass.) 251; *Downer v. Hollister*, 14 N. H. 122, 40 Am. Dec. 175; *Banks v. Johnson*, 12 N. H. 445.

[a] Where the creditor has previously consented thereto, the oath may

be administered before the expiration of the hour. *Lord v. Skinner*, 9 Allen (Mass.) 376.

45. *Sweetser v. Eaton*, 14 Allen (Mass.) 157.

[a] This rule has been changed by statute and the justices may now hold the hearing open for longer than the hour in their discretion. *Lincoln v. Cook*, 124 Mass. 383.

46. *In re Ballou*, 7 R. I. 466.

47. *In re Ballou*, 7 R. I. 466.

[a] Where the debtor has recently been refused relief under the insolvency laws the magistrates to whom application is made for relief as a poor debtor may require the applicant to show that he has undergone some change of circumstances in the interim. *In re Ballou*, 7 R. I. 466.

48. *Harrison v. Emmerson*, 2 Leigh (29 Va.) 764.

[a] *Mandamus* lies to compel the justices to administer the oath and order the debtor's discharge in such a case. *Harrison v. Emmerson*, 2 Leigh (29 Va.) 764. See generally the title "Mandamus."

49. *Cushing v. Briggs*, 2 R. I. 139.

50. *Brown v. Lakeman*, 5 Metc. (Mass.) 347.

51. *Marr v. Clark*, 56 Me. 542; *Bunker v. Nutter*, 9 N. H. 554.

not be required to answer such questions as are not pertinent to the investigation.<sup>52</sup>

(2.) *Continuances*.—Such hearing may be continued from time to time as justice may require, upon order of the judge or magistrate,<sup>53</sup> or by the consent of the parties thereto.<sup>54</sup> Any such adjournment, however, must be to a proper place and time,<sup>55</sup> and the proceeding may not be left open under a general continuance.<sup>56</sup> In some cases an adjournment takes place by operation of law, as where the day for the hearing falls upon a non-judicial day.<sup>57</sup> Statutes sometimes limit a time beyond which this hearing may not be adjourned without the loss of jurisdiction,<sup>58</sup> unless by stipulation of the parties.<sup>59</sup>

(H.) THE OATH AND ITS ADMINISTRATION. — The statutes regulating this proceeding usually designate the person or tribunal by whom the prescribed oath shall be administered,<sup>60</sup> and also determine the form and general requisites thereof.<sup>61</sup> In substance, they usually require the debtor to swear that he has no estate above a sum or amount specified in the statute,<sup>62</sup> and that he is not attempting to defraud any of his creditors.<sup>63</sup> The requirements of the statute as to the form of this oath should be closely followed.<sup>64</sup>

[a] An adjudication of the bankruptcy of the debtor does not relieve him of this duty under a statute requiring him to answer and "make true disclosure of his business affairs and property under oath." *Marr v. Clark*, 56 Me. 542.

52. *Ledden v. Hanson*, 39 Me. 355.

53. *Me.*—*Gould v. Ford*, 91 Me. 146, 39 Atl. 480; *Chamberlain v. Sands*, 27 Me. 458; *Fales v. Goodhue*, 25 Me. 423. *Mass.*—*Manning v. Reynolds*, 164 Mass. 150, 41 N. E. 62; *Barham v. Gomez*, 149 Mass. 221, 21 N. E. 297; *Carleton v. Wakefield*, 111 Mass. 481; *Russell v. Goodrich*, 8 Allen 150; *Way v. Foote*, 7 Allen 354. *N. H.*—*Osgood v. Hutchins*, 6 N. H. 374.

[a] After announcement of intention to deny relief the magistrate, it has been held, may not adjourn the hearing. *Russell v. Goodrich*, 8 Allen (Mass.) 150.

[b] In Maine it is not a condition precedent that the citation and return be first examined as to their correctness, nor is it necessary that the fees of the justice be paid nor any formal organization perfected before the power to adjourn may be exercised. *Gould v. Ford*, 91 Me. 146, 39 Atl. 480.

[c] This power is incidental to the authority conferred to determine the application. *Banks v. Johnson*, 12 N. H. 445.

As to the power to grant continuances generally, see 5 STANDARD PROC. 441-443.

[d] Where the hearing is before two justice's and only one is present, it is the duty of the justice present to adjourn the hearing. *Chesley v. Welch*, 10 N. H. 251. *Contra*, *Hovey v. Hamilton*, 24 Me. 451; *Williams v. Burrill*, 23 Me. 144, not even with the creditor's consent.

54. *Leach v. Pillsbury*, 18 N. H. 525. See also *Mt. Washington Glass Works v. Allen*, 121 Mass. 283.

55. *Bliss v. Kershaw*, 180 Mass. 99, 61 N. E. 823.

56. *Bliss v. Kershaw*, 180 Mass. 99, 61 N. E. 823.

57. *Poor v. Beatty*, 78 Me. 580, 7 Atl. 541. See generally the title "Sunday and Holidays."

58. *Fales v. Goodhue*, 25 Me. 423.

59. *Leach v. Pillsbury*, 18 N. H. 525.

60. See the statutes, and the following: *Bunker v. Nutter*, 9 N. H. 554; *Wilcox v. Crowell*, 16 R. I. 707, 19 Atl. 329; *In re Ballou*, 7 R. I. 466.

[a] Not by the clerk even in the absence of the judge. *Wilcox v. Crowell*, 16 R. I. 707, 19 Atl. 329.

61. See the statutes.

62. *Little v. Hasey*, 12 Mass. 319; *Bunker v. Nutter*, 9 N. H. 554.

63. *Bunker v. Nutter*, 9 N. H. 554.

64. *Little v. Hasey*, 12 Mass. 319.

(I.) **THE ASSIGNMENT.**—The statute sometimes requires the debtor to make an assignment before he is entitled to his discharge;<sup>65</sup> in which event he must make the assignment whether or not he has an assignable interest and regardless of its effect.<sup>66</sup>

(J.) **COSTS.**—A debtor who obtains his discharge in this manner is not entitled to his costs,<sup>67</sup> and in some jurisdictions he is required to satisfy his creditor and the jailer for charges incurred for his maintenance in custody before he may be discharged.<sup>68</sup>

(K.) **THE CERTIFICATE.**—(1.) *General Statement.*—Upon his determination that the debtor is entitled to his discharge the magistrate must, in some states, make a certificate to this effect.<sup>69</sup> It is this certificate which entitles the debtor to his discharge,<sup>70</sup> when he has otherwise complied with the statutory conditions precedent to his discharge.<sup>71</sup>

(2.) *Requisites.*—Statutes sometimes prescribe the form of the certificate to be made by the magistrate,<sup>72</sup> and, where such is the case, nothing need be inserted therein which these statutes do not require.<sup>73</sup> Generally, however, the certificate must conform to the execution from which relief is sought,<sup>74</sup> and should show that at the time therein named,<sup>75</sup> the creditor having been duly notified thereof,<sup>76</sup> the debtor was admitted to and actually took the oath prescribed by law.<sup>77</sup> If it recites that the creditors were properly notified, it need not there-

65. See the statutes.

[a] **To whom made,** see *Jordan, Marsh & Co. v. Hall*, 9 R. I. 218, 11 Am. Rep. 245.

66. *Head v. Clark*, 45 N. H. 287; *Sheafe v. Loughton*, 36 N. H. 240.

67. *Roberts v. Shell*, 4 Yerg. (Tenn.) 160.

68. *Haight v. Richards*, 3 Vt. 77. See also *Emerson v. Lombard*, 15 Me. 458, where the creditor is held entitled to his costs but it is not determined that the payment thereof is a condition precedent to the debtor's release.

[a] **The payment of the magistrate's fee** is not a condition precedent to the debtor's discharge. *Coleman v. Hawkes*, 120 Mass. 594.

69. *Granite Bank v. Treat*, 18 Me. 340; *Murray v. Neally*, 11 Me. 238.

[a] **Two certificates**, (1) one to the debtor and one to the jailer. *Haight v. Richards*, 3 Vt. 77; *Raymond v. Southerland*, 3 Vt. 494; *Staniford v. Barry*, Brayt. (Vt.) 200. (2) Delivery of certificate to plaintiff's attorney for the jailer is not a compliance with the statute. *Haight v. Richards*, 3 Vt. 77.

70. **Mass.**—*Butler v. Fairbanks*, 4 Gray 531; *Green v. Wilbur*, 10 Cush. 439. **N. H.**—*Banks v. Johnson*, 12 N. H. 445. **R. I.**—*Barry v. Viall*, 12 R. I. 18; *Eastwood v. Schroeder*, 5 R. I. 388.

**Vt.**—*Raymond v. Southerland*, 3 Vt. 494; *Staniford v. Barry*, Brayt. 200.

[a] **Upon the presentation** to his keeper, of such a certificate, the debtor may demand his discharge as a matter of right. *Banks v. Johnson*, 12 N. H. 445; *Barry v. Viall*, 12 R. I. 18; *Eastwood v. Schroeder*, 5 R. I. 388.

71. *Call v. Barker*, 27 Me. 97; *Metcalf v. Hilton*, 26 Me. 200.

72. See the statutes.

[a] **For forms of certificate**, see *Farrington v. Farrar*, 73 Me. 37; *Allen v. Hall*, 8 Vt. 34.

[b] **Stamp act held not to affect** such certificates. *Angier v. Smalley*, 58 Me. 425.

73. *Butler v. Fairbanks*, 4 Gray (Mass.) 531; *Chesley v. Welch*, 10 N. H. 251.

74. *Holbrook v. Pearce*, 15 Vt. 616; *Dean v. Lowry*, 4 Vt. 481.

[a] **Failure to insert date of execution** will not vitiate the certificate where the debt is otherwise sufficiently identified. *Burnham v. Howe*, 23 Me. 489.

75. *Banks v. Johnson*, 12 N. H. 445.

76. *Banks v. Johnson*, 12 N. H. 445; *Osgood v. Hutchins*, 6 N. H. 374.

77. *Banks v. Johnson*, 12 N. H. 445. See also *Clark v. Metcalf*, 38 Me. 122.

after state whether they did or did not attend.<sup>78</sup> This certificate forms no part of the record,<sup>79</sup> and need not recite that the justices who presided were disinterested.<sup>80</sup> It should, however, show that the magistrates signing the same had jurisdiction throughout the entire course of the proceedings.<sup>81</sup> Harmless irregularities in the certificate will not vitiate it.<sup>82</sup>

(3.) *Amendment*.—If an application therefor be seasonably made, this certificate may be amended to make its recitals conform to the facts.<sup>83</sup>

(V.) *Effect of the Discharge*.—Discharge under the poor debtor's act relieves the debtor from arrest or imprisonment,<sup>84</sup> in respect of the debt or claim which is the subject of the suit in which he is in custody.<sup>85</sup> It shields his body against that debt so long as it continues

78. *Carter v. Miller*, 12 Vt. 513. Compare *Banks v. Johnson*, 12 N. H. 445; *Osgood v. Hutchins*, 6 N. H. 374, dictum to the contrary.

[a] In *Vermont* (1) the certificate of the commissioners is required to state their determination as to the sufficiency and regularity of the notice given to the creditor on the application of the debtor for this relief. *Allen v. Hall*, 8 Vt. 34. (2) In the absence of some such statement as to notice it would seem necessary that it show the creditors to have appeared. *Carter v. Miller*, 12 Vt. 513.

[b] The certificate is conclusive as to its recitals regarding this notice. *Raymond v. Southerland*, 3 Vt. 494.

79. *Scamman v. Huff*, 51 Me. 194.

80. *Scamman v. Huff*, 51 Me. 194.

81. *Bowker v. Porter*, 39 Me. 504.

[a] Where the hearing and oath were at an adjourned term, the certificate should reveal such facts as will show that jurisdiction was not lost by the adjournment. *Bowker v. Porter*, 39 Me. 504.

[b] A certificate signed by a magistrate without jurisdiction is void. *Cushing v. Briggs*, 2 R. I. 139.

82. *Burnham v. Howe*, 23 Me. 489 (failure to insert date of execution); *Carter v. Miller*, 12 Vt. 513, immaterial variance between certificate delivered to jailer and one delivered to debtor.

83. *Scamman v. Huff*, 51 Me. 194; *Ayer v. Woodman*, 24 Me. 196; *Ward v. Clapp*, 4 Mete. (Mass.) 455.

[a] *Amendment To Show Administration of Proper Oath*.—*Kimball v. Irish*, 26 Me. 444; *Burnham v. Howe*, 23 Me. 489; *Ward v. Clapp*, 4 Mete. (Mass.) 455.

[b] *After the commencement of an action* (1) on the poor debtor's bond (*Burnham v. Howe*, 23 Me. 489); (2) or even at the time of the trial thereof. *Kimball v. Irish*, 26 Me. 444; *Burnham v. Howe*, 23 Me. 489.

84. *Me.*—*McLaughlin v. Whitten*, 32 Me. 21. *N. H.*—*In re Shannon*, 48 N. H. 407. *R. I.*—*Jordan, Marsh & Co. v. Hall*, 9 R. I. 218, 11 Am. Rep. 245; *In re Ballou*, 7 R. I. 466.

85. *U. S.*—*Stearns v. United States*, 2 Paine 300, 22 Fed. Cas. No. 13,341. *Cal.*—See *Ex parte Batchelder*, 96 Cal. 233, 31 Pac. 45, where the defendant was in custody under an order for his arrest for failure to pay alimony. *Conn.* *Trumbull v. Smith*, 2 Conn. 241. *Ga.* *Harris v. Broyles*, 25 Ga. 136. *Me.*—*McLaughlin v. Whitten*, 32 Me. 21. *Mass.* *Kellogg v. Underwood*, 163 Mass. 214, 40 N. E. 104; *Willington v. Stearns*, 1 Pick. 497. *N. H.*—*In re Shannon*, 48 N. H. 407. *N. J.*—See *Bannister v. Miller*, 54 N. J. Eq. 121, 32 Atl. 1066. *R. I.*—*Jordan, Marsh & Co. v. Hall*, 9 R. I. 218, 11 Am. Rep. 245; *In re Ballou*, 7 R. I. 466; *Eastwood v. Schroeder*, 5 R. I. 388.

[a] *When the United States is the committing creditor* (1) the rule is the same. *Stearns v. United States*, 2 Paine 300, 22 Fed. Cas. No. 13,341. (2) Not, however, where the debtor is in custody to satisfy a fine imposed in a criminal prosecution. *In re Laski*, 14 Fed. Cas. No. 8,098.

[b] *Obligations arising subsequent to the discharge* are not effected thereby. *McLaughlin v. Whitten*, 32 Me. 21; *Bannister v. Miller*, 54 N. J. Eq. 121, 32 Atl. 1066.

a debt,<sup>86</sup> unless he is thereafter convicted of having acted fraudulently in procuring his discharge.<sup>87</sup> It is also a full justification to an officer for omitting to make an arrest under an execution.<sup>88</sup> The discharge does not, however, operate extraterritorially,<sup>89</sup> nor as to creditors other than those at whose suit the debtor is in custody.<sup>90</sup> Nor does the discharge operate to bar the creditor from collecting his claim out of the debtor's property.<sup>91</sup>

(VI.) **Renewal of Application.**—In some jurisdictions notices of the debtor's intention to seek this relief may be issued as often as it is shown that subsequent to the hearing on a former application, the debtor has undergone some change of circumstances from which it would appear that he is now entitled to the benefit of the oath,<sup>92</sup> or that evidence, not available at the former hearing, has been subsequently discovered.<sup>93</sup> In some states the second application is made *ex parte*;<sup>94</sup> in others it is obtained only after a hearing had upon proper notice.<sup>95</sup> The citation in such a case is required to recite the change of circumstances upon which it is issued.<sup>96</sup>

86. *Eastwood v. Schroeder*, 5 R. I. 388; *Angell v. Robbins*, 4 R. I. 493; where the court say further, "even if the judgment be again sued on."

[a] **Habeas corpus** will afford relief from an arrest made in the face of such a discharge. *In re Davis*, 111 Mass. 288; *State v. Ward*, 8 N. J. L. 120. See generally *supra*, II, C, 15, f.

[b] **Debtor's Wife Not Protected.** It is only the debtor's body that is protected by this discharge. So where his wife is in custody, his discharge as a poor debtor will not entitle her to be released. *Hall v. White*, 27 Conn. 488.

87. *In re Davis*, 111 Mass. 288; *Man v. Lowden*, 4 McCord (S. C.) 485.

88. *Thompson v. Berry*, 5 R. I. 95.

89. Conn.—*Woodbridge v. Wright*, 3 Conn. 523. Ga.—*Joice v. Seales*, 18 Ga. 725. N. H.—*Hubbard v. Wentworth*, 3 N. H. 43. N. J.—*Wood v. Malin*, 10 N. J. L. 208.

90. *Jordan, Marsh & Co. v. Hall*, 9 R. I. 218, 11 Am. Rep. 245.

91. *Jones v. Jones*, 87 Me. 117, 32 Atl. 779; *Spencer v. Garland*, 20 Me. 75 (holding that the bond is only a substitute for the detention of the body, and not a satisfaction of the judgment, or a limitation upon the rights of the creditor against the debtor's property); *Hathaway v. Crosby*, 17 Me. 448. See also *Hunter v. United States*, 5 Pet. (U. S.) 173, 8 L. ed. 86.

92. *In re Snow*, 3 Woodb. & M. 430, 22 Fed. Cas. No. 13,143; *Burdick v. Simmons*, 9 R. I. 17; *Watson v. Fairbrother*, 7 R. I. 511; *Eastwood v.*

*Schroeder*, 5 R. I. 388; *Angell v. Robbins*, 4 R. I. 493.

[a] **By a renewal of the application is meant**, any such citation or application issued for the purpose of relief against the same debt. That the former application was for relief from mesne process does not alter this rule. *Eastwood v. Schroeder*, 5 R. I. 388.

[b] **After the Lapse of a Specified Time.**—*Merrill v. Kaulback*, 158 Mass. 228, 33 N. E. 515; *Burt v. Geary*, 128 Mass. 404; *Hastings v. Partridge*, 124 Mass. 401.

[c] **Under a statute which prohibits** the debtor from having a second citation where he has withdrawn his application, or where, upon trial, he shall not be admitted to take the oath, the refusal of the magistrate to hear the application because of defects in the notice, does not prevent a second application. *Angell v. Robbins*, 4 R. I. 493; *Cushing v. Briggs*, 2 R. I. 139.

[d] **A debtor who is at large on an undertaking is in no different position** from a debtor who remains in actual custody, so far as the provisions relating to a renewal of his application are concerned. *City Bank v. Norton*, 48 Me. 73.

93. *In re Snow*, 3 Woodb. & M. 430, 22 Fed. Cas. No. 13,143.

94. *Burdick v. Simmons*, 9 R. I. 17; *Watson v. Fairbrother*, 7 R. I. 511; *Angell v. Robbins*, 4 R. I. 493.

95. *City Bank v. Norton*, 48 Me. 73.

96. *Burdick v. Simmons*, 9 R. I. 17;

(VII.) **Appeal and Review.**<sup>97</sup> — The right to appeal from the determination of this application is usually given to either party.<sup>98</sup> An appeal from the order of discharge will not operate to detain the debtor in custody, and, if he is at liberty on bail, it will not continue the liability of the sureties,<sup>99</sup> nor will an appeal by the debtor from an adverse decision, exempt him from arrest during the pendency of the appeal.<sup>1</sup>

1. *On Surrender of Property.* — (I.) **Generally.** — Statutes in some states provide that a person imprisoned by virtue of an execution against the body may be discharged upon making a full assignment or surrender of his property for the benefit of the execution creditor.<sup>2</sup> Under some<sup>3</sup> but not under other statutes<sup>4</sup> a debtor may obtain his release from constructive as well as actual custody.

*Watson v. Fairbrother*, 7 R. I. 511; *Eastwood v. Schroeder*, 5 R. I. 388.

[a] If it does not do so, subsequent proceedings thereunder are void. *Eastwood v. Schroeder*, 5 R. I. 388.

[b] It need not, however, recite the evidence by which such change of circumstances was shown. *Burdick v. Simmons*, 9 R. I. 17.

97. As to appeals generally see 2 STANDARD PROC. 106, et seq.

98. *Everett v. Henderson*, 150 Mass. 411, 23 N. E. 318.

[a] **Jeopardy.**—A statute which confers such a right does not violate the constitutional inhibition against placing the debtor twice in jeopardy. *Stockwell v. Silloway*, 100 Mass. 287.

99. *Collamore v. Fernald*, 3 Gray (Mass.) 318; *Ingersoll v. Strong*, 9 Metc. (Mass.) 447.

1. *Fletcher v. Bartlett*, 10 Gray (Mass.) 491.

2. **Ga.**—*Hening v. Nelson*, 20 Ga. 583. **Ill.**—See *Hurd's Rev. St.*, 1909, ch. 72; *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024; *In re Salisbury*, 16 Ill. 350; *People ex rel. Brennan v. Cotton*, 14 Ill. 414. **Ky.**—*McGovern v. Maloney*, 30 Ky. L. Rep. 801, 99 S. W. 935. **La.** *State ex rel. Cawley v. Judge of District Court*, 45 La. Ann. 948, 13 So. 196. **N. Y.**—Cons. Laws, 1909, §§120-139; *Shaffer v. Riseley*, 114 N. Y. 23, 20 N. E. 630; *Develin v. Cooper*, 84 N. Y. 410; *Matter of Brady*, 69 N. Y. 215, 53 How. Pr. 128; *Green v. Young*, 21 N. Y. Supp. 255. **Ohio.**—*Walsh's Lessee v. Ringer*, 2 Ohio 327, 15 Am. Dec. 555. **S. C.**—*Walker v. Riley*, 10 Rich. L. 87; *Mack v. Garrett*, 10 Rich. L. 79; *Bulwinkle v. Grube*, 5 Rich. L. 286;

*Gibson v. Steele*, 3 McCord 45. **Tenn.** *M'Kenzie v. Hackney*, 3 Yerg. 417. See also *Grisham v. Grisham*, 8 Yerg. 393.

[a] **The sole object of this statute** is the discharge of honest debtors who have made an honest and full surrender of all their property for their creditors. It is not intended to benefit debtors who have disposed of their property for the purpose of defrauding the very creditors at whose suit they were imprisoned. *Matter of Brady*, 69 N. Y. 215, 53 How. Pr. 128, affirming 8 Hun 437.

[b] **A mere readiness and willingness** (1) to deliver his property is not enough; there must be an actual delivery of the property to the assignee, or the performance of some act which is equivalent thereto. *Walker v. Riley*, 10 Rich. L. (S. C.) 87. (2) Where the property is in the possession of another who claims title thereto, a transfer to his creditors of his right in the property is all he can do and will entitle him to his discharge, so far as the delivery of his property is concerned. *Bowen v. Holleyman*, 9 Rich. L. (S. C.) 65.

[c] **An infant** is a "person" within the meaning of such statutes. *People ex rel. Smith v. Mullin*, 25 Wend. (N. Y.) 698.

3. *In re Langslow*, 167 N. Y. 314, 60 N. E. 590; *Develin v. Cooper*, 84 N. Y. 410.

[a] **A person who has been admitted to jail liberties**, is deemed to be imprisoned, within the meaning of such statutory provisions. *In re Langslow*, 167 N. Y. 314, 320, 60 N. E. 590.

4. *Wendover v. Tucker*, 4 Ind. 381.

(II.) **Proceedings To Procure.**—(A.) **IN GENERAL.**—In some states the debtor<sup>5</sup> makes an application by petition.<sup>6</sup> All the statutory requirements in proceedings for such a discharge must be closely followed,<sup>7</sup> since such requirements are all jurisdictional to the right of the court to grant the order of discharge.<sup>8</sup>

(B.) **TIME FOR MAKING APPLICATION.**—The time within which the application may be made is regulated by statute,<sup>9</sup> which sometimes requires a certain period of imprisonment in case the debt or debts exceed a specified sum.<sup>10</sup>

(C.) **THE PETITION.**—The statutes generally require a written petition signed by the petitioner<sup>11</sup> and addressed to the court from which the execution issued,<sup>12</sup> or to some other tribunal designated by statute.<sup>13</sup> Unless required by statute, the petition need not name or refer to the judgment under which the execution was issued.<sup>14</sup> Where length of residence<sup>15</sup> or of the imprisonment<sup>16</sup> of the debtor are jurisdictional facts, they must be directly averred. The prayer of the petition under such statutes is that the estate of the debtor may be assigned for the benefit of his creditors and that his person may be exempted from arrest or imprisonment.<sup>17</sup>

5. *Hoyle v. Murray*, 42 App. Div. 313, 59 N. Y. Supp. 200. legally made on that day. *King v. Strain*, 6 Blackf. (Ind.) 447.

6. *Matter of Brady*, 69 N. Y. 215, 53 How. Pr. 128; *Bullymore v. Cooper*, 46 N. Y. 236. See *infra*, II, C, 15, 1, (II), (C). 10. *Funke v. Hurst*, 119 Mich. 182, 77 N. W. 695; *In re Haight*, 11 Civ. Proc. (N. Y.) 227. See *supra*, II, C, 11, b, (IV).

7. *Shaffer v. Riseley*, 114 N. Y. 23, 20 N. E. 630; *Bullymore v. Cooper*, 46 N. Y. 236, 246; *In re Quick*, 92 App. Div. 131, 87 N. Y. Supp. 316; *Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42; *In re Patton*, 7 Misc. 467, 27 N. Y. Supp. 992. 11. See the statutes.

8. *Bullymore v. Cooper*, 46 N. Y. 236, 246; *In re Quick*, 92 App. Div. 131, 87 N. Y. Supp. 316. [a] In Illinois, the proceeding is summary and no formal pleadings are required. It is enough that the imprisoned debtor offers to surrender his property and asks to be discharged. *Kitson v. Farwell*, 132 Ill. 327, 335, 23 N. E. 1024.

[a] "We consider the statute imperative, that the papers presented to the court shall conform with exactness to its provisions. It is matter necessary to the jurisdiction of the court, not only that a petition and account should be presented to it, but that they shall be the very petition and account specified." *Bullymore v. Cooper*, 46 N. Y. 236, 246.

[b] But trifling deviations from the statutory requirements will not invalidate the proceedings. *Richmond v. Prain*, 24 Hun (N. Y.) 578.

9. *In re Haight*, 11 Civ. Proc. (N. Y.) 227.

[a] Discharge may be obtained on Sunday from an arrest on civil process

12. *Matter of Brady*, 69 N. Y. 215, 53 How. Pr. 128.

13. See the following: Ill.—*Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024; *Sawyer v. Nelson*, 44 Ill. App. 184. Ky.—*McGovern v. Maloney*, 30 Ky. L. Rep. 801, 99 S. W. 935. N. Y.—*Matter of Brady*, 69 N. Y. 215, 53 How. Pr. 128; *Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42.

14. *Goodwin v. Griffis*, 88 N. Y. 629.

[a] That only one plaintiff and one defendant in the judgment were named in the petition is not a fatal defect. *Goodwin v. Griffis*, 88 N. Y. 629.

15. *Develin v. Cooper*, 84 N. Y. 410.

16. *In re Rosenberg*, 10 Abb. Pr. N. S. (N. Y.) 450. See *supra*, II, C, 11, b, (IV).

17. *Develin v. Cooper*, 84 N. Y. 410,

**Cause of Imprisonment.** — Under some statutes, the petition must state the cause of the imprisonment.<sup>18</sup>

(D.) **SCHEDULE AND INVENTORY.** — (1.) *Generally.* — Under some statutes, the petitioner must annex to, and present with the petition or application for such discharge, a schedule of his property,<sup>19</sup> or show in his petition a sufficient excuse for failing to do so.<sup>20</sup> And even where a formal petition is not required, such a schedule must be made before a discharge will be granted.<sup>21</sup> A new schedule need not be filed upon a second application, made because of informality in first proceedings,<sup>22</sup> nor where a second arrest has been made on another execution.<sup>23</sup>

(2.) *Form and Contents.* — This schedule should contain a statement of all the estate, effects and property of the applicant,<sup>24</sup> wheresoever

18. *Matter of Brady*, 69 N. Y. 215, 53 How. Pr. 128; *Bullymore v. Cooper*, 46 N. Y. 236; *Matter of Chappell*, 23 Hun (N. Y.) 179.

[a] It is sufficient, (1) where the statute does not require more, to state the imprisonment is by virtue of an execution. *Goodwin v. Griffis*, 88 N. Y. 629. (2) Where the petition alleged that the defendant was a prisoner, confined in the county jail, on execution issued out of the county court, in a civil cause at the suit of a person, naming him, it was held a sufficient statement of the cause of imprisonment, under the circumstances stated in the text. *Matter of Chappell*, 23 Hun (N. Y.) 179.

19. III.—*Stricker v. Kubusky*, 35 Ill. App. 159. N. J.—*Race v. Dehart*, 24 N. J. L. 37; *Le Chevallier v. Hamilton*, 18 N. J. L. 260. N. Y.—*Shaffer v. Riseley*, 114 N. Y. 23, 20 N. E. 630; *Dev-elin v. Cooper*, 84 N. Y. 410; *Bullymore v. Cooper*, 46 N. Y. 236; *In re Haight*, 11 Civ. Proc. 227; *Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42; *In re Patton*, 7 Misc. 467, 27 N. Y. Supp. 992. N. C.—*Ballard v. Waller*, 52 N. C. 84; *Adams v. Alexander*, 23 N. C. 501. Pa.—*In re Oliver*, 1 Ashm. 112; *Woodward's Case*, 1 Ashm. 107.

20. *Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42.

[a] **Statement of Exemption Not an Excuse.**—*Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42.

[b] **Recital in Order of Discharge Will Not Cure Omission.**—*Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42.

[c] **Allegation of adjudication of bankruptcy before the rendition of the**

judgment, is not an excuse. *Bullymore v. Cooper*, 46 N. Y. 236, *affirming* 2 Lans. (N. Y.) 71.

21. *Stricker v. Kubusky*, 35 Ill. App. 159.

22. *Race v. Dehart*, 24 N. J. L. 37.

[a] That the debtor may have acquired property in the interim is no objection to such a rule, for on the hearing the debtor is compelled to disclose the present condition of his estate under oath. *Race v. Dehart*, 24 N. J. L. 37.

23. *Banks v. Ingram*, 10 Rich. L. (S. C.) 28.

24. III.—*Stricker v. Kubusky*, 35 Ill. App. 159. Ky.—*Sowle Mfg. Co. v. Bernard*, 100 Ky. 658, 39 S. W. 239. N. J.—*Van Waggoner v. Coe*, 25 N. J. L. 197. N. Y.—*Bullymore v. Cooper*, 46 N. Y. 236; *People ex rel. Galsten v. Brooks*, 40 How. Pr. 165; *In re Thomas*, 10 Abb. Pr. (N. S.) 114; *In re Haight*, 11 Civ. Proc. 227; *Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42; *In re Patton*, 7 Misc. 467, 27 N. Y. Supp. 992. N. C.—*Adams v. Alexander*, 23 N. C. 501. Pa.—*McDonough's Case*, 37 Pa. 275; *Wolfram v. Strickhouser*, 1 Watts & S. 379. S. C.—*Clerry v. Spears*, 2 Spears 686; *Cavan v. Dunlap*, Cheves 241. And see *Hibler v. Hammond*, 2 Strobb. 105.

[a] In listing property previously transferred by a trust deed for the benefit of creditors, it is not sufficient merely to list the resulting trust, for the trust deed may have been given fraudulently. The schedule should list to the assignee whatever interest the debtor may have so that, if the conveyance were fraudulent, the assignee might recover the entire property for

situat<sup>25</sup> and of whatever kind or character,<sup>26</sup> whether real or personal,<sup>27</sup> legal or equitable,<sup>28</sup> and without regard to whether or not it is exempt from execution.<sup>29</sup> All charges affecting the property or estate thus scheduled must be made to appear,<sup>30</sup> both as they exist at the time when the petition for discharge was prepared,<sup>31</sup> and as they existed at the time when the person was first imprisoned under the execution.<sup>32</sup> The property listed, however, need only be such as the debtor has at the time of filing the schedule; not what he owned at the time of his arrest.<sup>33</sup> The schedule should contain a list of all of the defendant's creditors,<sup>34</sup> the amount due to each,<sup>35</sup> unless this amount be to him unknown,<sup>36</sup> or in dispute,<sup>37</sup> and the nature and character of the debt,<sup>38</sup> and a statement as to the causes of his insolvency.<sup>39</sup> In some states, it must also contain an account

the creditor. *Adams v. Alexander*, 23 N. C. 501.

25. *Wolfram v. Strickhouser*, 1 Watts & S. (Pa.) 379.

26. *Adams v. Alexander*, 23 N. C. 501; *Wolfram v. Strickhouser*, 1 Watts & S. (Pa.) 379.

[a] **A contingent remainder** should be included. *Clerry v. Spears*, 2 Spears (S. C.) 686.

[b] **A residuary interest** in property assigned, after the purpose of the assignment is satisfied, should be listed. *In re Oliver*, 1 Ashm. (Pa.) 112.

27. *In re Thomas*, 10 Abb. Pr. N. S. (N. Y.) 114.

28. *In re Thomas*, 10 Abb. Pr. N. S. (N. Y.) 114.

[a] **Equitable Estates.**—The schedule ought to "disclose every interest, which would have been liable to the creditor on *fi. fa.*, or ought in law or equity to be subject to the debtor's demand." *Adams v. Alexander*, 23 N. C. 501.

29. *Stricker v. Kubusky*, 35 Ill. App. 159.

30. *Bullymore v. Cooper*, 46 N. Y. 236 (under 2 Rev. St. 31, §4); *In re Thomas*, 10 Abb. Pr. N. S. (N. Y.) 114; *Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42; *In re Patton*, 7 Misc. 467, 27 N. Y. Supp. 992.

31. *Bullymore v. Cooper*, 46 N. Y. 236 (under 2 Rev. St. 31, §4); *In re Thomas*, 10 Abb. Pr. N. S. (N. Y.) 114; *Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42; *In re Patton*, 7 Misc. 467, 27 N. Y. Supp. 992.

32. *Bullymore v. Cooper*, 46 N. Y. 236; *In re Thomas*, 10 Abb. Pr. N. S. (N. Y.) 114; *Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42; *In re*

*Patton*, 7 Misc. 467, 27 N. Y. Supp. 992.

33. *Johnson v. Martin*, 25 Ga. 268.

34. **N. J.**—*Berry v. Arthur*, 13 N. J. L. 308. **N. Y.**—*Develin v. Cooper*, 84 N. Y. 410. **Pa.**—*McDonough's Case*, 37 Pa. 275; *Wolfram v. Strickhouser*, 1 Watts & S. 379.

[a] **Failure to mention the plaintiff** at whose suit the petitioner is imprisoned will not, in the absence of a showing of fraud therein or that such omission in some way wrought a hardship on the plaintiff, invalidate a discharge had in such a proceeding. *Com. v. Cornman*, 4 Serg. & R. (Pa.) 2.

35. *Le Chevallier v. Hamilton*, 18 N. J. L. 260; *Berry v. Arthur*, 13 N. J. L. 308; *Wolfram v. Strickhouser*, 1 Watts & S. (Pa.) 379.

36. *Le Chevallier v. Hamilton*, 18 N. J. L. 260.

37. *Le Chevallier v. Hamilton*, 18 N. J. L. 260.

38. *Wolfram v. Strickhouser*, 1 Watts & S. (Pa.) 379.

[a] **The cause and consideration** of the indebtedness is required to be set forth. *Develin v. Cooper*, 84 N. Y. 410, *affirming* 20 Hun (N. Y.) 188, holding it a sufficient compliance with such a requirement, to state that "the indebtedness is one on drafts drawn by the debtor and discounted by the creditor. . . . It is not necessary to state what the money was used for by the debtor."

39. *McDonough's Case*, 37 Pa. 275; *Wolfram v. Strickhouser*, 1 Watts & S. (Pa.) 379.

[a] **This last requirement is met** by a schedule which assigns the causes of the petitioner's insolvency to debts due him, in a certain sum, "as appears by a

of all deeds, securities, books, vouchers and papers, relating to the property scheduled,<sup>40</sup> with the names and places of abode of the witnesses to such deeds, securities, and writings or papers.<sup>41</sup> In all cases, facts and not the mere conclusion from facts, must be set forth.<sup>42</sup> This schedule need not state on what execution it was given when the writ under which the surrender was made is attached thereto.<sup>43</sup> Irregularities which are trivial and in no way mislead the creditors will not vitiate the schedule.<sup>44</sup>

The return of this schedule should, under some of the statutes, be to the clerk of the court from which the execution issued.<sup>45</sup>

(3.) *Amendment.* — In a proper case the court may permit an amendment of the debtor's schedule.<sup>46</sup> Granting or withholding permission to do so, is, however, largely a matter of discretion.<sup>47</sup> Thus, omissions which were inadvertent and not the result of a fraudulent design may be supplied by amendment.<sup>48</sup>

(E.) *THE AFFIDAVIT.* — Under some statutory provisions, an affidavit by the petitioner,<sup>49</sup> on the day of the presentation of the application<sup>50</sup>

reference to his book of accounts in possession of his assignees." *In re Oliver*, 1 Ashm. (Pa.) 112.

40. *Bulldmore v. Cooper*, 46 N. Y. 236.

41. *Bulldmore v. Cooper*, 46 N. Y. 236; *McKenzie v. Garrison*, 10 Rich. L. (S. C.) 234.

[a] In South Carolina it has been held that although the language of the statute may be imperative, nevertheless a case might arise wherein a full compliance therewith, or even a partial one would be impracticable and that the entire matter should be left to the discretion of the commissioner of special bail. *McKenzie v. Garrison*, 10 Rich. L. 234.

42. *In re Patton*, 7 Misc. 467, 27 N. Y. Supp. 992.

43. *Sheriff of Fayette v. Buckner*, 1 Litt. (Ky.) 126.

44. *Lindsey v. Hunter*, 18 Ga. 50; *Le Chevallier v. Hamilton*, 18 N. J. L. 260.

[a] The failure of the debtor to strictly pursue all the statutory requirements in this connection, will not, if the result of inadvertence or imperfect recollection rather than any bad faith, forever preclude him from obtaining his discharge in this manner. *In re Rosenberg*, 10 Abb. Pr. N. S. (N. Y.) 450.

[b] Naming a creditor without stating the sum due him, as where the applicant put opposite the creditor's name, "amount disputed," does not

vitiate the schedule. *Le Chevallier v. Hamilton*, 18 N. J. L. 260.

45. *Sheriff of Fayette v. Buckner*, 1 Litt. (Ky.) 126. See generally the title "Returns."

46. *In re Rosenberg*, 10 Abb. Pr. N. S. (N. Y.) 450; *Kelly v. Johnson*, 13 Rich. L. (S. C.) 35; *Craig v. Pinson*, 2 Spears (S. C.) 176; *Glenn v. Lopez*, Harp. (S. C.) 105.

[a] Where the amendment is permitted after the hearing the creditor has a right to examine the debtor as to the matter presented by his amendment. *Kelly v. Johnson*, 13 Rich. L. (S. C.) 35.

47. *Craig v. Pinson*, 2 Spears (S. C.) 176.

48. *Glenn v. Lopez*, Harp. (S. C.) 105, where the court says that in such a case the party seeking the amendment should be required to show "satisfactorily that the omission was not designed to effect a fraudulent concealment, or to give some other reasonable account why the property was not included."

49. *In re Thomas*, 10 Abb. Pr. N. S. (N. Y.) 114; *In re Haight*, 11 Civ. Proc. (N. Y.) 227. See also *Develin v. Cooper*, 84 N. Y. 410; *Brandon v. Rogers*, 10 Rich. L. (S. C.) 9.

50. *Shaffer v. Riseley*, 114 N. Y. 23, 20 N. E. 630; *Matter of Brady*, 69 N. Y. 215, 53 How. Pr. 128; *Bulldmore v. Cooper*, 2 Lans. (N. Y.) 71 (*affirmed* in 46 N. Y. 236); *Richmond v. Priam*, 24 Hun (N. Y.) 578.

for such discharge, must be annexed to the petition and schedule.<sup>51</sup>

**Form and Contents.** — In some states, the statutes prescribe the form and contents of such affidavit,<sup>52</sup> and they should be closely followed.<sup>53</sup>

(F.) **NOTICE TO CREDITOR.** — (1.) *Generally.* — Statutes generally provide that within a time specified therein, the petitioner must serve upon all his creditors,<sup>54</sup> and the adverse party,<sup>55</sup> a copy of his petition and schedule,<sup>56</sup> together with a written notice of the time when, and place where, they will be presented.<sup>57</sup> Clerical errors in this notice will not vitiate the proceedings.<sup>58</sup> The length of time of this notice

[a] **The failure to make,** on the day of the presentation of the petition, the affidavit required by the statute, renders the proceedings for a discharge jurisdictionally defective. *Shaffer v. Riseley*, 114 N. Y. 23, 20 N. E. 630; *Bulymore v. Cooper*, 46 N. Y. 236, 244.

[b] **Before Presentation.** — An affidavit, taken seventeen days before the day of presenting the petition for discharge, is not a compliance with statute. *Shaffer v. Riseley*, 114 N. Y. 23, 20 N. E. 630. See also *Bulymore v. Cooper*, 2 Lans. (N. Y.) 71 (*affirmed* in 46 N. Y. 236); *Richmond v. Priam*, 24 Hun (N. Y.) 578.

[c] **As served on the judgment creditor,** the petition and the account of the imprisoned debtor's property are not required by the statute to be sworn to. *Bulymore v. Cooper*, 2 Lans. (N. Y.) 71, *affirmed* in 46 N. Y. 236.

[d] **The "presentation"** of the petition "should not be deemed to mean the actual moment when it is handed to the court on the application for an order to bring the prisoner before it, but should be construed to extend from that moment until the actual production of the prisoner." *Hillyer v. Rosenberg*, 11 Abb. Pr. N. S. (N. Y.) 402.

51. *Shaffer v. Riseley*, 114 N. Y. 23, 20 N. E. 630; *Matter of Brady*, 69 N. Y. 215, 53 How. Pr. 128; *In re Haight*, 11 Civ. Proc. (N. Y.) 227.

[a] **It is a sufficient compliance** with a statute requiring the affidavit to be "indorsed thereon" to attach or annex the affidavit to the petition. *Richmond v. Priam*, 24 Hun (N. Y.) 578.

[b] **Failure to make objection** to the lack of the affidavit, or to call the attention of the court to such defect, waives it. *Shaffer v. Riseley*, 114 N. Y. 23, 20 N. E. 630. See also *Cowenhoven v. Ball*, 118 N. Y. 231, 235, 23 N. E. 470.

52. *Matter of Brady*, 69 N. Y. 215, 53 How. Pr. 128; *In re Haight*, 11 Civ. Proc. (N. Y.) 227; *Bulymore v. Cooper*, 2 Lans. (N. Y.) 71, (*affirmed*, 46 N. Y. 236); *Brandon v. Rogers*, 10 Rich. L. (S. C.) 9.

53. *Bulymore v. Cooper*, 2 Lans. 71, *affirmed*, 46 N. Y. 236, 246.

54. N. J. — *Weeks v. Buderus*, 39 N. J. L. 448; *Hogan v. Hutton*, 20 N. J. L. 82; *Berry v. Arthur*, 13 N. J. L. 308. N. Y. — *In re Quick*, 92 App. Div. 131, 87 N. Y. Supp. 316. N. C. — *Watson v. Willis*, 24 N. C. 17; *Crain v. Long*, 14 N. C. 371; *Jordan v. James*, 10 N. C. 110; *Burton v. Dickens*, 7 N. C. 103. Pa. — *Bartholomew's Admr. v. Bartholomew*, 50 Pa. 194. See *Row and v. Smiley*, 96 Pa. 165. S. C. — *Ex parte Cantey*, 11 Rich. L. 520; *Hibler v. Hammond*, 2 Strobb. 105.

[a] **In New York** the fourteen days' notice of the presentation of the debtor's petition and schedule required by §2205 of the Code of Civ. Proc. may not be dispensed with by an order to show cause under §780 of the Code. *In re Quick*, 92 App. Div. 131, 87 N. Y. Supp. 316, *affirmed* in 179 N. Y. 601, 72 N. E. 1149.

55. *Sowle Mfg. Co. v. Bernard*, 100 Ky. 658, 39 S. W. 239.

56. *In re Quick*, 92 App. Div. 131, 87 N. Y. Supp. 316.

[a] **Jurisdictional Prerequisite.** Service of the petition, schedules, and notice, or some equivalent thereof, is indispensable to invest the court with jurisdiction to grant an order discharging the debtor. *In re Quick*, 92 App. Div. 131, 87 N. Y. Supp. 316.

57. See cases cited *supra*, this section.

58. *Briggs v. Hobson*, 3 Ala. 404 (holding sufficient a notice that the debtor would appear on "Saturday the 28th July next," when, in fact, the 28th day of the next July was Friday);

varies under the different statutes.<sup>59</sup> The provisions as to time must be strictly observed.<sup>60</sup>

(2.) *Service*.—Service of such papers may be made under some statutory provisions, either upon the creditor,<sup>61</sup> or his representative,<sup>62</sup> or upon his attorney.<sup>63</sup> The manner of serving the notice is prescribed by statute,<sup>64</sup> which must be strictly followed,<sup>65</sup> unless its requirements have been waived.<sup>66</sup> Such waiver may be found from any facts tending to show the same.<sup>67</sup>

(G.) *OBJECTIONS AND EXCEPTIONS*.—Existing judgment creditors,<sup>68</sup> or, in some states, any person interested,<sup>69</sup> may contest the application for discharge, by establishing the fraudulent disposition of his property by the debtor,<sup>70</sup> or that the proceedings for a discharge are not

*In re Blanchard*, 15 N. J. L. 478, the mere omission of the word "junior" after the name of the debtor will not be fatal.

59. See the statutes, and *Sowle Mfg. Co. v. Bernard*, 100 Ky. 658, 39 S. W. 239; *Berry v. Arthur*, 13 N. J. L. 308.

60. *In re Quick*, 92 App. Div. 131, 87 N. Y. Supp. 316.

[a] A general statute permitting reduction of time required for service of notice of motion, is not applicable to these proceedings. *In re Quick*, 92 App. Div. 131, 87 N. Y. Supp. 316. See generally the title "Notice."

[b] A delay in giving the requisite notice has been excused where the debtor misunderstood the ambiguous language of the act. *Ex parte Cantey*, 11 Rich. L. (S. C.) 520.

61. *In re Quick*, 92 App. Div. 131, 87 N. Y. Supp. 316.

[a] When the state is a creditor, see N. Y. Code Civ. Proc., §2207.

[b] In New Jersey this notice must be served on the creditors' attorneys and on the creditors individually if they be within the state. *Louis v. Kaskel*, 49 N. J. L. 592, 9 Atl. 773.

62. See the statutes.

63. *Shaffer v. Riseley*, 114 N. Y. 23, 20 N. E. 630, whose name is subscribed to the execution.

[a] *What Attorney*.—Under a statute requiring the giving of such notice to the attorney for the committing creditor is meant the attorney who appeared for the creditor in the suit in which the debtor was imprisoned. *Louis v. Kaskel*, 49 N. J. L. 592, 9 Atl. 773.

64. See the statutes.

65. *Mordecai v. La Risse*, 1 Rich. L. (S. C.) 192.

66. *Goodwin v. Griffis*, 88 N. Y. 629, waiver of personal service.

67. *Goodwin v. Griffis*, 88 N. Y. 629.

[a] Where an admission of service was endorsed upon the petition and the accompanying papers, and the person so signing was properly identified as the creditor in the judgment upon which the execution issued, it was held sufficient as against the objection that there was no proof of the personal service of the papers upon the judgment creditor. *Goodwin v. Griffis*, 88 N. Y. 629, 635.

68. Ill.—*People v. Hanchett*, 111 Ill. 90. N. Y.—*In re Pearce*, 29 Hun 270; *Coffin v. Gourlay*, 20 Hun 308; *In re Haight*, 11 Civ. Proc. 227. S. C.—*Hibler v. Hammond*, 2 Strobb. 105.

[a] *Only Existing Creditors*.—*Matter of Brady*, 69 N. Y. 215, 53 How. Pr. 128.

[b] In Illinois (1) any creditor of the debtor may appear before the court and contest the truth of the schedule, presented by the debtor (*Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024), (2) and his right to a discharge. *People v. Hanchett*, 111 Ill. 90.

69. *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024.

70. *Matter of Brady*, 69 N. Y. 215, 53 How. Pr. 128; *In re Fowler*, 59 How. Pr. (N. Y.) 148, 8 Daly 548; *In re Haight*, 11 Civ. Proc. (N. Y.) 227; *Matter of Watson*, 2 E. D. Smith (N. Y.) 429.

[a] "The fraud which will bar a debtor's discharge is not that of which he may have been guilty in contracting the debt or liability, but fraud in the subsequent disposition of his property to evade such liability." *In re Pearce*,

in other respects just and fair;<sup>71</sup> which latter fact is conclusively adjudicated by a previous motion to vacate the order of arrest,<sup>72</sup> or for discharge from provisional arrest in the same action,<sup>73</sup> when such a finding was necessarily made therein.<sup>74</sup>

**Suggestions of Fraud.**<sup>75</sup> — Provision is made in some states for filing suggestions of fraud<sup>76</sup> upon obtaining leave of court therefor<sup>77</sup> upon motion supported by affidavit.<sup>78</sup> The language of such affidavit should

29 Hun (N. Y.) 270. See also *Matter of Brady*, 69 N. Y. 215, 53 How. Pr. 128; *Coffin v. Gourlay*, 20 Hun 308; *In re Haight*, 11 Civ. Proc. (N. Y.) 227.

See *infra*, this section.

[b] **Fraudulent conveyance whether before or after the action in which the arrest is made.** *In re Haight*, 11 Civ. Proc. (N. Y.) 227; *In re Watson*, 2 E. D. Smith (N. Y.) 429.

[c] **Application for discharge as a bankrupt is not such a disposition of his property as will defeat the debtor's right to discharge.** *In re Fowler*, 59 How. Pr. (N. Y.) 148, 8 Daly (N. Y.) 548, *limiting and explaining In re Fitzgerald*, 8 Daly (N. Y.) 188, which holds that where a debtor elects to proceed under the Bankruptcy Act, he waives his right to proceedings for a discharge under the state law.

71. *In re Boyce*, 11 N. Y. Supp. 624, 19 Civ. Proc. 23.

[a] **Where the credit of a judgment debtor is good** (1) and he makes no effort to pay the debt in judgment against him by means of such credit (*In re Boyce*, 11 N. Y. Supp. 624, 19 Civ. Proc. 23), (2) or where it appears that the wife of a debtor is in a position where she might aid her husband, and it does not appear that she is unwilling or unable to do so, the proceedings for a discharge are not "just and fair" within the meaning of the statute. *In re Boyce*, 11 N. Y. Supp. 624, 19 Civ. Proc. 23.

[b] **Where the income of a debtor, together with the circumstances connected with the judgment against him and the facts as to those dependent upon him, shows that with proper effort the debtor might pay a portion, at least of the judgment against him, the proceedings for a discharge are not just and fair.** *In re Donoghue*, 17 Abb. N. C. (N. Y.) 277.

72. *Matter of Zeitz*, 12 Civ. Proc.

(N. Y.) 423; *Matter of Roberts*, 8 Daly (N. Y.) 95, 59 How. Pr. 136.

[a] **If the judgment does not necessarily involve a finding that the debtor had a fraudulent intent or guilty knowledge, the question is an open one, and may be tried in a proceeding for a discharge.** *In re Roberts*, 8 Daly (N. Y.) 95, 59 How. Pr. 136; *In re Zeitz*, 12 Civ. Proc. (N. Y.) 423.

73. *In re Roberts*, 8 Daly (N. Y.) 95, 59 How. Pr. (N. Y.) 136.

74. See generally the title "Res Judicata."

[a] **The entry in the judgment in an action, that the plaintiff is entitled to an execution against the person by reason of a prior order of arrest issued in the action, which, upon motion the court refused to vacate, though an essential element thereof, is not an adjudication that the proceedings for a discharge are not just and fair, and therefore a ground for refusing the same, since the recital in the judgment is merely an entry indicating the process by which the judgment may be enforced, and the granting or vacating of the order of arrest does not affect the plaintiff's cause of action and right to judgment thereon.** *In re Zeitz*, 12 Civ. Proc. (N. Y.) 423.

75. As to determination of suggestions of fraud, see *infra*, II, C, 15, I, (II), (H).

76. See cases cited *infra*, this section.

77. *Ex parte Maffet*, 11 Rich. L. (S. C.) 358. Compare *Hibler v. Hammond*, 2 Strobh. (S. C.) 105, where it is said: "If the creditors appear, the court shall hear what may be alleged for or against the discharge."

78. *Ex parte Maffet*, 11 Rich. L. (S. C.) 358.

[a] **The determination of this motion rests largely in the discretion of the court.** *Ex parte Maffet*, 11 Rich. L. (S. C.) 358.

be specific as to the charges of fraud.<sup>79</sup> The suggestions of fraud should be in writing,<sup>80</sup> and should be filed within the prescribed time.<sup>81</sup> They should conform to the general principles of pleading,<sup>82</sup> should be made upon oath,<sup>83</sup> and should specify the particulars wherein the fraud exists,<sup>84</sup> with certainty.<sup>85</sup> Where there are several creditors they may be compelled, at the request of the debtor, to all join in an issue on a suggestion of fraud.<sup>86</sup>

(H.) HEARING AND DETERMINATION. — (1.) *Generally.* — The debtor should be present at the hearing,<sup>87</sup> and should be required to submit, under oath,<sup>88</sup> to an examination as to the condition of his property.<sup>89</sup> The court may consider matter anterior to the imprisonment,<sup>90</sup> and may review the acts of the applicant in respect of any of his property, whether listed in his schedule or not.<sup>91</sup> Jurisdictional objections may properly be presented at this time.<sup>92</sup> Where suggestions of fraud have been filed, an issue thereon should be framed and submitted to a jury.<sup>93</sup> And in some jurisdictions all other issues must be submitted to a jury.<sup>94</sup> Where it appears that the debtor's schedule is correct and that his proceedings are just and fair, his discharge will be ordered.<sup>95</sup> On the other hand, should it appear that the applicant has failed to make a full and fair surrender of his estate for the benefit of his creditors,<sup>96</sup> or has not given to his creditors such

79. *Ex parte* Maffet, 11 Rich. L. (S. C.) 358, general belief insufficient.

80. *State v. Carroll*, 51 N. C. 458.

81. *Coleman v. Dickerson*, 10 Ga. 551.

[a] Should be filed not later than the first term unless good excuse be shown for not doing so earlier. *Coleman v. Dickerson*, 10 Ga. 551.

82. *Gray v. Schroder*, 2 Strobb. (S. C.) 126.

83. *State v. Carroll*, 51 N. C. 458.

84. *State v. Carroll*, 51 N. C. 458.

85. *Nixon v. Nunnery*, 31 N. C. 28.

[a] A reasonable certainty is all that is required. *Gray v. Schroder*, 2 Strobb. (S. C.) 126.

[b] Objections to the form (1) of the suggestion of fraud, as that it is not sufficiently certain, must be made, if at all, before issue is joined thereon. *Nixon v. Nunnery*, 31 N. C. 28. (2) Such objections may, it seems, be in the form of a demurrer. See *Gray v. Schroder*, 2 Strobb. (S. C.) 126.

86. *Williams v. Floyd*, 27 N. C. 649, even though they have separate judgments.

[a] This privilege may be waived by the debtor. *Williams v. Floyd*, 27 N. C. 649.

87. *Cooley v. Culton*, 20 Ill. 40.

88. *In re Thomas*, 10 Abb. Pr. N. S. (N. Y.) 114.

89. *Cooley v. Culton*, 20 Ill. 40.

90. *In re Thomas*, 10 Abb. Pr. N. S. (N. Y.) 114.

91. *In re Thomas*, 10 Abb. Pr. N. S. (N. Y.) 114.

92. *In re Rosenberg*, 10 Abb. Pr. N. S. (N. Y.) 450.

As to objections and exceptions generally, see *supra*, II, C, 15, 1, (II), (G).

93. Ga.—*Mims v. Lockett*, 20 Ga. 474. N. C.—*State v. Carroll*, 51 N. C. 458. S. C.—*Ex parte Maffet*, 11 Rich. L. 358.

[a] Except where the debtor assigns whatever interest he may have in the property which it is alleged he did not include in his schedule. *Craig v. Finson*, 2 Spears (S. C.) 176.

[b] Where no suggestion of fraud is filed the court may not take it upon itself to declare the schedule fraudulent, because this is a matter peculiarly for a jury. *Mims v. Lockett*, 20 Ga. 474.

As to filing suggestions of fraud, see *supra*, II, C, 15, 1, (II), (G).

94. *Hartsville Oil Mill v. Du Rose* (S. C.), 88 S. E. 446.

95. *In re Thomas*, 10 Abb. Pr. N. S. (N. Y.) 114; *In re Haight*, 11 Civ. Proc. (N. Y.) 227.

96. Ill.—*Lipe v. McClevy*, 41 Ill. App. 59. Ky.—See *Sowle Mfg. Co. v.*

notice of his application as the law requires,<sup>97</sup> or that he has, in any other particular, failed to comply with the requisites of the law,<sup>98</sup> it is the duty of the court to deny the application unless it appears that such omission was the result of necessity or accident,<sup>99</sup> or is inconsequential in its nature.<sup>1</sup> Where it appears at the hearing that the execution under which the debtor is in custody was issued in the sort of a case in which he is not entitled to discharge, the application must be denied.<sup>2</sup> And the same is true where it appears that the imprisonment has not continued for the statutory length of time to entitle the debtor to a discharge.<sup>3</sup> It has been held that the right to open and close the argument belongs to counsel for the creditors resisting the discharge.<sup>4</sup>

(2.) *Continuances.*<sup>5</sup> — Where the statute so provides,<sup>6</sup> or even in the absence of statute, where justice requires it,<sup>7</sup> the hearing may be continued for a time not exceeding the limit, if any, set by the statute,<sup>8</sup> unless by the consent of the parties.<sup>9</sup> The application for a continuance

Bernard, 100 Ky. 658, 39 S. W. 239. S. C.—*Ex parte* Maffet, 11 Rich. L. 358.

[a] Where it appears that the debtor has given to his wife several thousand dollars and a luxurious home in which he lives with her, receiving from her a liberal income, the court will refuse to discharge him as an insolvent debtor. *Lipe v. McCleavy*, 41 Ill. App. 59.

97. *Berry v. Arthur*, 13 N. J. L. 308; *Rowand v. Smiley*, 96 Pa. 165. See *supra*, II, C, 15, 1, (II), (F).

98. N. J.—*Iliff v. Banghart*, 60 N. J. L. 400, 37 Atl. 894. N. Y.—*In re* Haight, 11 Civ. Proc. 227. S. C.—*Ex parte* Maffet, 11 Rich. L. 358.

99. *Hogan v. Hutton*, 20 N. J. L. 82; *Berry v. Arthur*, 13 N. J. L. 308. See also *In re* Blanchard, 15 N. J. L. 478.

[a] A discharge will not be denied for lack of notice where it appears that "the creditor or his place of address could not be found, or if the agent employed to serve the notice, should serve it on the wrong person by mistake." *Hogan v. Hutton*, 20 N. J. L. 82.

[b] Where the petitioner fails to list a debt due him because of the honest conviction that the debt is worthless, or because of some misapprehension or mistake, his discharge will not be denied him on that account. *In re* Oliver, 1 Ashm. (Pa.) 112.

1. *In re* Blanchard, 15 N. J. L. 478.

2. Ill.—*In re* Mullin, 118 Ill. 551, 9 N. E. 208; *In re* Murphy, 109 Ill. 31;

*First Nat. Bank v. Burkett*, 101 Ill. 391, 40 Am. Rep. 209; *Masterson v. Furman*, 89 Ill. App. 291; *Blattau v. Evans*, 57 Ill. App. 311; *Brown v. Lobdell*, 51 Ill. App. 574, in case malice is the gist of the action. N. H.—*Leighton v. Bills*, 75 N. H. 566, 78 Atl. 643. N. J.—*Hatfield v. Boswell*, 25 N. J. L. 85 (seduction); *Wallace v. Coil*, 24 N. J. L. 600, same. Pa.—*Feil v. Solomon*, 21 Pa. Dist. 599, slander.

[a] Seduction.—A defendant in custody in an action for seduction may obtain his release in this manner notwithstanding a statute which provides for denying his discharge when malice was the gist of the action. *People v. Greer*, 43 Ill. 213. Compare *Hatfield v. Boswell*, 25 N. J. L. 85.

3. *Funke v. Hurst*, 119 Mich. 182, 77 N. W. 695. See *In re* Rosenberg, 10 Abb. Pr. N. S. (N. Y.) 450, and *supra*, II, C, 11, b, (IV).

4. *Johnson v. Martin*, 25 Ga. 268. But see the title "Opening and Closing."

5. See, as to continuances generally, 5 STANDARD PROC. 438, et seq.

6. See generally the statutes of the various states and the following: *People v. Hanchett*, 111 Ill. 90; *Cooley v. Culton*, 20 Ill. 40; *Stagg v. Austin*, 18 N. J. L. 82.

7. *Johnson's Case*, 1 Ashm. (Pa.) 157, to allow amendment of petition.

8. *People v. Hanchett*, 111 Ill. 90.

9. *People v. Hanchett*, 111 Ill. 90.

[a] Consent May Be Implied. Where such a hearing was continued to a designated day and the court at the

is addressed to the discretion of the court.<sup>10</sup>

(3.) *Findings.* — The findings should conform to the general principles governing findings.<sup>11</sup> A finding of a specific cause for denying the discharge need not follow the language of the statute prescribing such a cause.<sup>12</sup> The findings should be specific,<sup>13</sup> and should be made to all the issues.<sup>14</sup>

(I.) THE ASSIGNMENT. — After the hearing and the determination that the debtor is entitled to his discharge,<sup>15</sup> the court must make an order, directing the petitioner to execute to one or more trustees named an assignment of all his property not exempt, or of so much thereof as is sufficient to satisfy the execution upon which he is imprisoned.<sup>16</sup> The assignee should be sworn to perform and discharge his duties as such in a true and faithful manner,<sup>17</sup> and may be required to give a bond.<sup>18</sup>

(J.) ORDER FOR DISCHARGE. — (1.) *In General.* — Upon a compliance by imprisoned debtor with the statutory provisions, the court must make an order, discharging the debtor from imprisonment, by virtue of each execution specified in his petition.<sup>19</sup> This order should recite all the facts requisite to give the court jurisdiction to make the same,<sup>20</sup> and,

time of granting the continuance inquired of the parties if the date fixed was satisfactory and no objection was made thereto, the objection that the continuance was beyond the statutory period was considered to have been waived. *People v. Hanchett*, 111 Ill. 90.

10. *Stagg v. Austin*, 18 N. J. L. 82.

11. See the title "Findings and Conclusions."

12. *Brandon v. Rogers*, 10 Rich. L. (S. C.) 9.

13. *Lemon v. Moore*, 2 Spears (S. C.) 617.

[a] **False Schedule.**—A finding that an assignment mentioned in the debtor's schedule was false and fraudulent will not convict him of filing a "false schedule." *Cavan v. Dunlap*, Cheves (S. C.) 241.

14. *Lemon v. Moore*, 2 Spears (S. C.) 617.

[a] **Where there were several specifications of fraud** a finding of the jury that the debtor was "guilty of fraud" is neither specific, nor does it embrace all the specifications. *Lemon v. Moore*, 2 Spears (S. C.) 617.

15. *Berry v. Arthur*, 13 N. J. L. 308; *Matter of Finck*, 59 How. Pr. (N. Y.) 145; *In re Patton*, 7 Misc. 467, 27 N. Y. Supp. 992, 23 Civ. Proc. 331, 58 N. Y. St. 512; *In re Boyce*, 19 Civ. Proc. 23, 11 N. Y. Supp. 624; *In re Haight*, 11 Civ. Proc. (N. Y.) 227.

16. *Stokes v. Hardy*, 71 N. J. L. 549,

60 Atl. 403; *In re Boyce*, 19 Civ. Proc. 23, 11 N. Y. Supp. 624; *In re Haight*, 11 Civ. Proc. (N. Y.) 227.

[a] **That the schedule does not show that the debtor has any property** does not alter this requirement. *Stokes v. Hardy*, 71 N. J. L. 549, 60 Atl. 403.

[b] **In Louisiana the practice in this regard** is for the court to make an order accepting the proffered surrender of property. See *State ex rel. Cawley v. Judge of District Court*, 45 La. Ann. 948, 13 So. 196.

17. *Jordan, Marsh & Co. v. Hall*, 9 R. I. 218, 11 Am. Rep. 245.

18. *Jordan, Marsh & Co. v. Hall*, 9 R. I. 218, 11 Am. Rep. 245.

19. *Shaffer v. Riseley*, 114 N. Y. 23, 20 N. E. 630.

[a] **In Louisiana the practice in this regard** is for the court to make an order accepting the proffered surrender of property and, at the same time, convoking a meeting of the prisoner's creditors. These latter have ten days in which to file suggestions of fraud during which time the debtor remains in custody. At the expiration of that time, no such suggestions having been filed, the order of discharge is made. *State ex rel. Cawley v. Judge of District Court*, 45 La. Ann. 948, 13 So. 196.

20. *Shaffer v. Riseley*, 114 N. Y. 23, 20 N. E. 630; *Bullymore v. Cooper*, 2 Lans. (N. Y.) 71, *affirmed* in 46 N. Y.

where the court is of special and limited jurisdiction, its failure in this respect renders the order invalid,<sup>21</sup> and affords an officer no protection if he discharges the judgment-debtor thereon,<sup>22</sup> unless he can show aliunde that the court did, in fact, have jurisdiction to make the order.<sup>23</sup>

(2.) *Vacating or Setting Aside.*<sup>24</sup> — The court may vacate an order of discharge which it has made without jurisdiction,<sup>25</sup> or which was made in a manner materially irregular.<sup>26</sup>

(3.) *Effect.*— Such a discharge operates as an exemption from arrest for a debt previously contracted.<sup>27</sup> It does not operate as a discharge of the debt, however, and a *fiery facias* may thereafter be issued.<sup>28</sup> Where the statute under which the proceedings were had provide for a notice to all the creditors of the imprisoned debtor,<sup>29</sup> the discharge operates only as to such of them as were given notice of his application.<sup>30</sup> It is generally considered that the operation of the order of discharge is only local and not extraterritorial.<sup>31</sup>

236; *Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42.

[a] A recital that the petition was filed is not equivalent to the statement that the requisite schedule was also annexed, since the schedule is no part of the petition—it is a distinct paper, required to accompany the petition for a discharge. *Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42.

[b] Presumption as to compliance with notice as to place of the hearing, see *Goodwin v. Griffis*, 88 N. Y. 629.

61. *Bullimore v. Cooper*, 2 Lans. (N. Y.) 71, *affirmed*, 46 N. Y. 236.

[a] Failure to recite essential part of affidavit held fatal. *Bullimore v. Cooper*, 2 Lans. (N. Y.) 71, 80, *affirmed*, 46 N. Y. 236.

22. *Shaffer v. Riseley*, 114 N. Y. 23, 20 N. E. 630; *Develin v. Cooper*, 84 N. Y. 410; *Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42.

23. *Shaffer v. Riseley*, 114 N. Y. 23, 20 N. E. 630; *Goodwin v. Griffis*, 88 N. Y. 629, 636; *Develin v. Cooper*, 84 N. Y. 410; *Bullimore v. Cooper*, 2 Lans. (N. Y.) 71, *affirmed*, 46 N. Y. 236; *Seward v. Wales*, 40 App. Div. 539, 58 N. Y. Supp. 42.

24. As to vacating judgments, see 15 STANDARD PROC. 151.

25. *In re Rosenberg*, 10 Abb. Pr. N. S. (N. Y.) 450.

26. *In re Rosenberg*, 10 Abb. Pr. N. S. (N. Y.) 450.

27. N. J.—*Bannister v. Miller*, 54 N. J. Eq. 121, 32 Atl. 1066. N. Y. *Spencer v. Richardson*, 7 Johns. 116. N. C.—*Jordan v. James*, 10 N. C. 110; *Parton v. Dickens*, 7 N. C. 103. Pa.

*Johnston v. Coleman*, 8 Watts & S. 69. R. I.—*In re Ballou*, 7 R. I. 466; *Taylor v. Ames*, 5 R. I. 361. S. C.—*Hibler v. Hammond*, 2 Strobb. 105. See also *Hurst v. Samuels*, 29 S. C. 476, 7 S. E. 822, opinion of Norton, J.

[a] This exemption may be waived by submitting to a subsequent arrest for a debt previously contracted and giving a bond to procure release from custody. *Johnston v. Coleman*, 8 Watts & S. (Pa.) 69.

[b] The remedy for a subsequent arrest is by a writ of habeas corpus. *Johnston v. Coleman*, 8 Watts & S. (Pa.) 69. See generally *supra*, II, C, 15, f, and 10 STANDARD PROC. 908, et seq.

28. *Strode v. Broadwell*, 36 Ill. 419; *Marshall Field & Co. v. Freed*, 191 Ill. App. 619; *Bannister v. Miller*, 54 N. J. Eq. 121, 32 Atl. 1066.

[a] In Rhode Island the debtor, by such a discharge is relieved from "all debts or pecuniary claims existing against him prior to his application, unless incurred by a promise of marriage, or originating in tort or criminal conduct." *Jordan, Marsh & Co. v. Hall*, 9 R. I. 218.

29. See *supra*, II, C, 15, 1, (II), (F).

30. *Crain v. Long*, 14 N. C. 371.

[a] Where no notice is required this limitation does prevail. *Crain v. Long*, 14 N. C. 371.

31. U. S.—*Sturges v. Crowninshield*, 4 Wheat. 122, 197, 4 L. ed. 529. Conn. *Smith v. Healey*, 4 Conn. 49; *Atwater's Admr. v. Townsend*, 4 Conn. 47, 10 Am. Dec. 97; *Woodbridge v. Wright*, 3 Conn. 523. N. J.—*Wood v. Malin*, 10 N. J. L.

(K.) REMANDING AFTER REFUSAL OF DISCHARGE. — Upon the refusal or dismissal of the debtor's application, the appropriate order is that he be remanded to the custody of the sheriff.<sup>32</sup> Such an order operates to supersede the bond given for the debtor's release prior to the hearing, and no action may be maintained thereon for a subsequent escape.<sup>33</sup>

(L.) SECOND APPLICATION. — When, after a hearing on the merits, the debtor's petition has been rejected, he cannot commence a new proceeding involving the same facts and have the same issues retried.<sup>34</sup> But if any new facts are included in his second application, these may be the proper subject of judicial investigation.<sup>35</sup> And a new application may be made where the first was not disposed of on the merits but because of some defect in the preliminary proceedings,<sup>36</sup> as, for example, that the sureties were not sufficient under the statute.<sup>37</sup> But a rehearing may be petitioned for,<sup>38</sup> and a second application is, under some statutes, a matter of right.<sup>39</sup>

m. *On Giving Bond To Apply for Relief as an Insolvent.* — (I.) **Generally.**<sup>40</sup> — The statutes of some states provide that a debtor in custody may obtain his liberty by giving a bond conditioned upon his ap-

208. **N. Y.**—*Peck v. Hozier*, 14 Johns. 346; *Sicard v. Whale*, 11 Johns. 194; *White v. Canfield*, 7 Johns. 117, 5 Am. Dec. 249.

[a] The reason for this rule, laid down by Chief Justice Marshall, in *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122, 197, 4 L. ed. 529, is that "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. . . . Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner, does not impair its obligation."

32. *Biebel v. Kuttner*, 147 Ill. App. 627. See also *Tucker v. Davidson*, 28 Ga. 535.

[a] **It Need Not Run in the Name of the People.**—*People v. Hanchett*, 111 Ill. 90.

33. *Lamar v. Foley*, 26 Ga. 180.

34. *In re Thomas*, 10 Abb. Pr. N. S. (N. Y.) 114; *In re Rosenberg*, 10 Abb. Pr. N. S. (N. Y.) 450; *Abbot's Case*, 1 Ashm. (Pa.) 69. See generally the title "Res Judicata," and 15 STANDARD PROC. 485, et seq., 561, et seq. Compare *supra*, II, C, 15, k, (VI).

35. *In re Thomas*, 10 Abb. Pr. N. S. (N. Y.) 114.

[a] **Matters of excuse or explanation** are not new facts. But if the new facts were omitted from the first proceeding because of inadvertence and not from fraudulent design, the court will consider them on the new application. *In re Thomas*, 10 Abb. Pr. N. S. (N. Y.) 114.

[b] **An objection that the court has no jurisdiction of the proceedings** may be taken at this time even though no such objection was made at the former hearing. *In re Rosenberg*, 10 Abb. Pr. N. S. (N. Y.) 450.

36. *Race v. Dehart*, 24 N. J. L. 37.

[a] **Where the former petition was dismissed on technical objections** and without a hearing on the merits, might a subsequent application be sustained? *query.* See *Abbot's Case*, 1 Ashm. (Pa.) 69.

37. *Race v. Dehart*, 24 N. J. L. 37.

38. *Abbot's Case*, 1 Ashm. (Pa.) 69, the granting of which is in the court's discretion.

39. *Sozio v. Court of Common Pleas*, 74 N. J. L. 63, 64 Atl. 970, as if no application had ever been made.

40. **As to the distinction between relief in such a proceeding and relief under "poor debtor's" acts**, see *supra*, II, C, 15, k, (I).

**As to insolvency generally**, see 13 STANDARD PROC. 635, et seq.

plication for his discharge as an insolvent.<sup>41</sup> These statutes, however, are only intended to afford relief from imprisonment under final process.<sup>42</sup>

(II.) **The Bond.**—The statutes governing the bond should be complied with, otherwise the bond will be invalid.<sup>43</sup> However, a substantial compliance is sufficient.<sup>44</sup> The amount of the bond is usually fixed by statute.<sup>45</sup> The conditions of the bond should not be more severe than those prescribed.<sup>46</sup> But a departure from the prescribed conditions which does not increase the burden of the bond, will not invalidate it.<sup>47</sup> Nor can the debtor or the sureties object on the ground that the conditions are less onerous than those imposed by statute,<sup>48</sup> although such a defect, if timely objection is taken thereto by the creditor, will

41. See generally the statutes, and the discussion following.

[a] **The federal bankruptcy act does not suspend** these acts so far as they operate merely to release the debtor from imprisonment. *In re Jacobs*, 12 Abb. Pr. N. S. (N. Y.) 273.

[b] **Rearrest.**—When he has given bond to apply for his discharge as an insolvent and does not do so within the time prescribed by law and the condition of his bond, a second execution may issue and he be again taken into custody. *Simmons v. Hoopes*, 1 Ashm. (Pa.) 35.

[c] **Fraud in Application.**—An applicant for the benefit of an act providing for the discharge of insolvent debtors, who has been convicted of fraud in making his schedule, may be at once rearrested and it is proper for the court to hear and determine a motion for an order directing the same, either at the same or a subsequent term. *Mack v. Garrett*, 10 Rich. L. (S. C.) 79.

42. *Ex parte Mason*, 2 Ashm. (Pa.) 239.

**As to relief from imprisonment on provisional process**, see 2 STANDARD PROC. 969, et seq.

43. *Browning v. Cooper*, 18 N. J. L. 196; *Eayre v. Earl*, 8 N. J. L. 359; *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33; *Power v. Graydon*, 53 Pa. 198; *McKee v. Stannard*, 14 Serg. & R. (Pa.) 380.

44. *Ala.*—*Thompson v. Pierce*, 3 Stew. 427. *N. J.*—*Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33. *N. C.*—*Moor- ing v. James*, 13 N. C. 254.

45. *Colley v. Morgan*, 5 Ga. 178; *Pease v. Norton*, 6 Greenl. (Me.) 229.

[a] **But a bond in a less sum than that fixed by the statute is not neces-**

sarily void. *Colley v. Morgan*, 5 Ga. 178.

46. *N. J.*—*Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33. *N. C.*—*Williams v. Yarborough*, 13 N. C. 12. But see *Hardison v. Benjamin*, 31 N. C. 331. *Pa.*—*Power v. Graydon*, 53 Pa. 198; *McKee v. Stannard*, 10 Serg. & R. 380.

[a] **Illustration.**—A bond given conditioned to apply for relief as an insolvent and "to abide all orders of said court," is void under a statute which provides that the condition of the bond shall be that the debtor shall apply for relief, and abide by all lawful orders or "surrender himself to the jail of the county" if he shall fail in any of these things. This is because the omission of this last clause "surrender himself, etc.," makes the condition of the bond more severe than the statute authorizes, for the debtor might, under such a bond, have surrendered himself to the county jail and still the bondsmen would have been liable. *McKee v. Stannard*, 10 Serg. & R. (Pa.) 380.

47. *Ala.*—*Thompson v. Pierce*, 3 Stew. 427. *N. J.*—*Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33. *Pa.*—*Power v. Graydon*, 53 Pa. 198.

[a] **The test** has been laid down as follows: "If the condition of the bond imposes no new duties on the obligors, or no duties diverse from those required by the statute as justly and legally expounded, then it will be good." *Smith v. Allen*, 1 N. J. Eq. 43.

[b] **"A mere verbal difference or departure from the statute, will not render the bond void."** *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33.

48. *Williams v. Yarborough*, 13 N.

invalidate the bond.<sup>49</sup> Neither surplusage<sup>50</sup> nor clerical mistakes, such, for example, as a misnomer of parties, will not invalidate the bond.<sup>51</sup> In the absence of a statutory direction to the contrary, this bond may be given either to the sheriff or the creditor.<sup>52</sup>

(III.) **Actions on the Bond.**<sup>53</sup> — The parties to such an action are determined in accordance with general principles elsewhere treated,<sup>54</sup> and the same is true as to the averments of the declaration or complaint.<sup>55</sup> A plea of a discharge under the insolvency laws should state facts showing such a discharge,<sup>56</sup> should specify the tribunal by which such discharge was granted,<sup>57</sup> and show that such tribunal had authority and jurisdiction to order the debtor's discharge.<sup>58</sup>

**16. Escape.** — The general rule is that after an escape, made with the consent of the officer having the prisoner in custody,<sup>59</sup> or with the consent of the committing creditor,<sup>60</sup> the debtor may not be again arrested on the same writ. In some states, however, the rule is other-

C. 12. See also *Kimball v. Preble*, 5 Greenl. (Me.) 353.

49. *Browning v. Cooper*, 18 N. J. L. 196; *Eayre v. Earl*, 8 N. J. L. 359.

50. *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33.

51. *Frick v. Kitchen*, 4 Watts & S. (Pa.) 30.

52. *Tucker v. Davidson*, 28 Ga. 535; *Pease v. Norton*, 6 Greenl. (Me.) 229.

[a] **The beneficial interest**, where this rule prevails, is considered as belonging to the creditor in either case. *Tucker v. Davidson*, 28 Ga. 535; *Pease v. Norton*, 6 Greenl. (Me.) 229.

[b] **Bond may be given to individual partners** in a suit by the partnership under a statute authorizing the bond to be payable to the plaintiff. *Greenville v. Trammell*, 13 Ga. 280.

53. *Compare supra*, II, C, 15, j, (III).

54. See the titles "**Bonds**;" "**Parties**."

[a] **Personal representatives of the creditor** are proper parties plaintiff to a suit on such a bond. *Mooring v. James*, 13 N. C. 254.

55. See generally the title "**Bonds**;" "**Declaration and Complaint**."

[a] **The condition** as well as the penal part of the bond should be set out in the declaration. *Patrick v. Rucker*, 19 Ill. 428.

[b] **A breach of the condition** should be alleged. *Louis v. Kaskel*, 51 N. J. L. 236, 17 Atl. 120.

56. *Langley v. Lane*, 10 N. C. 313.

As to pleading discharge, see generally 13 STANDARD PROC. 684.

As to pleading judgment as estoppel see generally 15 STANDARD PROC. 623, et seq.

[a] **A discharge in another county** where he had given another bond after his arrest there, is a good defense. *Skillman v. Baker*, 18 N. J. L. 134.

57. *Langley v. Lane*, 10 N. C. 313.

58. *Langley v. Lane*, 10 N. C. 313.

As to presumptions of jurisdiction see 15 STANDARD PROC. 424, 426, et seq.

59. *Conn.*—*Munson v. Hills*, 2 Root 324. *Ga.*—*Colley v. Morgan*, 5 Ga.

178. *Mass.*—*Doane v. Baker*, 6 Allen 260; *Houghton v. Wilson*, 10 Gray 365;

*Brown v. Getchell*, 11 Mass. 11; *Com.*

*v. Drew*, 4 Mass. 391. *N. H.*—*Butler*

*v. Washburn*, 25 N. H. 251, 258; *Sher-*

*burn v. Beattie*, 16 N. H. 437. *N. J.*

*Browning's Exr. v. Rittenhouse*, 40 N.

*J. L.* 230. *N. Y.*—*Lockwood v. Mer-*

*cereau*, 6 Abb. Pr. (N. S.) 206; *Lans-*

*ing v. Fleet*, 2 Johns. Cas. 3, 1 Am.

Dec. 142; *Clark v. Cleveland*, 6 Hill

344, 349. *N. C.*—*Jackson v. Hampton*,

28 N. C. 34; *Spencer v. Moore*, 19 N.

C. 264. *Pa.*—*Com. v. Sheriff*, 1 Grant

Cas. 187.

See *supra*, II, C, 10.

[a] **That the plaintiff may retake the escaped debtor** in such a case, although the sheriff may not, is laid down as the general rule in *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 3, 1 Am. Dec. 142.

60. *Doane v. Bartlett*, 4 Allen (Mass.) 74; *Little v. Newburyport Bank*, 14 Mass. 443; *Lansing v. Fleet*,

2 Johns. Cas. (N. Y.) 3, 1 Am. Dec.

142. See *supra*, II, C, 15, b.

wise.<sup>61</sup> But if a re-arrest is made on the same writ without objection by the debtor and is sanctioned by the creditor, the escape is purged.<sup>62</sup> Where the escape was the result of the neglect of the officer,<sup>63</sup> or was otherwise than by the consent of the sheriff or creditor,<sup>64</sup> the debtor may be retaken on the same writ. When the debtor escapes from constructive custody the same rules apply.<sup>65</sup> The right to arrest under alias and pluries writs is discussed elsewhere in this article.<sup>66</sup>

**17. Rearrest.**—The circumstances under which the debtor may be re-arrested have been in large part previously treated in this article.<sup>67</sup> When a re-arrest is proper, the sheriff may retake the debtor at any time,<sup>68</sup> and may use all necessary force.<sup>69</sup>

61. *People v. Hanchett*, 111 Ill. 90.

[a] By Statute.—*State v. Lawson*, 2 Gill (Md.) 62.

[b] "The present doctrine is well stated in the case of *Carthrae v. Clarke*, 5 Leigh 268. That was an action on a prison bounds bond. The defense was that the sheriff had voluntarily permitted the debtor to escape, and had rearrested him, and then taken the bond in suit. It was there contended that the rearrest was not legal, and he was not legally imprisoned when he executed the bond, and that it was therefore void. In answer to this position the court said: 'It is said in 2 Bacon's Abridgment, *Escape*, c. p. 515, that it was formerly held if the sheriff suffered a prisoner in execution to make a voluntary escape, the prisoner was, in such case, absolutely discharged from the creditor, and that the right of action was entirely transferred against the sheriff, who, by means of such escape, became a debtor *ex delicto*, for which *Arundel v. Wytham*, Leo. 73, and the case of *Sheriff of Essex*, Hob. 202, are cited. . . . The principle was soon after repudiated by the courts of England. The case of *Trevillian v. Lord Roberts*, is reported in *Rolle's Abr.* 902, pl. 8, 11, *Viner's Abr. Execution*, v. a. pl. 8, p. 26: 'If A be in execution at the suit of B, and escape with the assent of the sheriff, and after the sheriff retakes him . . . he shall be in execution to B, . . . and it is then said that the Sheriff of Essex case, in *Hobart*, is not law.' " *People v. Hanchett*, 111 Ill. 90.

As to actions against sheriffs for permitting escape of prisoner, see the title "Prisons and Prisoners."

62. *Lockwood v. Mercereau*, 6 Abb. Pr. N. S. (N. Y.) 206; *Thompson v.*

*Lockwood*, 15 Johns. (N. Y.) 256; *Lansing v. Fleet*, 2 Johns. Cas. (N. Y.) 3, 1 Am. Dec. 142; *McElroy v. Mancius*, 13 Johns. (N. Y.) 121; *Rawson v. Turner*, 4 Johns. (N. Y.) 469. See *Browning's Exr. v. Rittenhouse*, 40 N. J. L. 230, where the court says: "The defendant was in custody by his voluntary submission, and by the concurrent act of the plaintiff it was made compulsory, so that he could not go at large." The "concurrent act of the plaintiff" referred to was in opposing an application for a discharge under an insolvent debtor's act. And for a similar case, see *McElroy v. Mancius*, 13 Johns. (N. Y.) 121.

[a] To constitute an election in such a case, however, the creditor must have acted with knowledge of his debtor's escape. *McElroy v. Mancius*, 13 Johns. (N. Y.) 121; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291.

63. Conn.—*Munson v. Hills*, 2 Root 324. Ga.—*Colley v. Morgan*, 5 Ga. 178. N. H.—*Butler v. Washburn*, 25 N. H. 251, 258. N. Y.—*Lockwood v. Mercereau*, 6 Abb. Pr. (N. S.) 206; *Lansing v. Fleet*, 2 Johns. Cas. 3, 1 Am. Dec. 142.

64. *Owen v. Glover*, 2 Cranch C. C. 522, 18 Fed. Cas. No. 10,629. See *Murray v. Peay*, 1 McMull. (S. C.) 10.

65. *Owen v. Glover*, 2 Cranch C. C. 522, 18 Fed. Cas. No. 10,629.

66. See *supra*, II, C, 10.

67. See *supra*, II, C, 10; II, C, 15, k, —; II, C, 15, m, (I), note; II, C, 16.

68. *Lockwood v. Mercereau*, 6 Abb. Pr. N. S. (N. Y.) 206.

69. *Lockwood v. Mercereau*, 6 Abb. Pr. N. S. (N. Y.) 206.

As to manner of making arrest, see *supra*, II, C, 11, a.

**D. PROCEEDINGS FOR WRONGFUL EXECUTION.**<sup>70</sup>—1. **Wrongful Levy.**—A wrongful levy of an execution may occur when an officer acts upon a writ which does not justify the levy, as where the writ contains an inherent defect caused by an irregularity in issuing it or the extinguishment of the execution judgment;<sup>71</sup> or it may result from the action of an officer in executing the writ, as by taking the property of the wrong person, or levying upon the wrong property of the execution debtor.<sup>72</sup>

2. **Nature of the Action.**—When an officer wrongfully levies upon the personal property of a stranger, the injured party may bring an action of replevin against him.<sup>73</sup> Under some statutes, however, the right to replevin against the officer has been abridged, in which case the remedy is an action attacking the process and judgment;<sup>74</sup> unless the property has been sold, when replevin may be maintained.<sup>75</sup> The injured owner may also sue for the value of the property taken and incidental damages, in an action of trespass,<sup>76</sup> or he may bring an

70. Remedies for excessive levy, see *infra*, IV, D, 2.

Abuse of process, see generally the title "Sheriffs, Constables and Marshals."

71. Cal.—*Tower v. McDowell*, 97 Cal. xviii, 31 Pac. 843. Mich.—*Trowbridge v. Bullard*, 81 Mich. 451, 45 N. W. 1012. Mo.—*Kamerick v. Castleman*, 29 Mo. App. 658.

72. U. S.—*Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257. Ind.—*Jarratt v. Gwathmey*, 5 Blackf. 237. Me.—*Mussey v. Cahoon*, 34 Me. 74.

73. Ill.—*Harris v. Nelson*, 113 Ill. App. 487. N. J.—*Bruen v. Ogden*, 11 N. J. L. 370, 20 Am. Dec. 593. N. Y. *Fonda v. Van Horne*, 15 Wend. 631, 30 Am. Dec. 77; *Allen v. Crary*, 10 Wend. 349; *Alvord v. Haynes*, 13 Hun 26. Ohio.—*Sammis v. Sly*, 4 Ohio Cir. Dec. 60. Pa.—*Shearick v. Huber*, 6 Binn. 2.

See generally the title "Replevin."

[a] **Mortgagee.**—Replevin will not lie in favor of a mortgagee before sale, but will after if the absolute title be sold. *Fugate v. Clarkson*, 2 B. Mon. (Ky.) 41, 36 Am. Dec. 589.

[b] **Replevin or Trespass.**—"The remedy in all times for this trespass, which is a very common one, has been by an action of replevin to take the property out of the hands of the sheriff or marshal and return it to the owner, or to leave the officer to proceed with the sale of the property and sue him or the purchaser in trespass for its value and for any incidental damage.

In the one case the party whose property was wrongfully seized recovered possession of it. In the other he recovered compensation for its loss." *Van Norden v. Morton*, 99 U. S. 378, 25 L. ed. 453.

[c] **Election of Remedies.**—Having successfully maintained replevin one cannot also bring trespass to recover for the damages occasioned by the wrongful levy. *Harris v. Nelson*, 113 Ill. App. 487. See generally 5 STANDARD PROC. 86, 111. But see *Stevens v. Springer*, 23 Mo. App. 375.

[d] In *Woodworth v. Gorsline*, 30 Colo. 186, 69 Pac. 705, 58 L. R. A. 417, it is held that replevin successfully maintained against the officer is not a bar to a subsequent action of trover against joint trespassers, the execution plaintiffs, not parties to the replevin action.

74. *Emerson v. Hopper*, 94 Ark. 384, 127 S. W. 467. See also *Van Norden v. Morton*, 99 U. S. 378, 25 L. ed. 453; *Shaw v. Levy*, 17 Serg. & R. (Pa.) 99.

As to the necessity for making a claim for the property, see *supra*, II, B, 6.

75. *Emerson v. Hopper*, 94 Ark. 384, 127 S. W. 467.

76. U. S.—*Van Norden v. Morton*, 99 U. S. 378, 25 L. ed. 453; *Hoxsie v. Nodine*, 123 Fed. 379, 61 C. C. A. 223. Ala.—*Stowers Furniture Co. v. Brake*, 158 Ala. 639, 48 So. 89; *Sheppard v. Shelton*, 34 Ala. 652; *Tatum v. Morris*, 19 Ala. 302. Cal.—*Buffandeau*

action of trover for the conversion of the property.<sup>77</sup> When the property wrongfully levied upon and sold is real estate, the action should be one to remove the cloud upon the title.<sup>78</sup> In such case an action for the value of the property will not lie,<sup>79</sup> unless the sale is to a bona fide purchaser without notice.<sup>80</sup> When the wrongful levy results from an

*v. Edmondson*, 17 Cal. 436, 79 Am. Dec. 139. **Ill.**—*McDaniel v. Fox*, 77 Ill. 343; *Collins v. Waggoner*, 1 Ill. 51; *Harris v. Nelson*, 113 Ill. App. 487. **Ind.**—*Glover v. Horton*, 7 Blackf. 295; *Jamison v. Hendricks*, 2 Blackf. 94, 18 Am. Dec. 131. **Ky.**—*Forsythe v. Ellis*, 4 J. J. Marsh. 298, 20 Am. Dec. 218; *Sanders v. Vance*, 7 Mon. 209, 18 Am. Dec. 167; *Wickliffe v. Sanders*, 6 Mon. 296. **Me.**—*Symonds v. Hall*, 37 Me. 354, 59 Am. Dec. 53. **Mass.**—*Blood v. Wood*, 1 Metc. 528. **N. H.**—*Breck v. Blanchard*, 20 N. H. 323. **N. J.**—*Bruen v. Ogden*, 11 N. J. L. 370, 20 Am. Dec. 593. **N. Y.**—*Chapman v. Dyett*, 11 Wend. 31, 25 Am. Dec. 598; *Phillips v. Hall*, 8 Wend. 610. **N. C.**—*Bender v. Askew*, 14 N. C. 149, 22 Am. Dec. 714. **Pa.**—*Allison v. Rheam*, 3 Serg. & R. 139, 8 Am. Dec. 644.

See generally the title "**Trespass.**"

[a] **Trespass Against Execution Plaintiff.**—The owner of property wrongfully taken under an execution against another is not restricted to his claim under the statute, but may resort to the indemnity bond, or to his action of trespass against the execution plaintiff. *Franklin v. Gumersell*, 9 Mo. App. 84; *State v. Donnelly*, 9 Mo. App. 519.

[b] **Trespass by Reversioner.**—A sale is necessary before an owner who holds merely a reversionary interest, and not possession, can maintain an action of trespass against the officer. *Dixon v. White Sew. Mach. Co.*, 128 Pa. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659.

**77. Ala.**—*Sheppard v. Shelton*, 34 Ala. 652. **Fla.**—*Toomer v. Fourth Nat. Bank*, 68 Fla. 555, 67 So. 225. **Ill.**—*Harris v. Nelson*, 113 Ill. App. 487. **Ind.**—*Jamison v. Hendricks*, 2 Blackf. 94, 18 Am. Dec. 131. **Ky.**—*Christopher v. Covington*, 2 B. Mon. 357; *Sanders v. Vance*, 7 Mon. 209, 18 Am. Dec. 167; *Wickliffe v. Sanders*, 6 Mon. 296. **N. Y.**—*Alvord v. Haynes*, 13 Hun 26. **Vt.**—*Gage v. Barnes*, 11 Vt. 195.

See generally the title "**Trover and Conversion.**"

**78. Norgren v. Edson, 51 Minn. 567, 53 N. W. 876. See *Pope v. Benster*, 42 Neb. 304, 60 N. W. 561, 47 Am. St. Rep. 703.**

**79. Norgren v. Edson, 51 Minn. 567, 53 N. W. 876.**

[a] But in *Pope v. Benster*, 42 Neb. 304, 60 N. W. 561, the court says: "It is true that the rule of caveat emptor applies to one who purchases real estate at a judicial sale thereof; and that if real estate be sold upon an execution issued upon a judgment which has in fact been paid and satisfied, that such sale would be void as against the owner thereof, and the purchaser thereat would not be protected as against such owner. This is as true of a sale made of personal property as it is of one made of real estate. If one should purchase a horse and buggy sold under an execution issued on a judgment, which judgment had in fact been paid, such purchaser would acquire no title to said property as against the owner; but such owner would undoubtedly have the right to take the property itself, or to waive the taking of the property and the invalidity of the sale and sue the officer and the plaintiff in execution for a conversion thereof. . . . Why, then, should not one whose real estate has been levied upon and sold on a satisfied judgment have the same right to treat the sale as void, or voidable, and, at his election, recover the real estate sold, or sue the execution creditor for the value of his interest in the real estate?"

**80. Norgren v. Edson, 51 Minn. 567, 53 N. W. 876.**

[a] **May Plead the Record.**—A bona fide purchaser without notice may plead the record in an action to quiet title to real estate sold under an execution which had been satisfied but satisfaction not entered of record. The owner may therefore recover the value of the property sold from the execution creditor. *Norgren v. Edson*, 51 Minn. 567, 53 N. W. 876.

irregularity in the proceedings, and the injury sustained is consequential rather than direct, the remedy of the injured party is an action on the case.<sup>81</sup> A statutory indemnity bond given by the officer in any case where property is claimed to have been taken by wrongful levy gives the party injured the right to sue on the bond,<sup>82</sup> but he is not limited to such action.<sup>83</sup>

**Joinder.** — Where shown to be a part of the same transaction, trespass *vi et armis* and *de bonis asportavit* may be joined.<sup>84</sup> Likewise, it has been held that a suit for injunction and demand for damages may be joined.<sup>85</sup>

**3. Prerequisites to Action.** — An action for wrongful levy of an execution, which is based upon a statutory privilege, will lie only when the procedure designated by the statute has actually been followed.<sup>86</sup> Generally it is not necessary to make a claim for property wrongfully taken under an execution in order to entitle the owner to sue for the conversion thereof,<sup>87</sup> though it is otherwise provided by some statutes as to an action against the officer.<sup>88</sup>

**4. Parties.** — The general rules as to parties are followed in actions for wrongful execution.<sup>89</sup> When the officer and purchaser are joint

**81. Ala.**—*Sheppard v. Shelton*, 34 Ala. 652. **Ark.**—*Dixon v. Watkins*, 9 Ark. 139. **Md.**—*Turner v. Walker*, 3 Gill & J. 377, 22 Am. Dec. 329. **Pa.**—*Barnett v. Reed*, 51 Pa. 190, 83 Am. Dec. 574; *Berry v. Hamill*, 12 Serg. & R. 210.

[a] The reason why an action on the case is the proper remedy for a malicious arrest is because the process is such as the law allows; the gravamen is the abuse of it. The act itself is lawful, the injury consequential. *Alison v. Rheam*, 3 Serg. & R. (Pa.) 139, 8 Am. Dec. 644.

**82. Ky.**—*Weddington v. McGuire*, 12 Ky. L. Rep. 143. **Mo.**—*State v. Donnelly*, 9 Mo. App. 519; *Franklin v. Gumersell*, 9 Mo. App. 84. **N. C.**—*Martin v. Buffalo*, 128 N. C. 305, 33 S. E. 902, 83 Am. St. Rep. 679.

**83. Hodge v. Monroe Mere. Co.**, 105 La. 668, 30 So. 142.

[a] Where a sheriff commits a trespass in seizing property not subject to his process, the claimant may elect to sue either on his official bond or the bond of indemnity. *Martin v. Buffalo*, 128 N. C. 305, 33 S. E. 902, 83 Am. St. Rep. 679.

**84. Stowers Furniture Co. v. Brake**, 158 Ala. 639, 48 So. 89. See 14 STANDARD PROC. 662.

**85. Hodge v. Monroe Mere. Co.**, 105 La. 668, 30 So. 142. See 14 STANDARD PROC. 710, et seq.

**86. Beek v. Avondino**, 82 Tex. 314, 18 S. W. 690.

[a] **Defendants' Choice of Property.** When the statute gives the execution defendant the privilege of directing the sheriff as to what property he should levy upon, the defendant must actually make such direction before an action will lie for illegal seizure. *Beek v. Avondino*, 82 Tex. 314, 18 S. W. 690.

**87. Fla.**—*Toomer v. Fourth Nat. Bank*, 68 Fla. 555, 67 So. 225. **Ind.**—*Jamison v. Hendricks*, 2 Blackf. 94, 18 Am. Dec. 131. **La.**—*Duperron v. Van Wickle*, 4 Rob. 39, 39 Am. Dec. 509.

**88.** See *supra*, II, B, 6.

**89.** See generally the title "Parties," and the following notes and cases.

[a] **Different Causes of Action.** Joint owners may not join in an action against the officer or his sureties if their causes of action are different. *Sheppard v. Shelton*, 34 Ala. 652.

[b] **Separate Owners May Not Join.** Owners of separate parcels of property wrongfully taken under the same execution should sue separately for the injury sustained. *Weddington v. McGuire*, 12 Ky. L. Rep. 143.

[c] **Real Party Injured.**—An action for trespass must be brought in the name of the actual owner, and not in the name of an agent. *Willis & Bro. v. Hudson*, 63 Tex. 678.

trespassers, they may be joined in one action,<sup>90</sup> but not otherwise.<sup>91</sup>

5. **Pleadings.**—The general rules of pleading should be observed in all actions for damages resulting from the wrongful levy of an execution.<sup>92</sup> In an action for damages for a wrongful sale on execution, the property taken should be particularly described,<sup>93</sup> or a good reason alleged for not doing so.<sup>94</sup> When the action is founded on maliciousness in procuring the issuance of the execution, malice need not be expressly alleged.<sup>95</sup>

Following the general rule, justification under judgment and execution is new matter and must be specially pleaded in order to be available as a defense.<sup>96</sup>

**III. BY ACTION OR OTHER PROCEEDING.<sup>1</sup>—A. IN GENERAL.**—In addition to the remedy for the enforcement of a judgment

[d] **By an Infant.**—If the injured party be an infant he may in accordance with the general rule sue by next friend. *Toomer v. Fourth Nat. Bank*, 68 Fla. 555, 67 So. 225. See 12 STANDARD PROC. 735.

[e] **Expiration of Office as Affecting Replevin.**—In replevin the officer against whom the proceedings are commenced remains a proper party defendant after his term of office expires. *Hines v. Stahl*, 79 Kan. 88, 99 Pac. 273. See generally the title "Replevin."

[f] **Action on Bond by Third Party.** When the execution plaintiff gives the officer an indemnity bond to protect him against a third party claim, the claimant may sue on the bond in the name of the state. *State v. Donnelly*, 9 Mo. App. 519. See *supra*, II, B, 6, d, (VIII), (B), (7), (b).

[g] **Sale of Mortgaged Property.** For damages sustained by reason of an irregularity in the sale of mortgaged property, the execution defendant and the mortgagee may bring the action; in which case the purchaser should be joined with the officer as a party defendant. *Davis v. Gott*, 130 Ky. 486, 113 S. W. 826.

90. *Symonds v. Hall*, 37 Me. 354, 59 Am. Dec. 53.

91. *Hoxsie v. Nodine*, 123 Fed. 379, 61 C. C. A. 223.

92. See the titles dealing with specific phases of pleading, and also those treating specific actions, such as "Trespass;" "Trove and Conversion."

[a] **Defect of parties** can be reached only by a special demurrer. *Wedington v. McGuire*, 12 Ky. L. Rep. 143.

[b] **The question of ownership** may be raised under a general denial. *Willis v. Hudson*, 63 Tex. 678. See generally the article "Title."

[c] **Fraud as to ownership** must be specially pleaded. *Willis v. Hudson*, 63 Tex. 678. See 10 STANDARD PROC. 49.

93. *Beck v. Avondino*, 82 Tex. 314, 18 S. W. 690.

94. *Beck v. Avondino*, 82 Tex. 314, 18 S. W. 690.

95. *Gensburg v. Marshall Field & Co.*, 104 Iowa 599, 74 N. W. 3. See *Lee v. Conard*, 1 Whart. (Pa.) 155, for a form of declaration.

As to abuse of process generally, see the title "Sheriffs, Constables and Marshals."

[a] **Use of Word "Malice" Not Essential.**—"Language defining or describing it, under the rules of pleading, is quite enough. . . . The petition also alleges that the acts of the sheriff and defendant 'were done for the purpose of oppressing plaintiff, and compelling him to surrender his property, without receiving compensation therefor.' This is a very good description of that evil motive termed 'malice.'" *Gensburg v. Marshall Field & Co.*, 104 Iowa 599, 74 N. W. 3.

96. *Maclaren v. Kramar*, 26 N. D. 244, 144 N. W. 85, 50 L. R. A. (N. S.) 714; *Gage v. Barnes*, 11 Vt. 195.

1. As to creditors suits, see the title "Creditors' Suits."

As to setting aside conveyances, see the title "Fraudulent Conveyances."

As to supplementary proceedings, see the title "Supplementary Proceedings."

As to sequestration, see the title "Sequestration."

or decree by execution against the property,<sup>2</sup> or person,<sup>3</sup> a party has another remedy; he may bring an action thereon.<sup>4</sup>

B. ACTION AT LAW. — 1. On Domestic Judgments. — a. *Right of Action.* — (1.) *Generally.* — An action on a domestic judgment may be maintained regardless of the fact that the time allowed for taking out an execution on the original judgment has not expired,<sup>5</sup> the right

2. See *supra*, II, B.

3. See *supra*, II, C.

4. *Brown v. Bell*, 46 Colo. 163, 103 Pac. 380, 133 Am. St. Rep. 54, 23 L. R. A. (N. S.) 1096. See generally the cases throughout this section.

As to proof of judgments see ENCY. OF EV. the title "Records."

5. *Ala.*—*Kaufman v. Richardson*, 142 Ala. 429, 37 So. 673, 110 Am. St. Rep. 40; *Field v. Sims*, 96 Ala. 540, 11 So. 763; *Elliott v. Holbrook*, *Carter & Co.*, 33 Ala. 659. *Cal.*—*Ames v. Hoy*, 12 Cal. 11. *Conn.*—*Denison v. Williams*, 4 Conn. 402; *Sterne v. Spalding*, *Kirby* 177. *Ill.*—*Young v. Cooper*, 59 Ill. 121; *Albin v. People*, 46 Ill. 372; *Greathouse v. Smith*, 4 Ill. 541. *Ind.*—*Becknell v. Becknell*, 110 Ind. 42, 10 N. E. 414; *Palmer v. Glover*, 73 Ind. 529; *Davidson v. Nebaker*, 21 Ind. 334, 83 Am. Dec. 350. *Ia.*—*Simpson v. Cochran*, 23 Iowa 81, 92 Am. Dec. 410; *Thomson v. Lee*, 22 Iowa 206; *Haven v. Baldwin*, 5 Iowa 503. *Kan.*—*Treat v. Wilson*, 65 Kan. 729, 70 Pac. 893; *Hummer v. Lamphear*, 32 Kan. 439, 4 Pac. 865, 49 Am. Rep. 491; *Burnes v. Simpson*, 9 Kan. 658. *La.*—*Ducker's Succession*, 10 La. Ann. 758. *Me.*—*Moor v. Towle*, 38 Me. 133. *Mass.*—*Wilson v. Hatfield*, 121 Mass. 551; *Linton v. Hurley*, 114 Mass. 76; *Clark v. Goodwin*, 14 Mass. 237. *Mich.* *Whelpley v. Nash*, 46 Mich. 25, 8 N. W. 570; *Woods v. Ayres*, 39 Mich. 345, 33 Am. Rep. 396; *McDonald v. Butler*, 3 Mich. 558. *Minn.*—*Merchants' Nat. Bank v. Gaslin*, 41 Minn. 552, 43 N. W. 483. *Mo.*—*Wood v. Newberry*, 48 Mo. 322; *Sheehan Co. v. Sims*, 28 Mo. App. 64. *Neb.*—*Eldredge v. Aultman*, *Miller & Co.*, 35 Neb. 884, 53 N. W. 1008, 37 Am. St. Rep. 476. *N. H.* *Morse v. Pearl*, 67 N. H. 317, 36 Atl. 255, 68 Am. St. Rep. 672; *Whittemore v. Carlin*, 58 N. H. 576. *N. Y.*—*Church v. Cole*, 1 Hill 645; *Smith v. Mumford*, 3 Cow. 26; *Harris v. Steiner*, 30 Misc. 324, 62 N. Y. Supp. 752. *Ohio.*—*Fox v. Burns*, 2 Ohio Dec. (Reprint) 311; *Headley v. Roby*, 6 Ohio 521. *Okla.* *Javis v. Foley*, 159 Pac. 646. *Pa.*

*Stewart v. Peterson's Exrs.*, 63 Pa. 230. *S. C.*—*Lawton v. Perry*, 40 S. C. 255, 18 S. E. 861; *Copeland v. Todd*, 30 S. C. 419, 9 S. E. 341; *Pinckney's Admr. v. Singleton*, 2 Hill 343. *Tenn.*—*Green-Rea Co. v. Holman*, 107 Tenn. 544, 64 S. W. 889; *Gardner v. Henry*, 5 Coldw. 458. *Tex.*—*Stevens v. Stone*, 94 Tex. 415, 60 S. W. 959, 86 Am. St. Rep. 861. *Vt.*—*White River Bank v. Downer*, 29 Vt. 332. *Va.*—*Kelly v. Hamblen*, 98 Va. 383, 36 S. E. 491. *Wash.*—*Citizens' Nat. Bank v. Lucas*, 26 Wash. 417, 67 Pac. 252, 90 Am. St. Rep. 748, 56 L. R. A. 812; *Bettman v. Cowley*, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815.

[a] There is no principle "which inhibits the creditor, on a judgment which is in force and unsatisfied, from recovering in an action brought on it, although he may at the time of bringing suit be entitled to an execution on his judgment." *Simpson v. Cochran*, 23 Iowa 81, 92 Am. Dec. 410.

[b] *Necessity or Reason for.*—"The chief argument is, that there is no necessity for a right of action on a judgment, inasmuch as execution can be issued to enforce the judgment already obtained, and no better or higher right or advantage is given to the subsequent judgment. But this is not true in fact, as in many cases it may be of advantage to obtain another judgment in order to save or prolong the lien; and in this case the advantage of having record evidence of the judgment is sufficiently perceptible. The argument that a defendant may be vexed by repeated judgments on the same cause of action, is answered by the suggestion that an effectual remedy to the party against this annoyance is the payment of the debt." *Ames v. Hoy*, 12 Cal. 11.

[c] Where several successive actions are brought on a judgment for the purpose of coercing payment of the plaintiff's debt by accumulating costs, the court will not permit its process to be perverted and used for such improper purpose, and a stay of proceedings in all the actions except the first will be

to an execution,<sup>9</sup> or to have a dormant judgment revived,<sup>7</sup> being merely cumulative remedies. Neither the lapse of time within which an execution might be issued,<sup>8</sup> nor the actual issuance of an execution on which no return has been made<sup>9</sup> will ordinarily prevent a judgment creditor from bringing an action on a domestic judgment. Such an action may be maintained after levy of execution on defendant's property as long as it has not resulted in satisfaction of the judgment,<sup>10</sup> and in some jurisdictions an action on a domestic judgment may be brought notwithstanding a return of full satisfaction of the execution, if the record is erroneous and the judgment in fact remains unsatisfied.<sup>11</sup> In other jurisdictions, however, no action can be brought upon a judgment which appears of record to be satisfied by a levy of execution.<sup>12</sup> A resort to the remedy of *scire facias*, rather than an action

granted in such instance. *Keeler v. King*, 1 Barb. (N. Y.) 390. See generally the title "**Supersedeas and Stay of Proceedings.**"

6. *Hickman v. Macon County*, 42 Fed. 759, "the right to an execution on a judgment is merely cumulative and does not take away the common law right to sue on an unpaid judgment as often as the judgment creditor elects to sue."

[a] **Right to Alias Execution.**—A statute giving plaintiff the right to the issuance of an alias execution within ten years gives plaintiff such remedy "to coerce the payment of the judgment, if he sees proper to use it, but was not intended to deprive him of his action of debt. The remedy given by the statute is cumulative merely, and a plaintiff may, if his judgment be not satisfied, sue in debt upon it, although he could, under the statute, issue an alias execution." *Kingsland & Co. v. Forrest*, 18 Ala. 519, 52 Am. Dec. 232.

7. *Baker v. Hummer*, 31 Kan. 325, 2 Pac. 808.

[a] "The provision in the statute giving the right to revive a dormant judgment by motion and notice made within one year after it becomes dormant, is only cumulative or additional to the remedy of the common law. A judgment creditor can either sue on a dormant judgment within a year after it becomes dormant, or have the original judgment revived by motion and notice as prescribed by the code." *Baker v. Hummer*, 31 Kan. 325, 2 Pac. 808.

8. Cal.—*Stuart v. Lander*, 16 Cal. 372, 76 Am. Dec. 538. D. C.—*Raub v. Hurt*, 24 App. Cas. 211. Nev.—*Mandle-*

*baum v. Gregovich*, 24 Nev. 154, 50 Pac. 849. S. C.—*Copeland v. Todd*, 30 S. C. 419, 9 S. E. 341.

9. U. S.—*Wells, Fargo & Co. v. Vansickle*, 112 Fed. 398. Mass.—*Wilson v. Hatfield*, 121 Mass. 551; *Linton v. Hurley*, 114 Mass. 76; *Allen v. Holden*, 9 Mass. 133, 6 Am. Dec. 46. N. H.—*Morse v. Pearl*, 67 N. H. 317, 36 Atl. 255, 63 Am. St. Rep. 672. N. Y.—*Hale v. Angel*, 20 Johns. 342. N. C.—*McDonald v. Dickson*, 85 N. C. 248. Vt.—*White River Bank v. Downer*, 29 Vt. 332.

10. *Clarkson v. Beardsley*, 45 Conn. 196; *Cowles v. Bacon*, 21 Conn. 451, 56 Am. Dec. 371; *Fish v. Sawyer*, 11 Conn. 545; *Hutchinson v. Greenbush*, 30 Me. 450.

[a] The levy of an execution on personal property of sufficient value to satisfy the judgment does not operate *prima facie* as a satisfaction of the judgment so as to bar an action thereon. *Smith v. Condon*, 174 Mass. 550, 55 N. E. 324, 75 Am. St. Rep. 372.

11. *Cohen v. Camp*, 46 Mo. 179; *Boynton v. Boynton*, 186 Mo. App. 713, 172 S. W. 1175.

12. *O'Conner v. Silver*, 26 Tex. 606; *City of San Antonio v. Routledge*, 46 Tex. Civ. App. 196, 102 S. W. 756; *Pratt v. Jones*, 22 Vt. 341, 54 Am. Dec. 80.

[a] Neither "the common law nor the practice in the various states of the republic, nor anything inherent in the subject, based on sound reason, gives to a judgment creditor an absolute right of action on a domestic judgment, unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment." *Pitzer v. Russel*, 4 Ore. 124.

on the judgment is required in some states,<sup>13</sup> at least after an execution has been returned.<sup>14</sup> In some jurisdictions an action on a domestic judgment cannot be brought unless the judgment would be of no avail without it,<sup>15</sup> or would give the creditor a better remedy,<sup>16</sup> and not until after the expiration of the time in which execution may issue thereon.<sup>17</sup>

(II.) **Nature and Character of Judgment.**—(A.) **VALIDITY OF JUDGMENT.** An action on a void judgment obviously cannot be maintained,<sup>18</sup> but where the judgment is merely erroneous, an action may be brought

13. *Green v. Bailey*, 3 N. H. 33. But see *Harter v. Harter*, 4 Pa. Dist. 211.

14. *Dennis v. Arnold*, 12 Met. (Mass.) 449. Compare *Pratt v. Jones*, 22 Vt. 341, 54 Am. Dec. 80, holding that where the record shows a levy and return of satisfaction, neither an action nor scire facias may be maintained until the levy has been vacated by a direct proceeding for that purpose.

[a] **The remedy of scire facias is exclusive** (1) not only after a return of an execution levied by metes, bounds and appraisement, but also after a levy on equities of redemption when that levy does not avail as a real satisfaction of the judgment. *Perry v. Perry*, 2 Gray (Mass.) 326. (2) If it should appear to the creditor that the property on which execution is levied cannot be held thereby "after return or recording of the execution the error must be corrected in scire facias; but, if the mistake shall be discovered before the return of the execution or before it shall be recorded, he is not thus restricted but he may resort to any other remedy." *Grosvenor v. Chesley*, 48 Me. 369.

[b] **After Partial Satisfaction.** Such statute, however, "does not prevent a judgment creditor from maintaining an action upon a judgment for the balance due where the execution was returned satisfied in part." *Habib v. Evans*, 222 Mass. 480, 111 N. E. 362.

15. *Smith v. Belmont Co.*, 11 Bush (Ky.) 390; *Cundiff v. Trimble*, 21 Ky. L. Rep. 657, 52 S. W. 940.

[a] **Where execution upon a judgment has been ordered quashed** no action can be maintained upon the judgment, as the only purpose for which such action can be maintained is the enforcement of collection on the judgment. *Cundiff v. Trimble*, 21 Ky. L. Rep. 657, 52 S. W. 940.

16. *Stevens v. Stone*, 94 Tex. 415, 60 S. W. 959, 86 Am. St. Rep. 861.

[a] **"Where no advantage can accrue to a plaintiff in a judgment by a second suit upon it, we fail to see that there is any propriety in allowing such suit. It is a narrow view of the subject, as we think, to say that the judgment is an evidence of debt and that a debt will support a cause of action. The purpose of judicial actions is to afford remedies for the enforcement of rights, and where the result of a suit prosecuted to success is to give the plaintiff no better remedy for the enforcement of his right than he had before, no reason other than a technical one can exist for permitting its prosecution. . . . Therefore we are inclined to hold . . . that a judgment creditor can not maintain an action upon his judgment without showing some advantage to be gained thereby. But however that may be, we are clearly of opinion that where it is made to appear that a second judgment may be in any respect more available than the first, the action should be allowed."** *Stevens v. Stone*, 94 Tex. 415, 60 S. W. 959, 86 Am. St. Rep. 861.

[b] **To Make Liable One Not a Party to the Judgment.**—Where the action is brought to render liable on the judgment one not named therein, the general rule is not applicable. *Heavrin v. Lack Iron Co.*, 153 Ky. 329, 155 S. W. 729.

17. *Van Diver v. Hammet*, 4 Rich. L. (S. C.) 509; *Lee v. Giles*, 1 Bailey (S. C.) 449.

18. **U. S.**—*Ellis v. Connecticut Mut. Life Ins. Co.*, 8 Fed. 81. **Mass.**—*Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429. **Mo.**—*Bobb v. Graham*, 4 Mo. 222. **N. H.**—*Bruee v. Cloutman*, 45 N. H. 37, 84 Am. Dec. 111. **N. Y.**—*Ely v. Cook*, 9 Abb. Pr. 366.

thereon until it is set aside or reversed.<sup>19</sup> The fact that the judgment record is lost or destroyed does not affect the right to maintain an action on a domestic judgment,<sup>20</sup> even though the statute provides for a specific remedy by which the lost record can be supplied.<sup>21</sup>

(B.) FINALITY OF JUDGMENT. — (1.) *Generally.* — The judgment sued on must be a final judgment for the payment of money, upon which execution may be issued.<sup>22</sup> An interlocutory judgment will not support an action;<sup>23</sup> neither will a judgment on default where the default has been opened, even though the judgment stands as security for any

19. *Bruce v. Cloutman*, 45 N. H. 37, 84 Am. Dec. 111; *Newcomb v. Peck*, 17 Vt. 302; 44 Am. Dec. 340.

20. *Mandeville v. Reynolds*, 68 N. Y. 528.

[a] Although the book containing the judgment record is destroyed, an action may be maintained. *Ames v. Hoy*, 12 Cal. 11.

21. *Cal.*—*Ames v. Hoy*, 12 Cal. 11. *Ind.*—*Jackson ex dem. Taylor v. Cul- lum*, 2 Blackf. 228, 18 Am. Dec. 158. *Mo.*—*Foulk v. Colburn*, 48 Mo. 225. *N. Y.*—*Mandeville v. Reynolds*, 68 N. Y. 528.

[a] Even though the statute furnishes a specific remedy for the restoration of a lost judgment record a party is not bound to pursue such remedy but may prove the lost judgment record in an action brought on the judgment. *Parry v. Walser*, 57 Mo. 169, in which it is said: "The general rule is, that if a record is lost, its contents may be proved like any other document, and the evidence given in this case, preliminary to the proof of the contents of the record, was sufficient to prove its destruction. In fact, the evidence seems to be almost conclusive on that subject. . . . It is, however, contended, by the defendant, that the statute of this state having furnished a remedy to the plaintiff, by which the record could be supplied, all other remedy is thereby taken away, and that the plaintiff was bound to follow the remedy furnished by the statute, and could pursue no other. . . . We do not agree to this view of the case. The destruction of the record did not destroy the force of the judgment, and the plaintiff might proceed to collect his judgment as at common-law, without resorting to the mode furnished by the statute."

[b] *Necessary To First Restore Judgment.*—But in *Walton v. McKes- son*, 64 N. C. 77; the court says: "In

an action on a former judgment, the record of the judgment is the proper evidence thereof. Its production can not be dispensed with, or supplied by any other evidence. The reason is, that upon plea of nul tiel record, the court decides upon the inspection of the record itself. The plaintiff's remedy in this case, was, upon notice to the defendants, a motion in the original suit, to have a record made of the judgment, in place of that which was destroyed; and then to offer the record in evidence in this suit."

As to restoration of lost or destroyed record of judgment, see the title "Records."

22. *U. S.*—*Corbin v. Graves*, 27 Fed. 644. *Ariz.*—*Brandt v. Meade*, 17 Ariz. 34, 148 Pac. 297. *Mo.*—*Smith v. Kan- der*, 58 Mo. App. 61. *N. Y.*—*Hanover Fire Ins. Co. v. Tomlinson*, 3 Hun 630, 6 Thomp. & C. 127. *N. C.*—*English v. Reynolds*, 4 N. C. 529.

As to when a judgment is final, see 2 STANDARD PROC. 162, and the title "Judgments."

[a] "The judgment must be one which requires the payment of a sum of money, so that the amount to be paid, and the circumstances under which it should be paid, are fixed by the judgment, and can be ascertained by a resort to it." *Matter of Van Beuren*, 33 App. Div. 158, 53 N. Y. Supp. 349.

[b] The mere ascertainment of the indebtedness of a partnership for the purpose of making a proper distribution of the assets and the determination that a certain amount is due to a creditor is not a judgment in personam for the amount of such indebtedness. *Seligman v. Kalkman*, 17 Cal. 152.

23. *U. S.*—*Corbin v. Graves*, 27 Fed. 644. *N. C.*—*English v. Reynolds*, 4 N. C. 529. *Tex.*—*Ledyard v. Brown*, 39 Tex. 402.

judgment that may finally be obtained in the pending action.<sup>24</sup>

(2.) *Effect of Appeal.*—The pendency of an appeal does not deprive the judgment creditor of his right to sue on a domestic judgment,<sup>25</sup> provided no stay of proceedings has been granted.<sup>26</sup>

(C.) DECREES IN EQUITY GENERALLY.—Final decrees of courts of equity ordering the payment of a fixed sum, likewise may be the basis of an action at law for the recovery of the sum adjudged to be due,<sup>27</sup> even

24. *McDougall v. Hoes*, 27 Misc. 590, 58 N. Y. Supp. 209.

[a] "The judgment sued upon is in no sense final. The order permitting the defendant to come in and defend, though it permitted the judgment to stand as security, deprived it of all validity for any other purpose. It was left standing as a mere security for whatever amount the plaintiff might subsequently establish by further proceedings in that action. No execution could be issued on it after the making of that order, and none can be issued on it now. Had the plaintiff prosecuted the action and recovered less than the amount named in the security judgment it would have been void as to the excess, and if the defendant therein had been wholly successful it would have fallen absolutely. Such is the legal result." *McDougall v. Hoes*, 27 Misc. 590, 58 N. Y. Supp. 209.

25. U. S.—*Dawson v. Daniel*, 2 Flip. 301, 7 Fed. Cas. No. 3,668. Cal.—*Taylor v. Shew*, 39 Cal. 536, 2 Am. Rep. 538. Ind.—*Nill v. Comporet*, 16 Ind. 107, 79 Am. Dec. 411. Mass.—*Faber v. Hovey*, 117 Mass. 107, 19 Am. Rep. 398. But see *Gifford v. Whalon*, 8 Cush. 428. Neb.—*Riley Bros. Co. v. Melia*, 3 Neb. (Unof.) 666, 92 N. W. 913. N. J.—*Suydam v. Hoyt's Admrs.*, 25 N. J. L. 230. Pa.—*Woodward v. Carson*, 86 Pa. 176. Vt.—*Tarbell v. Downer*, 29 Vt. 339.

*Contra*, *Curtiss v. Beardsley*, 15 Conn. 518.

26. U. S.—*In re Berlin Dye Works Co.*, 225 Fed. 683. Cal.—*Dowdell v. Carpy*, 137 Cal. 333, 70 Pac. 167. Mo. Sublette v. St. Louis, I. & S. Ry. Co., 66 Mo. App. 331.

As to effect of appeal as stay, see the title "Supersedeas and Stay of Proceedings."

[a] Stay Does Not Prevent Action. Where the statute providing for a stay of execution on judgments rendered by justices of the peace does not expressly negative the right of bringing an action

thereon immediately, such stay does not affect the right to sue. *McDonald v. Butler*, 3 Mich. 558; *Smith v. Mumford*, 9 Cow. (N. Y.) 26.

27. U. S.—*Nations v. Johnson*, 24 How. 195, 16 L. ed. 628; *Du Bois v. Seymour*, 152 Fed. 600, 81 C. C. A. 590. Cal.—*Ames v. Hoy*, 12 Cal. 11. Conn.—*Drakesly v. Roots*, 2 Root 138. Ga.—*Tompkins v. Cooper*, 97 Ga. 631, 25 S. E. 247. Ill.—*Warren v. McCarthy*, 25 Ill. 95. Ind.—*Elliott v. Ray*, 2 Blackf. 31; *Traylor v. Richardson*, 2 Ind. App. 452, 28 N. E. 205. Ky. *Williams v. Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 179. Me.—*McKim v. Odom*, 12 Me. 94. N. J.—*Cord v. Newlin*, 71 N. J. L. 438, 59 Atl. 22; *Mutual Life Ins. Co. v. Newton*, 50 N. J. L. 571, 14 Atl. 756. Compare *Van Buskirk v. Mulock*, 18 N. J. L. 184. N. Y. *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536. Ohio.—*Moore v. Ogden*, 35 Ohio St. 430, 434. Pa.—*Evans v. Tatem*, 9 Serg. & R. 252, 11 Am. Dec. 717. R. I.—*Wagner v. Wagner*, 26 R. I. 27, 57 Atl. 1058, 65 L. R. A. 816; *Burges v. Souther*, 15 R. I. 202, 2 Atl. 441. Vt.—*Downer v. Dana*, 22 Vt. 337; *Thrall v. Waller*, 13 Vt. 231, 37 Am. Dec. 592.

[a] "We are aware that at one period courts of equity were said not to be courts of record, and their decrees were not allowed to rank with judgments at law. . . . The relative dignity of courts of equity, and the binding effect of their decrees, when given within the pale of their regular constitution and jurisdiction, are no longer subjects for doubt or question. . . . We lay it down, therefore, as the general rule, that in every instance in which, an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more; and that the record of the proceedings in the one case must

though the decree sued upon orders the doing of other things besides the payment of money.<sup>28</sup> But in some jurisdictions the early rule still prevails, that no action may be maintained on such a decree.<sup>29</sup> And a decree containing a condition which renders it uncertain whether payment shall ever become obligatory will not support an action at law; nor will a decree which is in the alternative<sup>31</sup> or one in which the amount of liability is to be ascertained by subsequent proceedings.<sup>32</sup>

(D.) DECREE OF FORECLOSURE. — In some jurisdictions, an action may be maintained to enforce a decree for the foreclosure of a mortgage,<sup>33</sup> while in others the rule is to the contrary.<sup>34</sup> An action may be brought

be ranked with and responded to as of the same dignity and binding obligation with the record in the other." *Fennington v. Gibson*, 16 How. (U. S.), 65, 14 L. ed. 847, *distinguishing* *Hugh v. Higgs*, 8 Wheat. 697, 5 L. ed. 719.

[b] In Code States.—"As in this state there is only one form of civil action for the enforcement of a private right, . . . the rules which under a former system prevented the enforcement of a decree in equity by a proceeding at law are inapplicable." *Rowe v. Blake*, 99 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45.

28. *Blattner v. Frost*, 44 Ill. App. 580. Compare *Warren v. McCarthy*, 25 Ill. 95.

29. *Boyle v. Schindel*, 52 Md. 1; *Richardson v. Jones*, 3 Gill & J. (Md.) 163, 22 Am. Dec. 293.

[a] "Whatever may be the law in other states as laid down by the text writers, we feel bound to adhere to the ancient ways marked out by our predecessors. It is not because decrees of courts of equity are not of equal dignity and finality with judgments at law, that they are not subjects of suits at law in this state, but because they are *so equal and final* they require no extrinsic aid from courts of law to give them full force and effect. Courts of equity within their own jurisdiction have full power to issue judicial writs to enforce their decrees with equal economy and despatch as at law. Having acquired jurisdiction over the parties and the subject-matter by previous proceedings, it is proper, that what was commenced in a court of equity should be concluded in the same, for many reasons too obvious and numerous to be assigned." *Boyle v. Schindel*, 52 Md. 1.

30. *Du Bois v. Seymour*, 152 Fed. 600, 81 C. C. A. 590.

31. *Thrall v. Waller*, 13 Vt. 231, 37 Am. Dec. 592.

[a] Where a decree consists of two parts, the first ordering the defendant to pay to plaintiff a certain sum and the second part ordering in default of such payment that the mortgaged premises be sold and a certain part of the proceeds be paid into court, the second order does not come into operation if the first is performed and becomes operative only if the first is not performed and no action on the decree can be maintained. *Burges v. Souther*, 15 R. I. 202, 2 Atl. 441.

32. *Corbin v. Graves*, 27 Fed. 644.

33. *Rowe v. Blake*, 99 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45.

[a] "The obligation upon a defendant to pay a specific sum of money out of his general estate, which an ordinary money judgment implies, differs in kind rather than in nature from the obligation to subject a specific parcel of land to the payment of a specific sum of money, and the reasons for enforcing this implied obligation or promise by an action are as cogent in the one case as in the other." *Rowe v. Blake*, 99 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45.

34. *Hanover Fire Ins. Co. v. Tomlinson*, 3 Hun (N. Y.) 630, 6 Thomp. & C. 127.

[a] A judgment directing the foreclosure of a mortgage and the sale of the mortgaged premises and also the payment of any deficiency that might arise upon such sale is not a final judgment, upon which an action may be maintained, as it contemplates further steps to be taken, namely the ascertainment of the deficiency and the docketing of a judgment for the amount of such deficiency. *Hanover Fire Ins. Co. v. Tomlinson*, 3 Hun (N. Y.) 630, 6 Thomp. & C. 127.

on a deficiency judgment in a foreclosure proceeding.<sup>35</sup>

(E.) DECREE FOR ALIMONY.—Where a final decree of divorce provides for the payment of a specific sum as alimony it may be enforced like ordinary decrees by an action thereon.<sup>36</sup>

(F.) PROBATE DECREE.—Generally an action cannot be brought on a decree of a probate court,<sup>37</sup> but an action may be brought upon a final judgment of the probate court for the payment of money.<sup>38</sup>

(G.) SPECIAL PROCEEDINGS.—A final order in a special proceeding, for the payment of money, may be sued on, though it is not strictly a judgment.<sup>39</sup>

(H.) JUDGMENTS IN REM.—A judgment which is in effect only a judgment in rem binding on the property brought within the court's jurisdiction by attachment or otherwise, will not support an action upon any personal obligation embodied in it against one over whom personal jurisdiction was not obtained,<sup>40</sup> since as to such a person the judgment would not be even competent evidence to establish any personal liability.

35. *Armstrong v. Patterson*, 97 Neb. 229, 149 N. W. 408.

36. Ill.—*Lancaster v. Lancaster*, 29 Ill. App. 510. Ind.—*Hansford v. Van Auken*, 79 Ind. 302. Me.—*Stratton v. Stratton*, 77 Me. 373, 52 Am. Rep. 779.

See 7 STANDARD PROC. 838.

Action on decree of sister state, see *infra*, III, B, 2, a, (II), (C).

[a] Action of Debt.—“The only question made in this case is, whether an action of debt will lie, to recover the sum ascertained to be due by the decree of this court for alimony; and there seems to be no reason why it should not. The debt is certain, and it is proved by record; and the decree is, in effect, as much a judgment, as if rendered on the common-law side of the court. It was once doubted whether an execution could issue, to carry into effect such a decree, and whether the only remedy should not be an action of debt; but there seems no good reason why both the remedies may not exist.” *Howard v. Howard*, 15 Mass. 196. See also 7 STANDARD PROC. 838.

[b] After Lapse of Statutory Period.—Where a statute provides that an action cannot be maintained between the original parties upon a judgment for a sum of money unless ten years have elapsed since it was docketed, a final decree in an action for divorce which provides for the payment of alimony by instalments is a judgment for the payment of money within such statute. *Farquhar v. Far-*

*quhar*, 172 App. Div. 242, 158 N. Y. Supp. 194.

37. *Fort v. Blagg*, 38 Ark. 471; *Eichelberger v. Smyser*, 8 Watts (Pa.) 181.

[a] An action cannot be maintained on a decree of distribution in the orphan's court to recover the distributive share of an estate, the jurisdiction of such court over the distribution of an estate being exclusive. *Black's Exr. v. Black's Exrs.*, 34 Pa. 354.

38. *Dubois v. Dubois*, 6 Cow. (N. Y.) 494.

39. *Fenlon v. Paillard*, 46 Misc. 151, 93 N. Y. Supp. 1101.

[a] “Apart from any statute on the subject, I have no doubt that this plaintiff may sue upon a final order in a special proceeding, establishing of record the fact of an indebtedness. Such an order has every attribute of finality in the determination of a judicial inquiry which is possessed by a surrogate's decree, and the principle which upholds the maintenance of an action upon the latter . . . is equally applicable to the former; yet neither is a ‘judgment’ in ordinary acceptance.” *Fenlon v. Paillard*, 46 Misc. 151, 93 N. Y. Supp. 1101.

40. See *Tay, Brooks & Backus v. Hawley*, 39 Cal. 93; *Oakley v. Aspinwall*, 4 N. Y. 513; and *infra*, III, B, 2, a, (II), (A). But see *Kendrick v. Kimball*, 33 N. H. 482, apparently holding otherwise. This case, however, is inconsistent with later ruling cases, such

ity.<sup>41</sup> But under some circumstances an action in equity may be maintained on such judgments.<sup>42</sup>

b. *Leave To Sue*.—Under the common law the plaintiff is not required to obtain leave to sue on a domestic judgment.<sup>43</sup> But in some jurisdictions such leave is a condition precedent to the maintenance of an action under certain conditions,<sup>44</sup> though it has been held that the absence of leave to sue is a mere irregularity and not a jurisdictional prerequisite, which may be cured by a subsequent order granting leave *nunc pro tunc*.<sup>45</sup> In other states the failure to obtain leave to sue on a domestic judgment merely prevents the plaintiff from recovery of costs in the action.<sup>46</sup> A statute requiring the parties to a judgment to obtain leave before suing upon it has no application to an action brought by an assignee of the judgment,<sup>47</sup> nor does such statute

as *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

41. See the titles "Judgments;" "Res Judicata;" and 7 ENCY. OF EV. 781.

42. See *infra*, III, C, 1.

43. *Ives v. Finch*, 28 Conn. 112; *Denison v. Williams*, 4 Conn. 402; *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 Pac. 849.

44. Ia.—*Wilson v. Tucker*, 105 Iowa 55, 74 N. W. 908; *Morrison v. Springfield Co.*, 84 Iowa 637, 51 N. W. 183; *Matthews v. Davis*, 61 Iowa 225, 16 N. W. 102. N. Y.—See *Graham v. Scripture*, 26 How. Pr. 501; *Baldwin v. Roberts*, 30 Hun 163; *Underhill v. Phillips*, 30 App. Div. 238, 51 N. Y. Supp. 801, 5 N. Y. Ann. Cas. 395; *Cook v. Thurston*, 18 Misc. 506, 42 N. Y. Supp. 1084; *United States L. Ins. Co. v. Gage*, 26 Abb. N. C. 16, 13 N. Y. Supp. 837. S. C.—*Brock v. Kirkpatrick*, 60 S. C. 322, 38 S. E. 779, 85 Am. St. Rep. 847. Wis.—*Cole v. Mitchell*, 77 Wis. 131, 45 N. W. 948.

As to pleading leave, see *infra*, II, B, 1, g.

[a] The absence of leave is not a mere irregularity which may be waived by defendant's not objecting thereto but it is a substantive right which must be shown to exist before the action can be maintained. *Farish v. Austin*, 25 Hun (N. Y.) 430. But see *Lane v. Salter*, 4 Robt. (N. Y.) 239.

[b] The decision of the trial court as to whether or not leave to bring an action on a judgment should be granted is conclusive and not reviewable. *Kendall v. Briley*, 86 N. C. 56. To the same effect, *Warren v. Warren*, 84 N. C. 614.

45. *Church v. Van Buren*, 55 How.

Pr. (N. Y.) 489. But see *Finch v. Carpenter*, 4 Abb. Pr. (N. Y.) 225, and cases in preceding note.

[a] *Order Nunc Pro Tunc*.—There "is no valid reason why a court may not, in furtherance of justice and in the exercise of a sound discretion, manifest its consent to the prosecution of a cause which shall operate retroactively, and thereby obviate the necessity of dismissing the action for the sole purpose of applying to the court for leave to again institute his suit just as before." *Stoddard Mfg. Co. v. Mattice*, 10 S. D. 253, 72 N. W. 891.

46. *Merchants' Nat. Bank v. Gaslin*, 41 Minn. 552, 43 N. W. 483.

47. *McGrath v. Maxwell*, 17 App. Div. 246, 45 N. Y. Supp. 587; *Knapp v. Valentine*, 24 Civ. Proc. 331, 33 N. Y. Supp. 712, 67 N. Y. St. 582; *Hedges v. Conger*, 45 Hun 590, 10 N. Y. St. 42; *Carpenter v. Butler*, 29 Hun (N. Y.) 251.

[a] "We suppose the object of the statute was to prohibit suing upon a judgment, when there could be no motive for it, except to accumulate costs. But the reason of the statute, if that was the sole reason for it, would seem to apply with as much force to the assignee as to the assignor of a judgment. We are not aware, however, of any complaints, that suits have been brought, with such motives, at the instance of the assignees of judgments. The advantages to an assignee, in recovering a judgment in his own name, are obvious. Such a recovery furnishes record evidence, that no equities existed between the assignor and the judgment-debtor, at the time of the assignment, which entitle the latter to exemption

apply to the presentation of a judgment by way of counterclaim or set-off,<sup>48</sup> or to a judgment of another state or federal court unless expressly so providing.<sup>49</sup>

c. *Form of Action*.—Debt is the proper action on a domestic judgment;<sup>50</sup> but in some jurisdictions assumpsit may be maintained.<sup>51</sup>

d. *Jurisdiction and Venue*.—An action on a domestic judgment may be maintained not only in the court wherein it was rendered,<sup>52</sup> but also in another court of competent jurisdiction.<sup>53</sup> It has been held, however, that an action on a domestic judgment may be brought only in the county wherein the judgment was rendered.<sup>54</sup> An action on a judgment may be brought in a justices' court.<sup>55</sup>

from paying the debt. It puts it out of the power of the assignor to discharge the judgment, or affect the rights or remedies, of his assignee. . . . We do not feel at liberty to extend, by construction under such circumstances, the common and natural meaning of the words, 'between the same parties.' As the code only prohibits an action between such parties, we do not feel authorized to hold that parties, not prohibited by that section from bringing an action, shall not bring one." *Tuffts v. Braisted*, 1 Abb. Pr. (N. Y.) 83.

48. *McClenahan v. Cotten*, 83 N. C. 332.

49. U. S.—*Union Trust Co. v. Rochester, etc. Co.*, 29 Fed. 609. N. Y.—*Morton v. Palmer*, 60 Hun 583, 14 N. Y. Supp. 912, 21 Civ. Proc. 94, 39 N. Y. St. 236; *Goodyear D. V. Co. v. Friselle*, 22 Hun 174. Pa.—*Hinman v. Hare*, 13 W. N. C. 251.

50. U. S.—*Du Bois v. Seymour*, 152 Fed. 600, 81 C. C. A. 590. Conn.—*Vail v. Mumford*, 1 Root 142. N. C.—*Humphreys v. Buie*, 12 N. C. 378. Vt.—*Woods v. Pettis Co.*, 4 Vt. 556.

See 6 STANDARD PROC. 475, 476.

[a] When "a judgment has been recovered for a tort, it then is fixed and certain. It is a debt, as much as if it were recovered upon a promise; and an action of debt, under the former practice, brought upon such a judgment, was an action ex contractu. It is so classed by all the writers." *Johnson v. Butler*, 2 Iowa 535.

51. Mich.—*Woods v. Ayres*, 39 Mich. 345, 33 Am. Rep. 396, by statute. N. Y.—*Stanton v. Thomas*, 24 Wend. 70, 35 Am. Dec. 595. Pa.—*Fullmer & Co. v. Pine*, 17 Pa. Co. Ct. 482.

See 3 STANDARD PROC. 193, 194, and *infra*, III, B, 2, b.

52. *Greathouse v. Smith*, 4 Ill. 541;

*Becknell v. Becknell*, 110 Ind. 42, 10 N. E. 414; *Hansford v. Van Auken*, 79 Ind. 157.

53. U. S.—*Hickman v. Macon County*, 42 Fed. 759. Ind.—*Becknell v. Becknell*, 110 Ind. 42, 10 N. E. 414; *Gould v. Hayden*, 63 Ind. 443. Ky.—*Craig v. Garnett's Admr.*, 9 Bush 97. N. Y.—*Goodrich v. Colvin*, 6 Cow. 397; *McGuire v. Gallagher*, 2 Sandf. 402; *Baldinger v. Turkowsky*, 36 Misc. 822, 74 N. Y. Supp. 897.

[a] "An action of debt on a judgment is not like a scire facias, which must issue from the same court which rendered the judgment." *Barr v. Simpson*, *Baldw.* 543, 2 Fed. Cas. No. 1,038.

[b] *In the County of Defendant's Residence*.—*Barr v. Simpson*, *Baldw.* 543, 2 Fed. Cas. No. 1,038; *Johnson v. Skipworth*, 59 Tex. 473; *Townsend v. Smith*, 20 Tex. 465, 70 Am. Dec. 400.

54. *Barnes v. Kenyon*, 2 Johns. Cas. (N. Y.) 381.

[a] "The authorities are conclusive upon the point that in action of debt, or in scire facias on a recognizance of bail by bill, and in action of debt on a judgment of record, the venue is local, and must be laid in the county where the record is. The reason assigned is, that the judgment constitutes a new contract between the parties, and the plaintiff must count upon the record, by which it will appear that the cause of action arose in the county where the judgment was obtained." *Smith v. Clark*, 1 Ark. 63.

55. *McGuire v. Gallagher*, 2 Sandf. (N. Y.) 402.

[a] Where a judgment of the justice's court is filed with and docketed by the county clerk it must be considered as a judgment of the county court, and the justices' court having no power to grant leave to bring an action on

e. *Joinder*.—The general rules as to joinder have been applied to actions on judgments.<sup>56</sup> It has been held improper to add to the count on the judgment a separate count on the instrument upon which the judgment was recovered.<sup>57</sup>

f. *Parties*.—(1.) *Plaintiff*.—In some jurisdictions an action on a domestic judgment can be brought only by the plaintiff in the original action or by his successor in interest,<sup>58</sup> even though the judgment was recovered for the benefit of another.<sup>59</sup> Under some statutes, however, the action must be brought by the real party in interest,<sup>60</sup> and therefore the assignee may sue in his own name,<sup>61</sup> and the owner of an equitable title to a domestic judgment may sue thereon.<sup>62</sup> But the assignor or legal owner of the judgment should be made a party to the action.<sup>63</sup>

such judgment an action thereon cannot be brought in the justices' court. *Baldwin v. Roberts*, 30 Hun (N. Y.) 163. See also *Lyon v. Manly*, 32 Barb. (N. Y.) 51, 10 Abb. Pr. (N. Y.) 337. And compare, *Baldinger v. Turkowsky*, 36 Misc. 822, 74 N. Y. Supp. 897.

56. See 14 STANDARD PROC. 691, 692.

[a] Several judgments may be sued on in the same action if all the debtors are the same and are made defendants. *Barnes v. Smith*, 1 Robt. (N. Y.) 699.

57. *Davis v. Sanders*, 25 App. Cas. (D. C.) 26. See also *Latine v. Clements*, 3 Ga. 426. But see *Harrison v. Magoon*, 13 Hawaii 339, 359, holding such joinder proper.

58. *United States Nat. Bank v. Verner*, 172 Mass. 449, 52 N. E. 543.

[a] *Party Wrongly Named in Judgment*.—Where a judgment is rendered in favor of a plaintiff designated by a wrong name an action cannot be maintained by such plaintiff on the judgment in his right name, even though it is averred in the complaint, that plaintiff was misnamed by mistake. *Gilbert v. Hanford*, 13 Mich. 40.

59. *Triplett v. Scott*, 12 Ill. 137.

60. *Colo.*—*Jansen v. Hyde*, 8 Colo. App. 38, 44 Pac. 760. *Ind.*—*Kelley v. Love*, 35 Ind. 106. *S. D.*—*Case Threshing Mach. Co. v. Pederson*, 6 S. D. 140, 60 N. W. 747.

[a] *An attorney*, who stipulates with his client to advance all costs and expenses of a suit and to indemnify the principal against all liability therefor may maintain an action on the judgment for the recovery of costs awarded therein. *Blondel v. Ohlman*, 132 Iowa 257, 109 N. W. 806.

[b] *Assignee of Half Interest*.

Where the statute requires every action to be brought by the real party in interest the assignee of one-half interest of the judgment is properly joined as plaintiff in an action thereon. *Mandla- baum v. Gregovich*, 24 Nev. 154, 50 Pac. 849. Compare *Fullmer & Co. v. Pine*, 17 Pa. Co. Ct. 482.

[c] *Trustee*.—No action on a decree for alimony can be brought by a party to whom the alimony is made payable for the benefit of defendant's wife and children, and an allegation that the action is instituted for the benefit of the wife and children does not alter his relation to the judgment sued on, since such allegation could not bind the real owner of the judgment and prevent the owner from bringing suit thereon. *Hunt v. Monroe*, 32 Utah 428, 91 Pac. 269, 11 L. R. A. (N. S.) 249.

[d] *The mere possession of a transcript* does not raise a presumption that the possessor has any legal or beneficial interest in the judgment to entitle him to the maintenance of an action on the judgment. *Tally v. Reynolds*, 14 Ark. 99, 31 Am. Dec. 737.

61. *Curtin v. Kowalsky*, 145 Cal. 431, 78 Pac. 962; *Shirts v. Irons*, 54 Ind. 13.

62. *N. J.*—*State v. Smith*, 15 N. J. L. 84. *N. Y.*—*Adams v. Stillman*, 4 Misc. 259, 23 N. Y. Supp. 810, 53 N. Y. St. 180. *S. D.*—*Case Threshing Mach. Co. v. Pederson*, 6 S. D. 140, 60 N. W. 747.

63. *Ind.*—*Chicago & S. E. Ry. Co. v. Higgins*, 150 Ind. 329, 50 N. E. 32; *McCammoek v. Clark*, 16 Ind. 320; *McCardle v. Aultman Co.*, 31 Ind. App. 63, 67 N. E. 236. *Ky.*—*Elliott v. Waring*, 5 Mon. 338, 17 Am. Dec. 69. *N. C.*—*McKinnie v. Rutherford*, 21 N. C. 14.

[a] *A failure to raise the objection*

And it has been held that a statute permitting actions on contracts express or implied to be brought in the name of the real party in interest has no application to judgments,<sup>64</sup> and therefore even in case of an assignment the action should be in the name of the assignor.<sup>65</sup> Upon assignment of part of the judgment an action on the judgment to recover the part assigned cannot be maintained where the judgment is for an entire sum payable at one time.<sup>66</sup>

(II.) **Defendant.**—One cannot be sued upon a judgment recovered in an action to which he was not a party.<sup>67</sup> But where the judgment was rendered against the defendant by a wrong name,<sup>68</sup> or his Christian name was omitted therein,<sup>69</sup> an action on the judgment may be maintained against him in his true name. Where the judgment is against one defendant only, no action can be brought against such defendant and another party jointly.<sup>70</sup> Under a statute permitting suit against

that the assignor is not made a party is a waiver of such objection. *Shirts v. Irons*, 54 Ind. 13.

[b] **Proper But Not Necessary Party.**—"Where the assignment is absolute and unconditional, there is no reason for making the assignor a party. It has been decided in this court that a mortgagor, who has parted with the equity of redemption, is not a necessary party; and I can see no stronger reason for making the assignor of a judgment a party, than the mortgagor who has parted with all his interests in the lands. The multiplication of parties should be avoided whenever they have no interest at stake in the cause; it can only tend to create expense and embarrassment." *Bruen v. Crane*, 2 N. J. Eq. 347.

64. *Masterson v. Gibson*, 56 Ala. 56.

[a] An action upon a judgment is not a contract, express or implied, for the payment of money within the meaning of the statute, and a judgment therefore must be sued on in the name of the original plaintiff or, if he be dead, of his executor or administrator. *Masterson v. Gibson*, 56 Ala. 56. *Contra*, *Moore v. Nowell*, 94 N. C. 265, where the court says: "The term 'contract,' as employed in the statute, . . . is used in its broadest legal sense—in a fundamental sense—and implies and embraces all things in action, that have the nature or legal quality of a contract as defined by the law. It is employed in a leading and distinguishing sense, in the formation of a system of procedure. Therefore, the judgments . . . do arise out of contract, and the

plaintiff, as assignee, may maintain an action upon them in his own name."

65. See preceding note.

[a] "It is a sufficient answer, that neither the common or statutory law recognizes the assignment of a judgment; such assignment passes only an equitable interest, and does not authorize a suit at law, in the name of the assignee." *Black v. Everett*, 5 Stew. & P. (Ala.) 60.

66. *Fullmer & Co. v. Pine*, 17 Pa. Co. Ct. 482. Compare *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 Pac. 849.

[a] "The action, whether debt or scire facias, must be issued upon the judgment, and must follow the judgment and be for the entire sum due thereon. If this judgment had been payable in instalments, then as each instalment fell due an action to collect such instalment would lie, but a judgment cannot be subdivided by a party so as to enable him to sue for a portion of it assigned to him." *Fullmer & Co. v. Pine*, 17 Pa. Co. Ct. 482.

67. *Bunt v. Rheum*, 52 Iowa 619, 3 N. W. 667.

68. *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. ed. 451; *Stevellie v. Read*, 2 Wash. 274, 22 Fed. Cas. No. 13,389.

[a] **Identity Must Be Questioned in Trial Court.**—Where no question as to defendant's identity is raised in the trial court none can be raised for the first time on appeal. *Hofferberth v. Nash*, 50 Misc. 328, 98 N. Y. Supp. 684, 18 Ann. Cas. 341, 37 Civ. Proc. 93.

69. *Newcomb v. Peck*, 17 Vt. 302, 44 Am. Dec. 340.

70. *Webb v. Garner*, 4 Mo. 10.

one or more of the persons liable on a joint obligation, a judgment against two or more defendants, in some jurisdictions is a several obligation and an action upon such judgment may be brought against any of the defendants named therein,<sup>71</sup> although the judgment had not been revived against one of the co-defendants who died since its rendition.<sup>72</sup> An action, however, on a domestic judgment cannot be maintained against a joint defendant who was not served with process in the original action.<sup>73</sup> In the absence of statute authorizing it actions on judgments against several defendants jointly liable thereon cannot be maintained unless all the living defendants are sued jointly,<sup>74</sup> even though it is provided by statute that all contracts which by the common law were joint shall be deemed several contracts.<sup>75</sup>

*g. Pleadings.*—(I.) **Generally.**—The pleadings in actions upon judgments are governed by the general rules elsewhere discussed.<sup>76</sup>

(II.) **Declaration and Complaint.**<sup>77</sup>—The judgment sued on must be described with sufficient particularity to identify the cause of action.<sup>78</sup>

71. **U. S.**—*Belleville Sav. Bank v. Winslow*, 30 Fed. 488; *United States v. Spiel*, 3 McCrary 107, 8 Fed. 143. **Kan.** *Richardson v. Painter*, 80 Kan. 574, 102 Pac. 1099, 133 Am. St. Rep. 224; *Read v. Jeffries*, 16 Kan. 534. **N. Y.**—*Johnson v. Smith*, 23 How. Pr. 444; *Carman v. Townsend*, 6 Wend. 206. **Va.** *Roane's Admr. v. Drummond's Admrs.*, 6 Rand. 182. **Wash.**—*Bignold v. Carr*, 24 Wash. 413, 64 Pac. 519; *Olson v. Veazie*, 9 Wash. 481, 37 Pac. 677, 43 Am. St. Rep. 855.

72. *Richardson v. Painter*, 80 Kan. 574, 102 Pac. 1099, 133 Am. St. Rep. 224.

73. *Oakley v. Aspinwall*, 4 N. Y. 513.

[a] "To say that a person is liable to an action on a judgment, but that he may, in that action, litigate the cause of action upon which the judgment was rendered—to hold that he may be sued upon the judgment, but that, if he pleads the proper matters in defense, the judgment is not even *prima facie* evidence against him, is, to our minds, altogether unsatisfactory and illogical." *Tay v. Hawley*, 39 Cal. 93.

74. **U. S.**—*United States v. Cushman*, 25 Fed. Cas. No. 14,907. **Mass.** *Wright v. Andrews*, 130 Mass. 150; *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356. **Mo.**—*Sheehan, etc. Trans. Co. v. Sims*, 28 Mo. App. 64.

[a] **Joint Judgment.**—Where the plaintiff in an action on a joint and several bond elects to treat the bond

as a joint one and obtains judgment against all the joint defendants, he cannot maintain an action on the judgment against one of the defendants only. *Judge of Probate v. Webster*, 46 N. H. 518.

[b] "The judgment survives against the living judgment debtors; and can in no mode whatsoever, known to the common law, be enforced against the administrator of the deceased debtor. As to him, in its character as a judgment, it is *functus officio*." *United States v. Cushman*, 25 Fed. Cas. No. 14,907.

75. *Sheehan, etc. Trans. Co. v. Sims*, 28 Mo. App. 64.

76. See the titles throughout this work dealing with particular phases of pleading.

77. See the title "Declaration and Complaint."

78. *Davis v. Davis*, 65 Fed. 380. See *infra*, III, B, 2, d, (I).

As to pleading judgment as estoppel, see the title "Judgments."

For forms of declaration and complaint, see 9 STANDARD PROC. 742-745.

[a] A count showing the recovery of the judgment, the court in which it was recovered, the date, parties and amount, is sufficient. *Masterson v. Matthews*, 60 Ala. 260.

[b] A complaint states facts sufficient to constitute a cause of action, if it "describes the court in which the alleged judgment was rendered, the place where it was held, the names of the parties, the date at which it was

It need not be set out in *hæc verba* but may be pleaded according to its legal effect.<sup>79</sup> In some jurisdictions the record of a judgment is held to be an instrument in writing within the meaning of a statute requiring a copy of such instrument to be filed with the complaint,<sup>80</sup> while in others the contrary is held.<sup>81</sup> A complaint upon a judgment must

entered, and the amount of the judgment." *Ewing v. Jennings*, 15 Nev. 379.

[c] **Judgment of Justice Court.**—A complaint containing the allegations, that a certain sum is due to plaintiff from the defendant on a judgment in favor of plaintiff against the defendant rendered on a certain day by a justice of the peace at a certain place, which said judgment with interest is still unsatisfied, due and unpaid, is sufficient. *Kaufman v. Richardson*, 142 Ala. 429, 37 So. 673, 110 Am. St. Rep. 40.

[d] **Judgment Partly Satisfied.** Where the plaintiff sets forth in his complaint the judgment and the amount recovered thereby and prays for recovery of the balance due on the judgment without naming the precise sum, the complaint is good as against a demurrer, as, strictly speaking, if any payment had been made, it is matter of defense and the plaintiff is not required to state the precise sum which he might be entitled to recover on the judgment. *O'Neal v. Kittredge*, 3 Allen (Mass.) 470.

79. *Central Bank v. Veasey*, 14 Ark. 671.

80. Ill.—*Jefferson v. Alexander*, 84 Ill. 278; *Lambert v. Jonte*, 28 Ill. App. 591. Kan.—*Burnes v. Simpson*, 9 Kan. 658. N. Y.—*Day v. New Lots*, 107 N. Y. 148, 13 N. E. 915. Ohio.—*Memphis Med. College v. Newton*, 2 Handy 163, 12 Ohio Dec. (Reprint) 382; *Linehan v. Snyder*, 7 Ohio N. P. 132. But compare *Cox v. Farley*, 2 Ohio Dec. (Reprint) 291, quoted in part in the following note.

See generally the title "Exhibits."

[a] "A judgment, when declared on as a cause of action, is such a written instrument as section 118 of the code requires to be set out by copy attached to and filed with the petition." *Oberlin L. T. & B. Co. v. Kitchen*, 8 Kan. App. 445, 57 Pac. 494.

[b] Where the rules of the court provide that in suits upon recognizances and instruments of record a copy of the instrument or record need not be

filed, if the complaint contains a full reference to the office, book and page where the same may be found, a compliance with such rule is sufficient and no copy of the judgment is required to be attached to the complaint. *Hauck v. Gundaker*, 21 Pa. Co. Ct. 12.

[c] **Remedy for Omission.**—"There was no copy of the judgment sued on attached to the petition. We think this was such an instrument as the code requires to be filed with the pleadings; but the defect was one to be corrected on motion, not by demurrer. In states like Indiana, where the code makes the instrument or account on which the pleading is founded a part of the record, the not filing it may well be taken advantage of by demurrer; but in a code like ours such a practice is not logical, and ought not to be enforced."

*Burnes v. Simpson*, 9 Kan. 658. See the following: Ill.—*Deem v. Crume*, 46 Ill. 69. Mo.—*Hall v. Harrison*, 21 Mo. 227, 64 Am. Dec. 225. Ohio.—*Linehan v. Snyder*, 7 Ohio N. P. 132.

81. *Becknell v. Becknell*, 110 Ind. 42, 10 N. E. 414; *Lytle v. Lytle*, 37 Ind. 281; *Snyder v. Snyder*, 25 Ind. 399.

[a] "It was held in some of the earlier cases in this court that when a judgment is sued upon, or set up as a defense, a transcript of the same must be filed with the pleading, and thus be made a part of it, under the statute which requires that when any pleading is founded on a written instrument, the original, or a copy thereof, must be filed with the pleading. It is now settled, by later and well considered cases, that a judgment is not a written instrument within the meaning of the statute, and that a transcript of the same need not be filed with pleadings in such cases." *Hopper v. Lucas*, 86 Ind. 43.

[b] "From the use of the words, 'written instrument,' it is clear that the code refers to an instrument executed by or between parties. Webster defines the word, as a writing containing the terms of a contract. In this sense, a record is not a written instru-

show that the judgment sued upon was a final determination of the rights of the parties.<sup>82</sup> The complaint should show where the judgment sued upon was rendered.<sup>83</sup> It is not necessary to set forth the proceedings in the action which culminated in the judgment sued upon,<sup>84</sup> or to show the cause of action upon which the judgment was rendered,<sup>85</sup> except where the judgment is deemed only *prima facie* evidence of the debt.<sup>86</sup>

ment. The judgment of the court is the ground of this action, and the record is the mere evidence of that recovery. The record is as accessible to the one party as the other. It is public property, and either party can obtain a copy of it. Section 117 refers to written instruments, which the party has in his exclusive possession, and a copy of which the other party may require in order to enable him to answer. But here the action is founded on the recovery, or judgment in Virginia, and the transcript, which the plaintiff may have, is a mere copy of that recovery—of that judgment—of the existence of which it is merely the legal evidence." *Cox v. Farley*, 2 Ohio Dec. (Reprint) 291.

82. *Edwards v. Hellings*, 99 Cal. 214, 33 Pac. 799.

[a] It is not sufficient to allege, that on a certain date it was "adjudged" that defendants should pay to plaintiff a certain sum, the term "adjudged" being applicable also to interlocutory orders. *Edwards v. Hellings*, 99 Cal. 214, 33 Pac. 799.

83. *Duyekine v. Clinton Mut. Ins. Co.*, 23 N. J. L. 279.

[a] The practice requiring the plaintiff suing upon a judgment to state where it was rendered "is not founded on the idea that an action upon a judgment is a local action. It prevails as well in declaring upon foreign, as upon domestic judgments, and upon the judgments of the superior courts, . . . as upon the judgments of inferior courts of limited jurisdiction. . . . When a court sits in different places for different districts, and where the territorial jurisdiction of the court varies with the place in which its sitting is held, the propriety and necessity (in declaring upon a judgment of such court) of stating definitely the place where the court was held when the judgment was rendered is sufficiently obvious. In that mode only, would the defendant be informed by the declara-

tion of the real cause of action, and enabled to avail himself of every legitimate defence." *Duyekine v. Clinton Mut. Ins. Co.*, 23 N. J. L. 279.

84. *Caldwell v. Richards*, 2 Bibb (Ky.) 331.

[a] "Where an action is brought to enforce a right arising from a judgment of a court of records, the pleadings upon which the judgment was recovered are not recited except so far as may be required to render the complaint intelligible. The pleadings are merged in the judgment, and the right of the plaintiff is established by it. In a collateral proceeding it will be presumed that the court, if of general jurisdiction, found the pleading sufficient to authorize its judgment or order, and such pleading cannot be called in question in an indirect attack." *Wabash R. Co. v. Ft. Wayne, etc. Traction Co.*, 161 Ind. 295, 67 N. E. 674.

[b] In "pleading the judgment or decree of a court having plenary jurisdiction of the subject, it is not necessary to set forth the proceedings preliminary to such judgment or decree. The presumption of law is conclusive, that all the requisite prior proceedings were had in the case, till the contrary appears." *Lathrop v. Stuart*, 5 McLean 167, 14 Fed. Cas. No. 8,113.

85. *Sims v. Hertzfeld*, 95 Ala. 145, 10 So. 227.

As to joinder of count on original cause of action, see *supra*, III, B, 1, e.

86. *Turner v. Hamlin*, 152 Ky. 469, 153 S. W. 773.

[a] Where the complaint sets forth the obligation (1) upon which the original judgment was rendered, it cannot be claimed that two causes of action are improperly united but the judgment nevertheless must be deemed the foundation of the action. *Krower v. Reynolds*, 99 N. Y. 245, 1 N. E. 775. (2) Where it is alleged in the complaint that the defendant made and delivered to plaintiff a certain promissory note and that upon maturity thereof plain-

Where the right to sue is a matter of course, cause for bringing the suit need not appear in the complaint.<sup>87</sup> But where leave to sue,<sup>88</sup> or any other fact,<sup>89</sup> is a condition precedent to an action, it must be alleged, though in some jurisdictions such leave of court is not regarded as part of the cause of action,<sup>90</sup> in which case objection for absence of leave is by motion rather than by demurrer.<sup>91</sup> It is not necessary to show that the judgment has not been appealed from.<sup>92</sup> It must affirmatively appear from the complaint that the judgment sued upon re-

tiff filed suit and obtained a judgment against the defendant, the "complaint does not, in any sense, contain two causes of action, one upon the note and the other upon the judgment rendered on the note. The allegation that the judgment was rendered upon the note is, in legal effect, an allegation that the note had become merged in the judgment. There could be no cause of action on a note upon which a valid judgment had been rendered." *Anderson v. Mayers*, 50 Cal. 525.

87. *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 Pac. 849.

88. *Graham v. Scripture*, 26 How. Pr. (N. Y.) 501; *Underhill v. Phillips*, 30 App. Div. 238, 51 N. Y. Supp. 801, 5 N. Y. Ann. Cas. 395. See also *Watts v. Everett*, 47 Iowa 269, and the title "Suits and Actions."

*Contra*, *Dean v. Eldridge*, 29 How. Pr. (N. Y.) 218. Compare, *Finch v. Carpenter*, 4 Abb. Pr. (N. Y.) 225.

As to necessity for leave to sue, see *supra*, III, B, 1, b.

[a] "Without an allegation that such permission has been obtained, the complaint fails to show a cause of action." *Graham v. Scripture*, 26 How. Pr. (N. Y.) 501.

[b] **Subsequent Reversal of Order Granting Leave.**—Where leave to bring an action on a judgment was obtained and it was so alleged in the complaint, but the order granting leave subsequently was reversed on appeal, the summons will not be set aside on motion, but leave should be granted to defendants to file a supplemental answer in which they may set up such order as a defense to the action. *United States L. Ins. Co. v. Gage*, 26 Abb. N. C. 16, 13 N. Y. Supp. 837.

89. See 6 STANDARD PROC. 677, and generally the title "Suits and Actions."

[a] **Lapse of Time From Docket-**

ing.—Under a statute providing that an action on a judgment may be maintained after the expiration of ten years since the docketing of the judgment or by leave of court the complaint should show the docketing of the judgment more than ten years before the commencement of the action or that the court has made an order granting the plaintiffs leave to sue and is defective, if it contains no such allegation. *Underhill v. Phillips*, 30 App. Div. 238, 51 N. Y. Supp. 801, 5 N. Y. Ann. Cas. 395.

90. See *Watts v. Everett*, 47 Iowa 269, and *supra*, III, B, 1, b.

91. *Finch v. Carpenter*, 4 Abb. Pr. (N. Y.) 225, motion to quash summons.

[a] "While the leave to prosecute the suit, though not pertaining to the cause of action, but to the right to prosecute the action, should be alleged, yet the want of averment of such leave could not be taken advantage of by demurrer; the defect should be assailed by motion." *Watts v. Everett*, 47 Iowa 269.

92. *Bronzan v. Drobaz*, 93 Cal. 647, 29 Pac. 254; *Carter v. Paige*, 80 Cal. 390, 22 Pac. 188; *Chaquette v. Ortet*, 60 Cal. 594; *Hammond v. Evans*, 23 Ind. App. 501, 55 N. E. 784.

[a] To hold that the absence of an allegation that the judgment sued upon has not been appealed from "is fatal to a petition in a suit on a judgment which describes the court in which the judgment was rendered, the place where it was held, the names of the parties, the date it was rendered, that no part of it was paid, and that the amount of the judgment is now due, would be going too far." *Chitty v. Gillett* (Okla.), 148 Pac. 1048.

As to effect of appeal on right to sue, see *supra*, III, B, 1, a, (II), (C), (2).

mains unpaid,<sup>93</sup> although it is sufficient to aver that the judgment remains in full force and effect.<sup>94</sup> The plaintiff is required to allege the facts and circumstances upon which he relies to rebut the presumption of payment arising from the lapse of time,<sup>95</sup> and the amount of costs if the judgment includes costs but does not show the amount thereof.<sup>96</sup> Where the action on a domestic judgment is brought by an assignee,<sup>97</sup> or the equitable owner thereof,<sup>98</sup> plaintiff's right to the ac-

93. *Cal.*—*Chaquette v. Ortet*, 60 Cal. 594. *Utah.*—*Vogel v. Walker*, 3 Utah 227, 2 Pac. 210. *Vt.*—*Bellows v. Sowles*, 71 Vt. 214, 44 Atl. 68, in full force and unsatisfied in part.

[a] That the judgment "was not paid should have been so clearly and concisely stated that reference to extraneous allegations in aid of such statements would be unnecessary and redundant. There being no allegation of existing indebtedness . . . by reason of or upon the . . . judgment, the complaint contains no cause of action against the defendants." *Vogel v. Walker*, 3 Utah 227, 2 Pac. 210.

[b] **Sufficient Allegation.**—An allegation that no part of the judgment has been paid and that there is now due and owing from the defendant to the plaintiff on the judgment the principal and interest is a sufficient allegation that the judgment remains unsatisfied. *Brandt v. Meade*, 17 Ariz. 34, 148 Pac. 297.

[c] But an allegation that the defendant is insolvent does not sufficiently show that the judgment remains unpaid. *Vogel v. Walker*, 3 Utah 227, 2 Pac. 210.

[d] "An averment that it is due and unpaid is sufficient to show that the judgment is in full force. Although an appeal may have been taken and is still pending, the holder of the judgment may bring suit on it pending the appeal." *Hammond v. Evans*, 23 Ind. App. 501, 55 N. E. 784.

[e] **It Is Unnecessary To Aver That the Judgment Is Unsatisfied.**—"The law does not presume . . . its satisfaction except after the period of twenty years. Satisfaction and reversal are matters of defense." *Masterson v. Matthews*, 60 Ala. 260.

94. *Wise v. Loring*, 54 Mo. App. 258; *Bellows v. Sowles*, 71 Vt. 214, 44 Atl. 68.

[a] An allegation that the sum claimed is still due on the judgment is sufficient without an averment that the

judgment is in full force and effect. *Hammond v. Evans*, 23 Ind. App. 501, 55 N. E. 784; *Blake v. Burley*, 9 Iowa 592.

[b] But it is "not necessary, after alleging the giving and entry of the judgment, to allege further that it was in full force and effect, and not vacated, set aside, reversed, or appealed from. Such allegations are not uncommon where a judgment is pleaded, but they are not necessary. If the judgment has been appealed from, or set aside, or reversed, or is for any reason no longer in force, the allegation of that fact comes more properly from the party against whom it is pleaded." *Carter v. Paige*, 80 Cal. 390, 22 Pac. 188.

95. *Olden v. Hubbard*, 34 N. J. Eq. 85; *Beekman v. Hamlin*, 20 Ore. 352, 25 Pac. 672.

[a] **Demurrer** lies to a complaint which is deficient in this respect. *Olden v. Hubbard*, 34 N. J. Eq. 85.

96. *Shelton v. Clark's Admx.*, 7 Ark. 194; *Caldwell v. Bell*, 3 Ark. 419. See also *infra*, III, B, 1, h, (II).

97. *Hughes v. Brewer*, 7 Colo. 583, 4 Pac. 1115.

[a] **Present ownership** need not be alleged in addition to the assignment, continuance of ownership being presumed. *Curtin v. Kowalsky*, 145 Cal. 431, 78 Pac. 962.

[b] **Partnership Judgment.**—It appearing from the summons and complaint that the action in which the judgment was rendered was brought by a firm, the plaintiff, though the judgment was entered in his name, cannot maintain an action thereon without the assignment to him of the interests of his coplaintiff and such assignment must be pleaded. *Jansen v. Hyde*, 8 Colo. App. 38, 44 Pac. 760.

[c] **Copy of Assignment of Judgment.**—Where suit is brought in the name of the plaintiff in the original action for the use of the assignee, it is not necessary to file the assignment with the complaint as it would have

tion must be shown by direct averment in the pleadings themselves.

**Averment of Jurisdiction.**—The jurisdiction of courts of general jurisdiction being presumed by law it is not necessary in pleading a domestic judgment rendered by a court of general jurisdiction to set forth jurisdictional facts.<sup>99</sup> This rule obviously applies to all cases in which the judgment described in the complaint is such that this presumption of jurisdiction attends it.<sup>1</sup> The rule is not affected by a statutory provision that in suing upon a domestic judgment it shall be sufficient to plead that the judgment was duly given or made, since this provision refers only to that class of cases in which, prior to its

been required if the suit was brought upon the assignment. *Love v. Fairfield*, 10 Ill. 303.

98. *State v. Smith*, 15 N. J. L. 84.

99. **U. S.**—*Pennington v. Gibson*, 16 How. 65, 14 L. ed. 847; *Sevier v. White*, 21 Fed. Cas. No. 12,681. **Ala.**—*Master-son v. Matthews*, 60 Ala. 260. **Cal.**—*McCoy v. Van Ness*, 98 Cal. 675, 33 Pac. 761; *Blanc v. Paymaster Min. Co.*, 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149. **Colo.**—*Bruckman v. Tausig*, 77 Colo. 561, 5 Pac. 152. **Ind.**—*Hansford v. Van Auken*, 79 Ind. 302; *Spaulding v. Baldwin*, 31 Ind. 376; *Hammond v. Evans*, 23 Ind. App. 501, 55 N. E. 784. **Kan.**—*Burnes v. Simpson*, 9 Kan. 658. **Minn.**—*Holmes v. Campbell*, 12 Minn. 221. **Neb.**—*Lear v. Brown County*, 77 Neb. 230, 109 N. W. 174. **N. H.**—*Wilbur v. Abbot*, 58 N. H. 272; *Rogers v. Odell*, 39 N. H. 452. **N. J.**—*McDevitt v. Connell*, 71 N. J. Eq. 119, 63 Atl. 504. **N. Y.**—*Springsteene v. Gillett*, 30 Hun 260.

[a] "In pleading the judgment of an inferior court, it is unquestionably necessary to aver that the cause of action arose within its jurisdiction, but in respect to superior courts and courts of general jurisdiction of other states, as well as our own, every presumption is in favor of their right to hold pleas and render the judgments they have rendered, until the contrary is alleged and proved by way of defence. Therefore, as the party setting up such judgment is not bound in the first instance to offer proof of jurisdiction, he is not required to state it in pleading; and the same rule applies to judgments of other states." *Rogers v. Odell*, 39 N. H. 452.

[b] The allegation that the persons sued on the judgment of a court of general jurisdiction were defendants in the action in which the judgment was

rendered is equivalent to an averment, that they were duly parties to the action either by the service of process upon them or by their voluntary appearance. *Sevier v. White*, 21 Fed. Cas. No. 12,681.

[c] But an allegation that one of the parties defendant named in the judgment was summoned, necessarily must be taken to mean that the other defendant was not summoned and that the court had no jurisdiction. *Wilbur v. Abbot*, 58 N. H. 272.

[d] An averment that the court which rendered the judgment was a court of general jurisdiction sufficiently shows the jurisdiction of the court. *Hammond v. Evans*, 23 Ind. App. 501, 55 N. E. 784.

1. As to the presumption of jurisdiction, see the title "Judgments."

[a] "It is undoubtedly the general rule that in all collateral proceedings involving rights acquired by the judgment of a superior court . . . the jurisdiction of the court, when the judgment of such court or the proceeding to enforce the judgment is silent upon the subject of jurisdiction, is to be presumed. And where a particular thing is required to be done in order to give the court jurisdiction we see no reason why the same presumption should not be indulged in. . . . Take the case of the circuit courts of the United States, whose jurisdiction is for the greater part confined to cases where the plaintiff or defendant is an alien or a citizen of another state, and unless that jurisdictional fact appears in the judgments of these courts they might be reversed by the court above; but it would not be contended that the silence of the judgment as to such jurisdictional fact would in a collateral proceeding authorize the court to treat such judgment

enactment, the jurisdictional facts were required to be pleaded.<sup>2</sup> But in an action upon the judgment of an inferior court the jurisdictional facts must appear from the complaint since they cannot be presumed,<sup>3</sup> unless this is rendered unnecessary by statute providing an abbreviated form of allegation, such as that the "judgment was duly given and

as void, nor would the silence of the proceeding upon such jurisdictional fact be deemed defective. The same presumption should be indulged in such case as if such special fact was not required." *Garner v. Wills*, 92 Ky. 386, 17 S. W. 1023.

[b] "It is undeniably true in pleading, that where a suit is instituted in a court of limited and special jurisdiction, it is indispensable to aver that the cause of action arose within such restricted jurisdiction; but it is equally true, with regard to superior courts, or courts of general jurisdiction, that every presumption is in favor of their right to hold pleas, and that if an exception to their power or jurisdiction is designed, it must be averred, and shown as matter of defense." *Pennington v. Gibson*, 16 How. (U. S.) 65, 14 L. ed. 847.

2. **Cal.**—*Ashton v. Heydenfeldt*, 124 Cal. 14, 56 Pac. 624. **Ind.**—*Hansford v. Van Auken*, 79 Ind. 302; *Spaulding v. Baldwin*, 31 Ind. 376. **Kan.**—*Burnes v. Simpson*, 9 Kan. 658.

[a] "The object of the law being to simplify the pleading of a judgment by dispensing with the necessity of a showing of the jurisdictional facts, and the law, prior to the enactment of the section, not requiring the pleading of a judgment of a court of general jurisdiction to include the jurisdictional facts, the necessity of the provision as to such judgments was not present, and it is apparent that the section has no reference to the judgments of courts of general jurisdiction." *Weller v. Dickinson*, 93 Cal. 108, 28 Pac. 854.

[b] "The word 'duly,' when used, does not refer to the regularity of the judgment, or its freedom from error, for that cannot be collaterally called in question, but it is equivalent to an allegation of facts showing jurisdiction." *Scanlan v. Murphy*, 51 Minn. 536, 53 N. W. 799.

3. **Ill.**—*Payne v. Taylor*, 34 Ill. App. 491. **Ind.**—*Willey v. Strickland*, 8 Ind. 453. **Mass.**—*Bridge v. Ford*, 4 Mass. 841. **N. H.**—*Rogers v. Odell*, 39 N. H.

452. **N. Y.**—*Friedman v. Metropolitan S. S. Co.*, 109 App. Div. 600, 96 N. Y. Supp. 331; *Barnes v. Harris*, 3 Barb. 603; *Cornell v. Barnes*, 7 Hill 35; *Sheldon v. Hopkins*, 7 Wend. 435; *Cleveland v. Rogers*, 6 Wend. 438. **Ore.**—*Willits v. Walter*, 32 Ore. 411, 52 Pac. 24.

[a] In the absence of an allegation provided by the statute it is necessary to allege the facts which conferred jurisdiction upon a court of inferior jurisdiction to hear and determine the case. *Weaver v. English*, 11 Mont. 84, 27 Pac. 396.

[b] **Jurisdiction of Person and Subject-Matter.**—(1) "In pleading the judgments of inferior courts of special and limited jurisdiction—and such are our justices' courts—it is necessary to show that the court not only had jurisdiction of the subject-matter in controversy, but that it also acquired jurisdiction over the person of the defendant. . . . It was formerly held necessary to set out the proceedings at large; but in modern times it is enough to state the facts which show jurisdiction." *Turner v. Roby*, 3 N. Y. 193. (2) "No presumptions will be indulged that courts of justice of the peace have acquired jurisdiction of the parties. This must be shown by the facts alleged in the pleading, or the statutory averment that the judgment was duly made or given." *Chicago & S. E. Ry. Co. v. Higgins*, 150 Ind. 329, 50 N. E. 32.

[c] The issuing and service of summons or that the defendant entered a voluntary appearance, should be alleged. *Barnes v. Harris*, 4 N. Y. 374.

[d] **Nature of Claim.**—Where it is alleged in the complaint that an action was commenced in the justice's court of a certain county but fails to specify the nature of the claim upon which it was brought "it cannot be said that the record affirmatively shows that the court had jurisdiction of the subject-matter . . . as there is nothing in the pleading to show that the action in question was not predicated upon a prohibited cause, and as no presump-

made."<sup>4</sup> Under a statute making such an allegation sufficient, either the exact language of the statute,<sup>5</sup> or words of equivalent meaning should be employed.<sup>6</sup> Thus, an allegation that the judgment was en-

tions in favor of jurisdiction will be indulged, it follows that the complaint does not state facts sufficient to constitute a cause of action." *Willits v. Walter*, 32 Ore. 411, 52 Pac. 24.

[e] "The surrogate's court is entirely a creature of the statute. It should be shown to the court affirmatively, therefore, that the surrogate had power to make the decree; that the facts upon which he acted, gave him jurisdiction of the subject-matter, and of the persons before him." *Dakin v. Hudson*, 6 Cow. (N. Y.) 221.

4. U. S.—*Lee v. Terbell*, 33 Fed. 850. Cal.—*Bronzan v. Drobaz*, 93 Cal. 647, 29 Pac. 254; *Weller v. Dickinson*, 93 Cal. 108, 28 Pac. 854; *Hansecom v. Tower*, 17 Cal. 518. Ind.—*Chicago & S. E. Ry. Co. v. Higgins*, 150 Ind. 329, 50 N. E. 32; *Toledo, etc. Ry. Co. v. McNulty*, 34 Ind. 531; *Crake v. Crake*, 18 Ind. 156. Ky.—*Garner v. Wills*, 92 Ky. 386, 17 S. W. 1023. Miss.—*State v. Bowen*, 45 Miss. 347. N. Y.—*Springsteene v. Gillett*, 30 Hun 260; *Wheeler v. Dakin*, 12 How. Pr. 537. N. D.—*Stroecker v. Railson*, 16 N. D. 68, 111 N. W. 612, 8 L. R. A. (N. S.) 1099.

[a] "As there is no presumption in favor of the authority or the regularity of the proceedings of courts or officers of special and limited jurisdiction, it was formerly necessary, in pleading their judgments or orders, to show that they had jurisdiction, and that their proceedings were regular. . . . The allegation that the judgment or determination was duly given or made is a substitute for the lengthy and minute statement of the jurisdictional facts which were formerly required. To show the jurisdiction is as necessary under our practice as it ever was, the only change being in the manner of stating it. That the judgment was duly given or made is a concise mode of stating that the court or officer had the proper jurisdiction, and that the judgment was regular, otherwise it would not be duly made or given." *Keys v. Grannis*, 3 Nev. 548.

5. Ind.—*Shockney v. Smiley*, 13 Ind. App. 181, 41 N. E. 348. Mont.—*Mears v. Shaw*, 32 Mont. 575, 81 Pac. 338.

N. D.—*Stroecker v. Railson*, 16 N. D. 68, 111 N. W. 612, 8 L. R. A. (N. S.) 1099.

[a] A judgment is duly "rendered" when it is duly pronounced and ordered to be entered. "But a judgment duly 'made or given' is a complete judgment, properly entered in the judgment-book, so that it may be pleaded in bar of another action. But whether this be so or not, the statute defines the precise terms on which a party pleading a judgment may be excused from stating in his pleading the jurisdictional facts; and to prevent the necessity of construing doubtful phrases in order to determine whether they are of equivalent import, the better practice is to require the pleader in such cases to pursue the statute strictly." *Young v. Wright*, 52 Cal. 407.

6. *Scanlan v. Murphy*, 51 Minn. 536, 53 N. W. 799.

[a] "In pleading a judgment, where the facts conferring jurisdiction are not pleaded, the exact form of words in 1878 G. S. ch. 66, §108, 'such judgment or determination may be stated to have been duly given or made,' need not be used if equivalent words are used. The word 'duly,' when used, does not refer to the regularity of the judgment, or its freedom from error, for that cannot be collaterally called in question, but it is equivalent to an allegation of facts showing jurisdiction. The allegation that the judgment was rendered in an action pending is to the same effect, and is sufficient." *Scanlan v. Murphy*, 51 Minn. 536, 53 N. W. 799.

[b] It is sufficient (1) to allege that plaintiff on a certain day recovered a judgment in a named court for the sum of ———, which judgment was "duly docketed" against said defendant. *Springsteene v. Gillett*, 30 Hun (N. Y.) 260. See also *Pierstoff v. Jorge*, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881. (2) An allegation that the judgment was rendered on a certain day by the court designated in the complaint is a sufficient allegation that the judgment was duly rendered. *Hansford v. Van Auken*, 79 Ind. 157. (3) But compare, *People ex rel. Batch-*

tered is not sufficient,<sup>7</sup> while an averment that the judgment was duly recovered is equivalent to an averment that it was duly given or made.<sup>8</sup>

(III.) *Plea or Answer.*—(A.) *GENERALLY.*<sup>9</sup>—The plea of nul tiel record is the proper plea of the general issue to an action on a domestic judgment,<sup>10</sup> and a plea of nil debet does not constitute any defense to such an action,<sup>11</sup> since the indebtedness is conclusively established by the judgment.<sup>12</sup> The plea of nul tiel record should conclude with a verification.<sup>13</sup> It puts merely the existence of the judgment record in

eloir v. Bacon, 37 App. Div. 414, 55 N. Y. Supp. 1045, in which the court said: "The statement here is that the judgment was recovered. But there is nothing to show the nature of the action, or that the court had jurisdiction of the subject-matter or of the person of the defendant; and, although there is the statement that the judgment was duly entered and docketed, this may be all true, and yet the judgment may never have been duly recovered, for it must be remembered that a judgment illegally obtained may thereafter be 'duly entered or docketed.'"

7. Hunt v. Dutcher, 13 How. Pr. (N. Y.) 538. But see Willits v. Walter, 32 Ore. 411, 52 Pac. 24.

[a] "To say that a judgment is *entered*, is merely to allege the single fact of the entry of the judgment, without including an averment that it was properly or lawfully done. All this is embraced in the language of the code, that the judgment was '*duly given or made*.' The word *entered*, or *perfected*, may be equivalent to the word *made*, or *given*: but the word *duly* is most essential. It can hardly be dispensed with and satisfy the terms of the statute. I can imagine no single word that will supply its place." Hunt v. Dutcher, 13 How. Pr. (N. Y.) 538.

8. Breen v. Henry, 34 Misc. 232, 69 N. Y. Supp. 627.

9. See the titles "*Answers*;" "*Denials*."

10. U. S.—Westerwelt v. Lewis, 2 McLean 511, 29 Fed. Cas. No. 17,446. Ala.—Crawford v. Simonton's Exrs., 7 Port. 110. Cal.—Reynolds v. Robertson, 66 Cal. xix, 4 Pac. 1192. Miss. Hinton v. First Nat. Bank, 98 Miss. 120, 53 So. 344. N. H.—Wilbur v. Abbot, 59 N. H. 132. N. C.—Purvis v. Jackson, 69 N. C. 474. Vt.—Clemons v. Clemons' Estate, 69 Vt. 545, 38 Atl. 314.

See 7 STANDARD PROC. 64, 65, and the title "*Nul Tiel Record*."

[a] "The record of the judgment declared on, is the whole basis of the plaintiff's action. The denial of the existence of the record, puts his whole claim in issue. This, it seems to us, fully answers the description of a general issue." Gassner v. Sandford, 2 Sandf. (N. Y.) 440.

11. U. S.—Reed v. Ross, Baldw. 36, 20 Fed. Cas. No. 11,652. Colo.—Harter v. Shull, 17 Colo. App. 162, 67 Pac. 911. Ind.—Indianapolis, B. & W. Ry. Co. v. Risley, 50 Ind. 60. Me.—Dunn v. Hill, 63 Me. 174. Miss.—Hinton v. First Nat. Bank, 98 Miss. 120, 53 So. 344. N. H.—Tappan v. Heath, 16 N. H. 34.

[a] *After Verdict.*—The plea of nil debet, though bad on demurrer, nevertheless is good after verdict. Wheaton v. Fellows, 23 Wend. (N. Y.) 375.

12. See 15 STANDARD PROC. —.

13. Thornton v. Lane, 11 Ga. 459; Steele v. Hanna, 8 Blackf. (Ind.) 326. See the title "*Nul Tiel Record*."

[a] "The plea of nul tiel record does not conclude to the contrary, because the matter is to be determined by the court by inspection of the record. Hence it concludes with a verification, although it is a direct denial of the allegation in the declaration that there is such a record; and herein it differs from the general issue in other forms of action where the parties are at issue, when the defendant simply denies the essential part of the declaration. It confesses nothing, and avoids nothing; and there remains nothing for the plaintiff to do but to traverse the denial of the want of a record, concluding with a verification by the record. For general purposes nul tiel record is the general issue." Wilbur v. Abbot, 59 N. H. 132.

[b] *A denial that if there be a record of any such alleged judgment, the*

issue,<sup>14</sup> and under such a plea the defendant cannot show that the judgment had been fraudulently obtained,<sup>15</sup> or that the judgment has been paid<sup>16</sup> as satisfaction and discharge are essentially matters of special defense.<sup>17</sup> Under the code system of pleading a general denial is equivalent to a plea of nul tiel record.<sup>18</sup> A general denial of indebtedness, however, constitutes no defense.<sup>19</sup> Where the defense is based upon a decree in equity setting the judgment aside it is not sufficient to state the legal effect of the decree but the provisions of the decree relied on should be averred.<sup>20</sup>

(B.) SPECIAL DEFENSES.—(1.) *Generally*.—It is essential to a defense on the ground of the pendency of a writ of error or appeal that it be alleged that the writ was brought or the appeal taken prior to the com-

defendants were not made parties to the suit in which it was rendered, "is in substance an argumentative denial of the existence of the record of the alleged judgment, by averring that they were not made parties to it. If they were not made parties and had no notice of the suit, there was no legal and valid judgment against them, and therefore the plea was in effect a plea of nul tiel record. But it is insufficient for that purpose, because it does not conclude with a verification *by the record*; and if it were allowable, the trial of the issue tendered by it would not have been confined to the record, but any evidence showing that they were not properly made parties might have been admitted, though it might have been in contradiction of the averments of the record. . . . And consequently the demurrer to the plea was improperly overruled." *Cannon v. Cooper*, 39 Miss. 784, 80 Am. Dec. 101.

14. *Stevens v. Fisher*, 30 Vt. 200.

15. *Clemons v. Clemons' Estate*, 69 Vt. 545, 38 Atl. 314.

16. *East St. Louis v. Canty*, 65 Ill. App. 325; *Hinton v. First Nat. Bank*, 98 Miss. 120, 53 So. 344.

[a] The defenses of nul tiel record and payment cannot be both interposed to an action on a judgment. *Riley v. Riley*, 20 N. J. L. 114.

17. *Brandt v. Meade*, 17 Ariz. 34, 148 Pac. 297.

[a] An allegation in an answer that the judgment sued upon was satisfied in full is a mere conclusion of law. *Brandt v. Meade*, 17 Ariz. 34, 148 Pac. 297.

[b] "If the defendant desires to plead payment, discharge or release, it should be so specially pleaded, but the plea of nil debet being simply an

effort to relitigate the merits of the controversy cannot be allowed and a demurrer to such plea is properly sustained." *Hinton v. First Nat. Bank*, 98 Miss. 120, 53 So. 344.

[c] *Necessity for Reply*.—"If defendant's answer setting forth matters transpiring subsequent to the rendition of the judgment can be regarded only as matters of denial of the rendition of the judgment, the existence of the cause of action, the judgment, then, of course, no reply was necessary, as the issue was thereby made one of truth of the allegations of the complaint. The question of the satisfaction and discharge of the judgment would not be involved in such issue, for the reason such matters as would operate to satisfy and discharge a judgment must have necessarily arisen at a time subsequent to the rendition of the judgment, and, in order to operate as a satisfaction and discharge, there must have been a valid judgment to operate on. . . . Clearly . . . the reply was necessary to support plaintiff's complaint." *Brandt v. Meade*, 17 Ariz. 34, 148 Pac. 297.

18. *First Nat. Bank v. Hamor*, 47 Fed. 36.

[a] A general denial, payment and that the judgment was compromised and defendant released, are not inconsistent defenses, and a motion to require defendants to elect under which of those pleas they intend to go to trial, is properly overruled. *Gaar, Scott & Co. v. Black*, 120 Mo. App. 181, 96 S. W. 683.

19. *Barlow v. Marrone*, 88 N. J. L. 187, 95 Atl. 985; *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767.

20. *Laibe v. Smolikowski*, 152 Ill. App. 256.

mencement of the action and that a stay of proceedings had been obtained.<sup>21</sup> So a plea in abatement on the ground of the pendency of another action on the same judgment must show the facts upon which the plea is founded.<sup>22</sup> As a rule a judgment is conclusive upon all preexisting matters of defense and when made the basis of a new action it is not permissible to interpose any plea which might have been pleaded to the first action.<sup>23</sup>

(2.) *Want of Jurisdiction.*—While in some jurisdictions the want of jurisdiction of a court of record can be taken advantage of in an action brought on a domestic judgment only in cases in which such want of jurisdiction appears upon the face of the record,<sup>24</sup> the defendant

21. *Jenkins v. Pepoon*, 2 Johns. Cas. (N. Y.) 312.

[a] "The only plea that is of any avail in such an action is that the judgment has been suspended by the execution of a supersedeas bond as provided by law or some other statutory method." *Sweetser v. Fox*, 43 Utah 40, 134 Pac. 599, Ann. Cas. 1916C, 620, 47 L. R. A. (N. S.) 145.

22. *Lincoln v. Thrall*, 34 Vt. 110. See generally the title "**Another Action Pending.**"

23. **U. S.**—*Dickson v. Wilkinson*, 3 How. 57, 11 L. ed. 491; *Wittemore v. Macomson*, 28 Fed. 605. **Ala.**—*Sims v. Hertzfeld*, 95 Ala. 145, 10 So. 227; *Crawford v. Exrs. of Simonton*, 7 Port. 110. **Ark.**—*Morris v. Curry*, 41 Ark. 75; *Ellis v. Clarke*, 19 Ark. 420, 70 Am. Dec. 603. **Colo.**—*Harter v. Shull*, 17 Colo. App. 162, 67 Pac. 911. **Ga.**—*McAllister v. Singer Mfg. Co.*, 64 Ga. 622. **Ill.**—*Guinard v. Heysinger*, 15 Ill. 288; *Shadbolt v. Findeisen*, 88 Ill. App. 432. **Ind.**—*Bloomfield R. Co. v. Burriss*, 82 Ind. 83; *Indianapolis, B. & W. R. Co. v. Risley*, 50 Ind. 60; *Burton v. Stewart*, 11 Ind. 238. **Ia.**—*Wright v. Leclair*, 3 Iowa 221. **Kan.**—*Snow v. Mitchell*, 37 Kan. 636, 15 Pac. 224. **Ky.**—*Maysville R. Co. v. Ball*, 108 Ky. 241, 56 S. W. 188; *Pollard v. Rogers*, 1 Bibb 473. **Me.**—*Jones v. Jones*, 87 Me. 117, 32 Atl. 779; *Lancaster v. Richmond*, 83 Me. 534, 22 Atl. 393; *Noble v. Merrill*, 48 Me. 140; *Bird v. Smith*, 34 Me. 63, 56 Am. Dec. 635. **Md.**—*Shupp v. Hoffman*, 72 Md. 359, 20 Atl. 5, 20 Am. St. Rep. 476. **Mass.**—*Barton v. Radcliffe*, 149 Mass. 275, 21 N. E. 374; *Flint v. Sheldon*, 13 Mass. 443, 7 Am. Dec. 162; *Thatcher v. Gammon*, 12 Mass. 268. **Mich.**—*Hammond v. Place*, 116 Mich. 628, 74 N. W. 1002, 72 Am. St. Rep. 543. **Mo.**—*Poorman*

*v. Mitchell*, 48 Mo. 45; *Cauthorn v. Berry*, 69 Mo. App. 404. **N. H.**—*Tappan v. Heath*, 16 N. H. 34. **N. Y.**—*Townsend v. Carman*, 6 Cow. 695. **N. C.**—*Ludwick v. Fair*, 29 N. C. 422, 47 Am. Dec. 333. **Tenn.**—*Bolling v. Anderson*, 1 Tenn. Ch. 127. **Tex.**—*Bridge v. Samuelson*, 73 Tex. 522, 11 S. W. 539; *Taylor v. Harris*, 21 Tex. 438; *Bullock v. Ballew*, 9 Tex. 498. **Wis.**—*Dudley v. Stiles*, 32 Wis. 371; *Morris v. Boomer*, 16 Wis. 547.

As to merger of defenses in judgment, see 15 STANDARD PROC. 540.

[a] "It is a universal rule in regard to judgments, that all matters, which might have been urged by the party before the adjudication, are concluded by the judgment, as to the principal parties and all privies in interest, or estate." *Parkhurst v. Sumner*, 23 Vt. 538, 56 Am. Dec. 94.

24. **Ky.**—*Maysville R. Co. v. Ball*, 108 Ky. 241, 56 S. W. 188. **Mass.**—*Kittredge v. Martin*, 141 Mass. 410, 6 N. E. 95; *Cook v. Darling*, 18 Pick. 393. **Vt.**—*Holt & Co. v. Thacher*, 52 Vt. 592.

As to whether lack of jurisdiction must appear from the record, to justify a collateral attack upon the judgment, see 15 STANDARD PROC. 424, et seq.

[a] The "rule as declared by our cases is that in order to avoid a judgment in a collateral proceeding it must be averred that the infirmity which makes it void appears of record. . . . It is only written instruments which constitute the foundation of the defense that can be properly made exhibits to the answer, and it is only such exhibits as are properly parts of the answer that aid or strengthen it. Under this familiar rule, . . . the copy of the summons and the endorsement cannot be considered in aid of

in other jurisdictions may show in the answer that the court had no jurisdiction notwithstanding a recital in the judgment to the contrary.<sup>25</sup>

Where a statute permits a judgment to be pleaded by alleging that it was duly given or made, want of jurisdiction to render the judgment

the answer." *Indianapolis & St. L. Ry. Co. v. Harmless*, 124 Ind. 25, 24 N. E. 369.

[b] **Unless Fraud Be Alleged.**—In an action on a domestic judgment the defendant cannot contradict the recital of the record that the court by process acquired jurisdiction of the person of the defendant, unless fraud is alleged: "It is a domestic judgment; it was rendered by a court of general jurisdiction, and it is not now assailed in the court which rendered it. The record shows affirmatively that the party was before the court. Our code of practice provides how and when a judgment may be vacated, and it has not been followed in this instance. In the absence of an averment of fraud upon the part of the party procuring the judgment, and evidence to support it if denied, the record showing, as it does in this instance, the service of a summons upon the petition, and an entry of appearance to the cross-petition, imports absolute verity." *Stevenson v. Flournoy*, 89 Ky. 561, 13 S. W. 210.

[c] **Waiver of Objection.**—But this rule "is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. If the party, however, should admit the facts which show the judgment to be void, or if he should allow them to be established without opposition, then, as a question of law upon such facts, we do not see why the case is not like that where a judgment is void upon its face." *Hill v. City Cab & Trans. Co.*, 79 Cal. 188, 21 Pac. 728.

25. *Clark v. Little*, 41 Iowa 497; *Salladay v. Bainhill*, 29 Iowa 555; *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589; *Baldwin v. Kimmel*, 16 Abb. Pr. (N. Y.) 373, 1 Robt. 109.

[a] "Two seemingly conflicting principles have given rise, in their application, to differences of judicial opinion concerning the effect of judicial records. The one accords to judgments of courts having apparent jurisdiction of the subject-matter and parties in an

action, conclusive verity as to all matters purporting to have been adjudicated, and precludes a re-examination of them in subsequent litigation between the parties and their privies. And the other, asserts the right of every person to his day in court, and an opportunity to be heard, before he can be condemned in his person or property. In accordance with the former, the rule generally prevails, and is nowhere more firmly established than in this state, that when it does not otherwise affirmatively appear from the record, it will be conclusively presumed, whenever a domestic judgment of a court of general jurisdiction is drawn in question in any collateral way, that the court regularly acquired and lawfully exercised its jurisdiction over the parties; and the record of an inferior court imports absolute verity when it shows on its face that such jurisdiction was obtained; and neither the presumption, nor recitals of the record, can be contradicted in such a proceeding, by extrinsic evidence. . . . On the other hand, the other principle referred to is sometimes employed to justify the broad statement that in all cases, even when the judgment is collaterally assailed, the jurisdiction of the court rendering it may be inquired into. . . . While there is some conflict of the decisions as to whether, where there is a presumption of service and jurisdiction, or where these appear on the face of the record, it can be shown in a collateral proceeding that in fact no service was had, the authorities are substantially uniform to the effect that when the judgment is directly attacked for want of jurisdiction, such want of service and jurisdiction may be shown, though it be in contradiction of the record. . . . The rule which forbids the collateral impeachment of judgments is founded on those considerations of public policy which require stability of judicial records. . . . It is obvious these reasons find no just application in an action brought upon the judgment, in which the only relief sought is a new recovery.

must be pleaded by setting forth the facts showing it.<sup>26</sup>

(3.) *Fraud*.—Fraud in obtaining the judgment is a good defense to an action on a domestic judgment,<sup>27</sup> but the facts upon which such defense is based must be specifically pleaded.<sup>28</sup>

h. *Replication*.—The replication should conform to the general rules governing that pleading.<sup>29</sup>

i. *Trial*.—(I.) *Generally*.—The trial of the issues in an action upon a judgment follows the general rules governing the disposition of questions of law and fact.<sup>30</sup>

(II.) *Variance*.—Under the code practice the general rule that any variance which is not of a character to mislead the defendant is immaterial applies to actions on domestic judgments.<sup>31</sup> Where the common law practice prevails any substantial variance between the judgment as described in the complaint and the one offered in evidence is

ery on it, as a debt of record; and where no rights of third persons have intervened, or are involved. Nor, in such case, would there appear to be any substantial ground for denying to the defendant the right to show in defense to the action, that the judgment was rendered without jurisdiction. Such a defense may, we think, be properly regarded as a direct attack on the judgment, and not within the rule or its reason, against collateral impeachments." *Kingsborough v. Tousley*, 56 Ohio St. 450, 47 N. E. 541. But see *Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448.

26. *Simmons Co. v. Van Rees*, 87 Misc. 284, 149 N. Y. Supp. 857.

27. *Ark.*—*Peel v. January*, 35 Ark. 331, 37 Am. Rep. 27. *Cal.*—*Spencer v. Vigneaux*, 20 Cal. 442. *Colo.*—*Harter v. Shull*, 17 Colo. App. 162, 67 Pac. 911. *Ill.*—*Hopkins v. Woodward*, 75 Ill. 62. *Ind.*—*Duringer v. Moschino*, 93 Ind. 495; *Stone v. Lewman*, 28 Ind. 97. *N. Y.*—*Gardiner v. Van Alstyne*, 163 N. Y. 573, 57 N. E. 1110; *Hackley v. Draper*, 60 N. Y. 88; *Michigan v. Phoenix Bank*, 33 N. Y. 9. *Tex.*—*Miller v. Lovell* (Tex. Civ. App.), 40 S. W. 835. *Wash.*—*Townsend v. Price*, 19 Wash. 415, 53 Pac. 668.

See generally the title "Judgments."

[a] *A Direct Attack*.—In "an action to enforce a judgment, an answer alleging fraud or collusion in its procurement will be treated as a direct attack opening the whole matter to inquiry, and not narrowly as a mere collateral attack." *State ex rel. Brad-*

*way v. De Mattos*, 88 Wash. 35, 152 Pac. 721.

28. *Hopkins v. Woodward*, 75 Ill. 62; *Deering v. Poston*, 78 Minn. 29, 80 N. W. 783. See generally the titles "Fraud and Deceit;" "Judgments."

29. See the title "Replication and Reply."

[a] *Replication to Plea of Lack of Jurisdiction*.—Under a statute providing that in pleading a judgment of a court of limited jurisdiction it shall be sufficient to allege that the judgment was duly given or made plaintiff's reply to defendant's answer denying that the court had jurisdiction of the cause is not sufficient if it merely avers that the defendant had appeared in the action and that the court thus had jurisdiction of the person, as the want of the jurisdiction of the cause under such pleadings stands admitted. *Wiley v. Strickland*, 8 Ind. 453.

30. See generally the titles "Province of Judge and Jury;" "Trial."

[a] *The issue of nul tiel record* must be determined by the court alone and cannot be submitted to the decision of the jury. *Ind.*—*White v. Elkin*, 6 Blackf. 123. *Mass.*—*Rathbone v. Rathbone*, 10 Pick. 1; *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356. *Vt.*—*Stevens v. Fisher*, 30 Vt. 200.

[b] *Questions of fact submitted to jury*. *Stevens v. Fisher*, 30 Vt. 200.

[c] *If equitable defenses are set up in the answer the action may be transferred to the equity docket*. *Peel v. January*, 35 Ark. 331, 37 Am. Rep. 27.

31. *Cobb v. Doggett*, 142 Cal. 142, 75 Pac. 785.

deemed fatal.<sup>32</sup> A variance as to the amount of the judgment recovered,<sup>33</sup> the date of its rendition,<sup>34</sup> the party in whose favor<sup>35</sup> or against

For general rules see the title "**Variance and Failure of Proof.**"

32. *Central Bank v. Veasey*, 14 Ark. 671; *Caldwell v. Bell*, 3 Ark. 419; *Lancaster v. Inhab. of Richmond*, 83 Me. 534, 22 Atl. 393.

[a] **A misdescription of the amount** of the judgment, however slight, creates a fatal variance upon a plea of nul tiel record. *Beecher v. Chester*, 2 Root (Conn.) 90.

[b] **Immaterial "omissions in matters of substance, in pleading records,** are attended with no other consequences than in other cases. . . . But as to matters of description it is otherwise, and there the record produced must conform strictly to the plea. It has been considered that if any circumstances descriptive of the record be untruly stated, though they were not necessary to be stated at all, it will be fatal on nul tiel record. . . . This is because the issue puts in question the identity of the record set up as evidence of a former recovery." *Whitaker v. Bramson*, 2 Paine 209, 29 Fed. Cas. No. 17,526. See also *Caldwell v. Bell*, 3 Ark. 419.

[c] **As to Return of Execution.** Where it is alleged in the complaint that an execution issued on the judgment was returned unsatisfied and the transcript introduced in evidence does not show that an execution was issued, the variance is fatal. *Walker v. Kendall*, Hard. (Ky.) 404.

33. **U. S.**—*Thompson v. Jameson*, 1 Cranch 282, 2 L. ed. 109. **Ala.**—*Ashley's Admr. v. Robinson*, 29 Ala. 112, 65 Am. Dec. 387. **Ark.**—*Butler v. Owen*, 7 Ark. 369; *Caldwell v. Bell*, 3 Ark. 419. **Conn.**—*Beecher v. Chester*, 2 Root 90. **Ill.**—*Boynton v. Robb*, 41 Ill. 349. **Ind.**—*Hern v. Allison*, 5 Blackf. 347. **Ia.**—*Hight v. White*, Morris 45. **Ky.**—*Williams v. Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 179. **Mo.**—*Wash v. Foster*, 3 Mo. 205. **Pa.**—*Eichelberger v. Smyser*, 8 Watts 181.

[a] **Variance as to Costs.**—Where it is alleged that the judgment included costs in a specified sum and it does not appear from the record that any specific sum was adjudged for costs, there is a material variance. *Butler v. Owen*, 7 Ark. 369. See also *Cald-*

*well v. Bell*, 3 Ark. 419; *Noyes v. Newmarch*, 1 Allen (Mass.) 51, blank amount of costs.

[b] **As to Manner of Payment.**—But where the complaint sets forth the recovery of a judgment for so many dollars and the judgment roll shows a judgment for the recovery of the same number of dollars with the direction that such sum be paid in a specified kind of money, there is no variance. *Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593. See also *East St. Louis v. Canty*, 65 Ill. App. 325.

34. **Ala.**—*Fulenwider v. Ridgeway*, 148 Ala. 675, 41 So. 846. **Miss.**—*Howard v. Cousins*, 7 How. 114. **N. J.**—*Gulick v. Loder*, 14 N. J. L. 572. **N. Y.**—*Vail v. Smith*, 4 Cow. 71.

[a] **Variance in Year.**—Where the judgment sued on is described in the complaint as of the December term, 1830, a judgment entered in December term, 1831, cannot be admitted in support of the complaint. *Howard v. Cousins*, 7 How. (Miss.) 114.

35. **Colo.**—*Larson v. Ross*, 10 Colo. App. 267, 50 Pac. 730. **Me.**—*Farrar v. Fairbanks*, 53 Me. 143. **Tenn.**—*Dibrell v. Miller*, 8 Yerg. 476, 29 Am. Dec. 126.

[a] **Variance as to Parties.**—Where the complaint is based upon an alleged judgment in an action, in which Samuel Gulick, plaintiff, impleaded William Loder and John Loder defendants and the record produced on trial is a record of a judgment in a suit in which Samuel Gulick was impleaded or sued by William Loder and John Loder, the variance between the record declared on and the one introduced in evidence is fatal. *Gulick v. Loder*, 14 N. J. L. 572.

[b] **Immaterial Variance.**—But where the writ in an action on a judgment describes the plaintiff as the United States National Bank of New York and the judgment is rendered in favor of the "United States National Bank," there is no variance, where it is stated in the complaint that the plaintiff is carrying on business in the city of New York as a national bank. *United States Nat. Bank v. Venner*, 172 Mass. 449, 52 N. E. 543.

whom<sup>36</sup> the judgment was rendered constitutes a material variance. A complaint describing a judgment against one only defendant cannot be supported by the production of a judgment against such defendant and other persons.<sup>37</sup> But where a copy of the judgment sued upon is attached to and made a part of the complaint,<sup>38</sup> or filed with the complaint,<sup>39</sup> a misdescription of the judgment creates no variance.

(III.) **Judgment.**—The plaintiff is entitled to the recovery of costs awarded by the original judgment,<sup>40</sup> as well as interest thereon.<sup>41</sup> Costs

[c] Where plaintiff has anticipated the variance by pleading his identity with the plaintiff named in the judgment, defendant cannot claim a variance as to party plaintiffs, under a mere plea of nul tiel record without a denial of the allegation of identity. *Barry & Co. v. Carothers*, 6 Rich. L. (S. C.) 331.

36. **U. S.**—First Nat. Bank *v. Hamor*, 47 Fed. 36. **Ga.**—*Howell v. Shands & Co.*, 35 Ga. 66. **Ill.**—*Ducommun v. Hysinger*, 14 Ill. 249; *Schertz v. First Nat. Bank*, 47 Ill. App. 124. **Ohio.** *Newburg v. Munshower*, 29 Ohio St. 617, 23 Am. Rep. 769.

[a] Where the judgment sued upon was rendered against the defendant personally and the action on the judgment is brought against him in a representative capacity as administrator he should, in order to avail himself of the variance, file a plea of nul tiel record, but where instead of doing so he pleads to the merits the objection on the ground of such variance is deemed waived. *Purvis v. Jackson*, 69 N. C. 474.

37. First Nat. Bank *v. Hamor*, 47 Fed. 36; *Mann v. Edwards*, 138 Ill. 19, 27 N. E. 603; *Schertz v. First Nat. Bank*, 47 Ill. App. 124.

[a] **Immaterial Variance.**—But where the judgment is rendered in favor of a certain person and the record contains the additional statement "or whoever may be the legal owner or owners of the land," the omission to mention such additional statement in the complaint creates no substantial variance between the record and the allegations of the complaint. *Laucaster v. Inhab. of Richmond*, 83 Me. 534, 22 Atl. 393.

38. *Varn v. Arnold Hat Co. (Tex. Civ. App.)*, 124 S. W. 693.

[a] There can "be no variance between the allegation and the instrument, itself made a part of the peti-

tion, because whatever might be alleged the instrument would be bound to control, and the party sued could not therefore be misled. The instrument itself would cure any misdescription of it in the petition to which it is attached as an exhibit." *Varn v. Arnold Hat Co. (Tex. Civ. App.)*, 124 S. W. 693.

39. *Garvin v. St. Clair*, 17 Tex. 435.

40. *Cranor v. School Dist.*, 81 Mo. App. 152; *Green-Rea Co. v. Holman*, 107 Tenn. 544, 64 S. W. 889.

[a] The costs are part of the judgment and in an action on such judgment the plaintiff may recover such costs together with the principal sum. *Cranor v. School District*, 81 Mo. App. 152.

[b] **Necessity of Showing Payment.** In *Meyer v. Mehrhoff*, 19 Mo. App. 682, it is held that the plaintiff in order to be entitled to the recovery of costs awarded in the judgment must show that he or his assignor has paid the same. It is said there: "The plaintiff's petition avers that these costs are still unpaid, nor is there any evidence in the case, that either the plaintiff or his assignor, ever paid the same, or any part thereof. It is true that costs form a part of a judgment. . . . If the plaintiff has advanced them he is entitled to receive them; if he has not advanced them he has no right to receive them. On what theory can the plaintiff in this case obtain a judgment against the defendant for an amount which is supported by no consideration, namely: for the costs which he has never paid, and for which, at this date, there is no liability on his part."

41. **Ind.**—*Palmer v. Glover*, 73 Ind. 529. **Ky.**—*Williams v. Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 179. **Tenn.** But see *Green-Rea Co. v. Holman*, 107 Tenn. 544, 64 S. W. 889.

of execution may likewise be added to the amount of the original judgment.<sup>42</sup> Where the judgment sued upon contains a limitation as to the source from which it is payable, its terms cannot be modified in a subsequent judgment by omitting such limitation.<sup>43</sup>

**2. On Judgments of Courts of Sister States.**—a. *Right To Action.*—(I.) **General Rule.**—An action may be maintained on a judgment rendered by a court of another state,<sup>44</sup> in accordance with the general principles, with certain exceptions,<sup>45</sup> governing actions on domestic judgments.<sup>46</sup>

(II.) **Nature of Judgment and Circumstances Affecting Its Enforcement.** (A.) **GENERALLY.**—The judgments of a sister state are recognized upon principles of comity as modified and enforced by the "full faith and credit" clause of the United States constitution.<sup>47</sup> And generally speaking, if actionable where it was rendered, it should be actionable in a sister state, and vice versa,<sup>48</sup> and, as a rule, a judgment valid in the state where it was rendered may be enforced by action in another state, although under the laws of the latter state such judgment would

42. *Miller v. Miller*, 5 N. J. L. 508.

43. *Weaver v. San Francisco*, 146 Cal. 728, 81 Pac. 119.

44. *Colo.*—*Interstate Sav. & T. Co. v. Wyatt*, 27 Colo. App. 217, 147 Pac. 444. *Conn.*—*Abbot v. Knight of Plainfield*, 1 Root 405. *D. C.*—*Davis v. Davis*, 29 App. Cas. 258, 9 L. R. A. (N. S.) 1071; *Clark v. Barber*, 21 App. Cas. 274. *Ill.*—*Dow v. Blake*, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156.

*Kan.*—*Ritter v. Hoffman*, 35 Kan. 215, 10 Pac. 576. *Mo.*—*McElroy v. Ford*, 81 Mo. App. 500. *Neb.*—*Snyder v. Critchfield*, 44 Neb. 66, 62 N. W. 306. *N. J.*—*Oyster v. Peavy*, 40 N. J. L. 401. *Wash.*—*Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204.

See section following.

As to force and effect of a judgment of a sister state, see 15 STANDARD PROC. 649, et seq., and the title "Res Judicata."

[a] "The judgment of the court of another state is . . . put on the same footing as a domestic judgment with this qualification: That it does not prevent an inquiry into the jurisdiction of the court in which the judgment was given to pronounce it, or the right of the state itself to exercise authority over the persons or subject-matter." *Lucas v. Vulcan Iron Works*, 233 Fed. 823.

[b] And a statute providing that no action shall be maintained on any judgment or decree rendered by any

court without the state against any person who, at the time of the commencement of the action in which such judgment or decree was rendered, was a resident of the state, in any case where the cause of action would have been barred by any act of limitation of the state, if such suit had been brought therein, is unconstitutional, it being in legal effect an attempt to deny the efficacy of any judgment recovered in another state against a citizen of the state in which such statute is in force. *Christmas v. Russell*, 5 Wall. (U. S.) 290, 18 L. ed. 475.

**Jurisdiction of justice of the peace** to entertain action on foreign judgment, see the title "Justices of the Peace."

**Enforcement in Federal Court.**—See *infra*, III, B, 3.

45. See sections following.

46. **Actions on domestic judgments**, see *supra*, IV, B, 1.

47. See 15 STANDARD PROC. 645, et seq.

[a] **Penal judgments of another state** will not support an action. *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239; *Arkansas v. Bowen*, 3 App. Cas. (D. C.) 537; *Schuler v. Schuler*, 209 Ill. 522, 71 N. E. 16. See 15 STANDARD PROC. 645, et seq.

48. See cases and discussion following.

be a nullity.<sup>49</sup> Before it is entitled to recognition and enforcement in another state, however, it must possess certain jurisdictional and other essentials of a valid and subsisting judgment.<sup>50</sup> An action on a judgment rendered without service of process on or appearance by the defendant cannot be sustained in another state,<sup>51</sup> and where the court of another state acquired jurisdiction in rem only, as by attachment, no action can be brought on the judgment as the court had no jurisdiction of the person of the defendant.<sup>52</sup> So also a judgment of another

49. *Ritter v. Hoffman*, 35 Kan. 215, 10 Pac. 576.

[a] "A judgment entered on warrant of attorney in a state recognizing such a proceeding is as much an act of the court as if formally pronounced on *nil dicit* or a *cognovit*, and until it is reversed or set aside it has all the qualities and effects of a judgment on verdict. . . . A judgment entered in such a manner in a state recognizing such instruments, when sued upon here, must be treated as any other judgment." *Snyder v. Critchfield*, 44 Neb. 66, 62 N. W. 306.

[b] But where it affirmatively appears that the judgment of an Ohio court rendered by confession was not in compliance with the laws in force in Oklahoma Territory and the statutes and laws of Ohio are neither pleaded nor proved, no recovery can be had on such judgment. *Harn v. Cole*, 20 Okla. 553, 95 Pac. 415.

50. See 15 STANDARD PROC. 644, et seq.

[a] "A judgment rendered without a statement of the cause of action, in some form recognized by law, whatever may be its force and effect, where it is rendered, is of no value beyond the jurisdiction of the court which rendered it. No authority to the contrary is cited by the defendants, and, indeed, it would seem impossible to maintain in any forum a judgment, unless it was based upon a complaint, or a statement of the cause of action of the party in whose favor it was rendered." *Young v. Rosenbaum*, 39 Cal. 646.

51. **U. S.**—See *Shipman v. Willard*, 194 Fed. 575. **Ala.**—*Bigger v. Hutchings*, 2 Stew. 445. **Ark.**—*Barkman v. Hopkins*, 11 Ark. 157. **Conn.**—*Kibbe v. Kibbe*, Kirby 119. **Del.**—*Mitchell v. Garrett*, 5 Houst. 34. **Ill.**—*Welch v. Sykes*, 8 Ill. 197, 44 Am. Dec. 689; *Robb v. Anderson*, 43 Ill. App. 575.

**Me.**—*McVicker v. Beedy*, 31 Me. 314, 50 Am. Dec. 666. **Mass.**—*Watson v. New England Bank*, 4 Mete. 343. **Miss.**—*Wright v. Weisinger*, 5 Smed. & M. 210. **Mo.**—*Overstreet v. Shannon*, 1 Mo. 529. **N. J.**—*Moulin v. Trenton, etc. Ins. Co.*, 24 N. J. L. 222. **N. Y.**—*Leighty v. Tichenor* (App. Div.), 159 N. Y. Supp. 457. **Tex.**—*Chunn v. Gray*, 51 Tex. 112. **Vt.**—*Newcomb v. Peck*, 17 Vt. 302, 44 Am. Dec. 340. **Va.**—*Johnson v. Anderson*, 76 Va. 766; *Wilson v. Bank of Mt. Pleasant*, 6 Leigh (33 Va.) 570.

[a] "If statutes authorizing a judgment without appearance, or actual or constructive notice, can have force upon the citizens of the state where they are passed, they cannot bind citizens of another state. Such judgments, as to them, are void." *Sim v. Frank*, 25 Ill. 125.

[b] **Summary Judgment.**—But where under the laws of a state a summary judgment without notice may be rendered in certain cases, an action on such judgment cannot be maintained in a state where no such practice prevails. *Sevier v. Roddie*, 51 Mo. 580. See generally the title "**Summary Proceedings.**"

[c] **Joint Defendants.—One Not Served With Process.**—Where an action is brought on a judgment of another state against only one of two defendants and it appears that no service of process was made on the other defendant, the action, in the absence of a statute, cannot be maintained for the reason that the judgment being an entirety cannot be divided. *Hanley v. Donoghue*, 59 Md. 239, 43 Am. Rep. 554.

52. *Succession of Durand*, 24 La. Ann. 352.

[a] "The state has undoubted jurisdiction over property within its territorial limits. It may subject it to taxation. It may render it liable to

state cannot be sued on unless it is final in the state wherein it was rendered,<sup>53</sup> and an interlocutory judgment of a court of another state

the payment of debts, though its owner may reside in another state. . . . Without property and its attachment, the court has no jurisdiction. . . . It is co-extensive with and limited by the attachment, and ends with the disposition according to law of the estate so attached. Where there is no attachment, no valid judgment can be rendered. . . . The judgment recovered by the plaintiff was clearly not of validity so as to constitute the basis of a suit without the state. . . . It is simply a proceeding in rem. It is a statutory process, by which a creditor, following the provisions of the statute, is enabled to appropriate the property of an absent debtor to the payment of his debts. If the appropriation is made, it is protected. If not made, the judgment ceases to have any validity, so that it can constitute the basis of a new judgment." *Eastman v. Wadleigh*, 65 Me. 251, 20 Am. Rep. 695.

[b] "In the present case, the judgment was sufficient to subject to its satisfaction, within New York, property of the defendant in that state. To that extent it would be held valid, as a proceeding in rem; but it has no binding force in personam, for want of jurisdiction of the person. To the extent in which jurisdiction existed, will faith and credit be given to the judgment in this state and no further. Thus, if personal property of the defendant had been sold under this judgment, in New York, and the purchaser had brought the property into this state, he would be protected against a claim of the defendant. The judgment, and sale thereunder, would sustain his title. But for all the purposes of establishing a personal claim against the defendant, it is a mere nullity, and it makes no difference whether valid, and in conformity with the course and practice of the court where rendered, or otherwise." *Kane v. Cook*, 8 Cal. 449.

53. *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156; *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204. Compare *supra*, III, B, 1, a, (II), (C).

**A judgment must be final to constitute a merger or res judicata and entitled to recognition as such elsewhere.** See the title "*Res Judicata*," and 15 STANDARD PROC. 595, et seq.

[a] "Judgments and decrees are recognized, by courts other than those in which they are rendered, as debts of record, but not unless they are final and complete to the extent of resting absolute and unconditional right in the persons in whose favor they are made. . . . This principle applicable to actions on judgments and decrees has full force and effect in actions on judgments and decrees of the courts of sister states, the benefits of which are preserved and sustained by the constitution and laws of the United States." *Henry v. Henry*, 74 W. Va. 563, 82 S. E. 522, L. R. A. 1916B, 1024.

[b] **Judgment on Contempt Proceedings.**—A decree adjudging that a certain sum is due from the defendant to the plaintiff for arrears for alimony, although made in contempt proceedings on the original decree of divorce for failure to comply therewith, is a final judgment and as such decree under the laws of Illinois has the force and effect of a judgment at law for the payment of money, an action on such decree of another state may be maintained in this state. *De Longe v. Fischback*, 153 Wis. 193, 140 N. W. 1125.

[c] **Judgment Payable in Gold Coin.** A judgment for a certain sum of money payable "in United States gold coin" is an obligation for the direct payment of money and cannot be regarded as a judgment for the payment of an unliquidated amount to be determined according to the fluctuations of the gold market, and an action of debt is properly brought on such judgment. *Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593.

[d] **The fact that costs remain to be taxed does not affect the finality of the judgment sued on, as the taxation of costs is incidental to the judgment and is not an essential part thereof.** *Clark v. Barber*, 21 App. Cas. (D. C.) 274.

will not support an action.<sup>54</sup> An action may be brought on a judgment by confession rendered by a court of another state.<sup>55</sup> No action can be maintained on a judgment which is dormant and unenforceable by action under the laws of the state where the judgment was rendered.<sup>56</sup> If the terms or conditions of the judgment are such that a judgment imposing the same obligations cannot be rendered in another state, no

54. *Brinkley v. Brinkley*, 56 N. Y. 192.

55. *Ind.*—*Kingman v. Paulsen*, 126 Ind. 507, 26 N. E. 393, 22 Am. St. Rep. 611. *Kan.*—*Ritter v. Hoffman*, 35 Kan. 215, 10 Pac. 576. *Mass.*—*Van Norman v. Gordon*, 172 Mass. 576, 53 N. E. 267, 76 Am. St. Rep. 304, 44 L. R. A. 840; *Richards v. Barlow*, 140 Mass. 218, 6 N. E. 68. *Mo.*—*Vennum v. Mertens*, 119 Mo. App. 461, 95 S. W. 292. *Neb.* *Nicholas v. Farwell*, 24 Neb. 180, 38 N. W. 820. *N. Y.*—*Teel v. Yost*, 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796; *Trebilcox v. McAlpine*, 62 Hun 317, 17 N. Y. Supp. 221. *Ohio.*—*Sipes v. Whitney*, 30 Ohio St. 69. *W. Va.*—*Coleman v. Waters*, 13 W. Va. 278.

[a] "The fact that the defendant was a non-resident of the state in which the note was executed and made payable, is no defense to the entering, by confession, of a judgment thereon in the state of its execution and where it was to be paid. As we view it, the record offered shows a valid judgment under the laws of Illinois, and was properly authenticated as provided by the acts of Congress, as well as by our statutes, and until otherwise properly impeached, was entitled to be given such faith and credit as it had by law or usage in the courts of the state in which it was rendered." *Vennum v. Holmberg*, 51 Colo. 306, 117 Pac. 169.

[b] But under a bond authorizing "any attorney of any court of record in the state of New York or any other state to confess judgment" the defendant "did not consent to be bound by the local laws of every state in the Union relating to the rendition of judgment against their own citizens without service or appearance, but on the contrary made such appearance a condition of judgment. And even if judgment could have been entered against him, not being served and not appearing, in each of the states of the Union, in accordance with the laws therein existing upon the subject, he could not be held liable upon such judgment in any other state than that in which it

was so rendered, contrary to the laws and policy of such state. The courts of Maryland were not bound to hold this judgment as obligatory either on the ground of comity or of duty, thereby permitting the law of another state to override their own." *Grover & B. S. Mach. Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. ed. 670.

[c] But if the confession of judgment was made by a person who had no authority, that fact may be shown in an action on the judgment brought in another state. *Central Pennsylvania Soc. v. Larue*, 164 Mo. App. 93, 148 S. W. 152.

56. *Chapman v. Chapman*, 48 Kan. 636, 29 Pac. 1071; *St. Louis Type F. Co. v. Jackson*, 128 Mo. 119, 30 S. W. 521; *Baker v. Stonebraker*, 36 Mo. 338. *Compare Beer v. Simpson*, 65 Hun 17, 19 N. Y. Supp. 578, 22 Civ. Proc. 351, 47 N. Y. St. 219.

[a] But an action may be brought on an order or judgment of revival. *Thomas v. Lally*, 28 Cal. App. 308, 152 Pac. 53.

[b] A revival of the judgment lien by scire facias without personal service of process is not a judgment upon which an action may be maintained in another state where the original judgment is barred by the statute of limitations. *Evans v. Reed*, 2 Mich. N. P. 212.

[c] "The question thus presented by the pleadings is, can a suit be maintained in the courts of this state upon a judgment of a court of another state, rendered upon returns of nihil to two successive writs of scire facias issued to revive a judgment in the foreign court of more than twenty years standing, where the defendant . . . had no notice of such writs? . . . We have no hesitation . . . in treating this judgment as one rendered without notice or service of process, and of no validity as the foundation of an action here, whatever may be its effect in the state where it was rendered, or upon the property of the defendant, if any, there situated." *Weaver v. Boggs*, 38 Md. 255.

action can be there maintained upon it.<sup>57</sup> A deficiency judgment in an action of foreclosure of mortgage cannot be enforced by an action in another state until after the sale of the mortgaged property.<sup>58</sup>

**Leave of Court.**—A statutory provision forbidding suits upon judgments of courts of record, without leave to bring such suits is intended only to govern domestic judgments and cannot be extended to judgments rendered by courts of other states,<sup>59</sup> unless the statute expressly so provides.<sup>60</sup>

(B.) EFFECT OF STAY AND OTHER PROCEEDINGS IN SISTER STATE. — The pendency of equitable proceedings in the courts of the state where it was rendered to set aside the judgment constitutes no obstacle to an action on the judgment in another state,<sup>61</sup> but no action can be brought on a judgment of another state, the enforcement of which is there enjoined<sup>62</sup> or stayed<sup>63</sup> in such way as to prevent an action being brought

57. See *Thorner v. Batory*, 41 Md 593, 20 Am. Rep. 74.

[a] **Alternative Judgment.**—“The judgment sued on is not such an one as the courts of this state can carry into effect by a like judgment to be rendered here. Any other judgment would be transcending the powers of our courts, which must be limited to the same measure of relief which the plaintiffs were entitled to in the state of Tennessee. The action brought on this subject is an action of *debt* in which the only judgment that can be rendered is for a certain sum of money. It is clear that such an unconditional judgment would take from the defendant the right which he had under the Tennessee judgment to satisfy it by returning the property, and to that extent would work an unauthorized change of the rights of the parties.” *Thorner v. Batory*, 41 Md. 593, 20 Am. Rep. 74.

58. *Smith v. Moore*, 53 Mo. App. 525.

59. *Union Trust Co. v. Rochester & P. R. Co.*, 29 Fed. 609; *Weber v. Yancy*, 7 Wash. 84, 34 Pac. 473. See also *Morton v. Palmer*, 60 Hun 583, 14 N. Y. Supp. 912, 21 Civ. Proc. 94, 39 N. Y. St. 236; *Goodyear D. V. Co. v. Friselle*, 22 Hun (N. Y.) 174.

As to necessity for leave to sue on a domestic judgment, see *supra*, III, B, 1, b.

Leave to sue on a federal court judgment, see *infra*, III, B, 3.

60. *Hinman v. Hare*, 13 W. N. C. (Pa.) 251.

61. *Parker v. Bowman*, 83 Ark. 508, 104 S. W. 158; *Tompkins v. Cooper*, 97 Ga. 631, 25 S. E. 247.

62. See note following.

[a] “We are bound . . . to respect the order of the Ohio court allowing the injunction, which is to be held as *res judicata* between the parties, suspending to all intents and purposes the absolute effect of the judgment. It is no answer to this that the security had not been entered before the commencement of this suit. It is for the plaintiff to apply to the Ohio court to revoke its decree allowing the injunction, if security has not been entered in due time. But while it is subsisting, the judgment is not final, and no action can be obtained on it as such.” *Palmer v. Palmer*, 2 Miles (Pa.) 373.

63. *Nazro v. McCalmont Oil Co.*, 36 Hun (N. Y.) 296. See also *supra*, III, B, 1, a, (II), (C), (2), and the title “*Supersedeas and Stay of Proceedings*.”

[a] “Regarding the judgment as a contract, it must be held, we think, to be such a contract as the laws of Pennsylvania make it, and that is one not enforceable until the expiration of the stay of execution. The action in this state in which the attachment issues, is based altogether upon the judgment. The recognizance by which the execution is stayed became part of the record of the judgment, and while it remains in full force and effect the law of Pennsylvania prevents the issuing of any execution to collect the judgment until the expiration of the stay, and this because the stay is a part of the ‘contract, express or implied,’ upon which the plaintiff has sued out his attachment. It is in its nature a contract not yet due, and for

on it there.<sup>64</sup> Neither the fact that another action is pending in a sister state upon the same judgment,<sup>65</sup> or the fact that an execution has been issued and levied upon defendant's property situated in the state where the original judgment was rendered,<sup>66</sup> or that an appeal has been taken from the judgment<sup>67</sup> is a bar to an action thereon in another state unless such other proceedings prevents action on the judgment where rendered.

(C.) DECREES IN EQUITY. — Generally an action may be maintained on a decree of a court of equity of another state directing the payment of a specific sum of money,<sup>68</sup> though in some jurisdictions an action can-

that reason not yet enforceable in this state by attachment against the property of the defendant." *Nazro v. McCalmont Oil Co.*, 36 Hun (N. Y.) 296

64. See note following.

[a] **Where Stay Bond Does Not Prevent Action.**—Where in an action on a judgment rendered in Ohio it was alleged in the answer that an appeal from the judgment is pending and that a supersedeas bond had been filed to stay proceedings, but the Ohio statutes were not introduced in evidence, it will be presumed that they are like those in this state. "Under our practice a supersedeas bond given in proceedings in error serves the purpose of staying the execution of the judgment only. . . . A stay of execution is no obstacle in the way of another action on the judgment." *Poll v. Hicks*, 67 Kan. 191, 72 Pac. 847.

65. *McArthur v. Goddin*, 12 Bush (Ky.) 274. See 1 STANDARD PROC. 1003; 1004.

66. *Field v. Sanderson*, 34 Mo. 542, 86 Am. Dec. 124. Compare *supra*, III, B, 1, a, (I).

67. **U. S.**—*Woodbridge, etc. Co. v. Ritter*, 70 Fed. 677; *Troy City Bank v. Lauman*, 24 Fed. Cas. No. 14,194. **Cal** *Taylor v. Shew*, 39 Cal. 536, 2 Am. Rep. 538. **Conn.**—*Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683. **Ill.**—*Dow v. Blake*, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156. **Kan.**—*Poll v. Hicks*, 67 Kan. 191, 72 Pac. 847. **Ky** *McArthur v. Goddin*, 12 Bush 274. **La** *Gaines' Succession*, 45 La. Ann. 1237, 14 So. 233. **Mass.**—*Clark v. Child*, 136 Mass. 344; *Faber v. Hovey*, 117 Mass. 107, 19 Am. Rep. 398. **Neb.**—*Loneragan v. Loneragan*, 55 Neb. 641, 76 N. W. 16. **Nev.**—*Rogers v. Hatch*, 8 Nev. 35. **N. J.**—*Suydam v. Hoyt's Admr.*, 25 N. J. L. 230. **Pa.**—*Merchants' Ins. Co. v. De Wolf*, 33 Pa. 45, 75 Am. Dec. 577.

**Va.**—*Piedmont, etc. Ins. Co. v. Ray*, 75 Va. 821.

See preceding note.

**As to effect of appeal in preventing action** where the judgment was rendered, see *supra* III, B, 1, a, (II), (C), (2).

68. **U. S.**—*Pennington v. Gibson*, 16 How. 65, 14 L. ed. 847; *Mellen v. Horlick*, 31 Fed. 865. **Ala.**—*Green v. Foley*, 2 Stew. & P. 441. **Cal.**—*Ames v. Hoy*, 12 Cal. 11. **Conn.**—*Drakesly v. Roots*, 2 Root 138. **Ga.**—*Tompkins v. Cooper*, 97 Ga. 631, 25 S. E. 247. **Ill.**—*Dow v. Blake*, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156; *Warren v. McCarthy*, 25 Ill. 95; *Blattner v. Frost*, 44 Ill. App. 580. **Ky.**—*Williams v. Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 179; *Fletcher v. Ferrel*, 9 Dana 372, 35 Am. Dec. 143. **Me.**—*McKim v. Odom*, 12 Me. 94. **Mass.** *Howard v. Howard*, 15 Mass. 196. **Miss.** *Barringer v. Boyd*, 27 Miss. 473. **Mo.** *Davis v. Cohn*, 96 Mo. App. 587, 70 S. W. 727. **N. Y.**—*Dubois v. Dubois*, 6 Cow. 494. **N. C.**—*Pennington v. Hadley*, 3 N. C. 502. **Ohio.**—*Moore v. Adie's Admr.*, 18 Ohio 430. **Okla.**—*Blumle v. Kramer*, 14 Okla. 366, 79 Pac. 215. **Ore.** *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705; *Meyer v. Brooks*, 29 Ore. 203, 44 Pac. 281, 54 Am. St. Rep. 790. **R. I.**—*Wagner v. Wagner*, 26 R. I. 27, 57 Atl. 1058, 65 L. R. A. 816. **Tenn.**—*Hunt v. Lyle*, 6 Yerg. 412. **Vt.**—*Thrall v. Waller*, 13 Vt. 231, 37 Am. Dec. 592. **Wis.**—*Kunze v. Kunze*, 94 Wis. 54, 68 N. W. 391, 59 Am. St. Rep. 857.

Compare *supra*, III, B, 1, a, (II), (D).

[a] "It is a general principle, that where a man is under an obligation to pay a certain sum of money, whether that obligation is founded on a contract, or the judgment of a court, an action of debt lies. On that principle, we support actions of debt on foreign

not be maintained on such a decree.<sup>69</sup> Where the decree directs the performance of acts rather than the payment of money no action can be brought thereon.<sup>70</sup> A decree for the payment of alimony in a lump sum may be enforced in another state by an action at law,<sup>71</sup> but condi-

judgments. And I confess, I see no reason why a decree in chancery is not as strong as a foreign judgment. If it be objected, that proceedings in chancery are not according to the course of the common law, the same objection lies against judgments of courts on the continent of Europe, where the proceedings are according to the civil law. To be sure, in case of a foreign judgment, the defendant is permitted to deny the original cause of action. But so likewise would the defendant in the present case have been permitted to enter into the merits of the original controversy, were it not for the constitution and laws of the United States, which forbid it. . . . It was also objected, that a decree in chancery, may be opened, altered, or annulled, on a bill of review. True it may; and so may a judgment at law be reversed on a writ of error. But still, an action of debt lies on the judgment, as long as it is in force, should it be afterwards reversed, the injured party would not be without remedy, and the same would be the case should a decree in chancery be reversed." *Evans v. Tatem*, 9 Serg. & R. (Pa.) 252, 11 Am. Dec. 717.

[b] **Conditional Decree.**—But where the decree as a condition to recovery required the plaintiff to execute and deposit with the clerk a certain deed and the plaintiff complied with this condition before the judgment was rendered and thereafter was given an absolute and unconditional judgment for the recovery of a specific sum of money, although the decree included a provision that upon satisfaction of the judgment the deed should be delivered to the defendant, an action thereon may be maintained. *McLain v. Parker*, 88 Kan. 717, 129 Pac. 1140.

69. *Boyle v. Schindel*, 52 Md. 1. See *Elliott v. Ray*, 2 Blackf. (Ind.) 31, that debt is maintainable on such a decree only when it has, where rendered, the force and effect of a judgment at law.

70. *Warren v. McCarthy*, 25 Ill. 95. Compare *Blattner v. Frost*, 44 Ill. App. 580.

71. **U. S.**—*Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. ed. 810; *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Knapp v. Knapp*, 59 Fed. 641. **Ala.**—*Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227. **D. Ct.**—*Davis v. Davis*, 29 App. Cas. 258, 9 L. R. A. (N. S.) 1071. **Ill.**—*Dow v. Blake*, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156. **Mo.**—*Brisbane v. Dobson*, 50 Mo. App. 170. **N. J.**—*Bennett v. Bennett*, 63 N. J. Eq. 306, 49 Atl. 501. **N. Y.**—*Lynde v. Lynde*, 162 N. Y. 405, 56 N. E. 979, 76 Am. St. Rep. 332, 48 L. R. A. 679. **Wis.**—*De Longe v. Fischback*, 153 Wis. 193, 140 N. W. 1125 (judgment in contempt proceedings for non-payment of alimony); *Kunze v. Kunze*, 94 Wis. 54, 68 N. W. 391, 59 Am. St. Rep. 857.

See 7 STANDARD PROC. 838.

[a] "The principal contention . . . is that the judgment of \$5,000, as for alimony in gross, given by the circuit court of the city of St. Louis, is not a final judgment, because the statute of Missouri provides that the court, on the application of either party, may make such alteration from time to time as to the allowance of alimony as may be proper; that the judgment of a sister state cannot be sued upon in this state unless it is final and conclusive in the state where it was rendered, according to the law of that state. . . . An ordinary judgment or decree in a suit at law or in equity may be discharged by payment, or new facts might arise after judgment warranting its discharge or modification by the court, and proceedings by petition in the same suit might be entertained by the court for that purpose. That would not affect the finality in the first instance. So, in the case at bar, facts might occur after the decree . . . which would authorize the court to recall the decree. . . . Should any modification thereof be hereafter made in the courts of Missouri, our courts, by proper proceeding instituted therein, will give effect to such modification, thereby carrying out the requirements of the federal constitution. If any modification was made before this action was instituted, it can

tional orders for alimony,<sup>72</sup> or orders for alimony not yet accrued,<sup>73</sup> cannot be enforced by an action in another state. Nor can an action be maintained upon an order for alimony pendente lite.<sup>74</sup> And if the decree for alimony is subject to modification in the state where rendered it is not within the protection of the full faith and credit clause of the United States constitution.<sup>75</sup>

b. *Form of Action.*—Debt is the proper remedy on a judgment of a court of another state,<sup>76</sup> rather than assumpsit,<sup>77</sup> although in some<sup>78</sup>

be pleaded by way of a defense or counter claim in this action. . . For the reasons given herein, we think the lower court erred in sustaining the demurrer to the amended complaint." *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204.

72. *Henry v. Henry*, 74 W. Va. 563, 82 S. E. 522, L. R. A. 1916B, 1024.

73. *Israel v. Israel*, 148 Fed. 576, 79 C. C. A. 32, 9 L. R. A. (N. S.) 1168.

74. *Geisler v. Geisler*, 30 Ky. L. Rep. 430, 98 S. W. 1023; *Brinkley v. Brinkley*, 50 N. Y. 192. See also *Vine v. Vine*, 21 R. I. 190, 42 Atl. 871.

[a] "The case at bar is not even the case of a final allowance of alimony; it is simply an order pendente lite. When the court that rendered it came to render his final judgment in the case he had authority to disregard it entirely and to make such judgment on the question of alimony as the proof on the whole action justified. . . . It is not uncommon in such cases for the court in rendering the final judgment to take into consideration what has been paid under the pendente lite allowance and to give a judgment for such balance as may be deemed proper under all the proof." *Geisler v. Geisler*, 30 Ky. L. Rep. 430, 98 S. W. 1023.

[b] In *Sistare v. Sistare*, 80 Conn. 1, 66 Atl. 772, it is said that the courts are not only under no constitutional obligation to give effect to an order for alimony pendente lite "but ought not, as an act of comity, to do so, since it would thus be given a greater effect than would be given to it in the jurisdiction of its origin."

75. 7 STANDARD PROC. 838.

76. *U. S.*—*Tompkins v. Craig*, 102 Fed. 69. *Ala.*—*Carter v. Crews*, 2 Port. 81. *Ark.*—*Morehead v. Grisham*, 13 Ark. 431. *Conn.*—*Sterne v. Spalding*, Kirby 177. *Ill.*—*Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097, 29 L. R.

A. 593. *Ind.*—*Cole v. Driskell*, 1 Blackf. 16. See *Elliott v. Ray*, 2 Blackf. 31. *Ky.*—*Garland v. Tucker*, 1 Bibb 361. *Mo.*—*Smith v. Kander*, 58 Mo. App. 61. *N. Y.*—*Andrews v. Montgomery*, 19 Johns. 162. *Ohio.*—*Headley v. Roby*, 6 Ohio 521. *S. C.*—*McIntire v. Caruth*, 3 Brev. 395, 1 Treadw. 457. *Vt.*—*Boston I. R. Factory v. Hoit*, 14 Vt. 92.

See generally the title "Debt."

Compare *supra*, III, B, 1, c.

77. *Garland v. Tucker*, 1 Bibb (Ky.) 361; *Gooding v. Hingston*, 20 Mich. 439, common counts. See also cases in preceding note.

Compare *supra*, III, B, 1, c.

[a] The "judgments of the courts of the several states, when properly authenticated, are now put upon the same footing as domestic judgments. The consequence of this has been to change the effect of a judgment from another state, when offered as evidence. It is no longer received as mere prima facie evidence of a simple contract debt, but as conclusive, as evidence of incontrovertible verity of a specialty, the merits of which cannot be re-examined, and which, under the constitution of the United States and the law of Congress, is entitled to all the sanctity of a domestic judgment. On such a judgment assumpsit will not lie." *McKim v. Odom*, 12 Me. 94.

78. *U. S.*—*Mellin v. Horlick*, 31 Fed. 865. *Ky.*—*Williams v. Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 179. *Mass.*—*Buttrick v. Allen*, 8 Mass. 273, 5 Am. Dec. 105. *Pa.*—*Finch v. White*, 190 Pa. 86, 42 Atl. 457. *S. C.*—*Lambkin v. Nance*, 2 Brev. 99.

[a] In *Pennsylvania* the plaintiff's statement in assumpsit on a foreign judgment must be accompanied by a complete copy of the whole record. "The reason is, obvious. Unless the whole record is displayed, the court cannot exercise its own judgment concerning the existence of the right of action,

cases it has been held that assumpsit may be maintained on such a judgment, and the statute sometimes so provides.<sup>79</sup>

c. *Parties.*—As to the parties plaintiff an action upon judgment of a sister state is governed by the general rules elsewhere discussed.<sup>80</sup>

**Defendant.**—Where the obligation upon which the judgment was recovered is joint and several, an action may be brought thereon in another state against any of the defendants,<sup>81</sup> but where the obligation is joint, an action thereon, in the absence of a statute modifying the common law, must be brought against all the defendants jointly.<sup>82</sup>

d. *Declaration or Complaint.*—(I.) **Generally.**—An action founded on a judgment of another state must be governed by the rules of pleading prevailing where such action is brought.<sup>83</sup> Ordinarily the laws of

but is obliged to accept the plaintiff's choice as determining finally this essential question." *Tompkins v. Craig*, 102 Fed. 69.

79. See *Knapp's Exr. v. Kingsbury*, 51 Ala. 563; *Detroit Sav. Bank v. Ziegler*, 49 Mich. 157, 13 N. W. 496, 43 Am. Rep. 456; *Woods v. Ayres*, 39 Mich. 345, 33 Am. Rep. 396.

80. See *supra*, III, B, 1, f, and the title "Parties."

[a] **Joining All the Plaintiffs.**—A judgment of a court of another state in favor of joint plaintiffs cannot be sued upon by one of the plaintiffs without showing a reason for the omission of the others. *Jansen v. Hyde*, 8 Colo. App. 38, 44 Pac. 760; *Gilbert v. Allen*, 57 Ind. 524.

[b] **By Real Party in Interest.** Where under statute an action must be brought by the real party in interest an action on a judgment of a court of another state may be brought by the owner of the judgment though he is not named therein. Hence, where the judgment was recovered by the assignor of the chose in action upon which it was based, for the benefit of the assignee, the latter may maintain the action on the judgment in his own name. *Greene v. Republic F. Ins. Co.*, 84 N. Y. 572.

[c] **The assignee of the judgment may sue on it.** *Anthony v. Masters*, 28 Ind. App. 239, 62 N. E. 505.

[d] **Where an administrator has recovered a judgment in his representative capacity he may nevertheless sue on it in another state in his individual capacity.** *Talmage v. Chapel*, 16 Mass. 71, where the court says: "An administrator appointed here could not maintain an action upon this judgment, not being privy to it. Nor could he main-

tain an action on the original contract; for the defendants might plead in bar the judgment recovered against them in New York. The debt sued for is in truth due to the plaintiff in his personal capacity. For he makes himself accountable for it by bringing his action; and he may well declare that the debt is due to himself."

81. *McElroy v. Ford*, 81 Mo. App. 500; *Varn v. Arnold Hat Co.* (Tex. Civ. App.), 124 S. W. 693.

[a] **Where a judgment is based upon a note executed by defendants for a partnership debt, the reduction of the "note to a judgment did not create a new liability or contract, but ascertained the legal rights of the parties to the contract. . . . The obligation of the defendants was not changed, but adjudicated. The judgment did not consolidate the obligation, which was joint and several, into a joint obligation only, but followed the original contract, and must be held to be a joint and several judgment because founded on a joint and several promissory note."** *McElroy v. Ford*, 81 Mo. App. 500.

82. *Hanley v. Donoghue*, 59 Md. 239, 43 Am. Rep. 554. See *supra*, III, B, 1, f, (II).

[a] **Although there are two judgments, separate in form, yet if it is shown in the complaint that each of these judgments was recovered upon an obligation of both defendants, there is no reason to conclude from the form in which the judgments were rendered that the joint liability of the parties had been severed.** *Oyster v. Peavy*, 40 N. J. L. 401.

83. See *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705.

[a] **Must Not Deny Remedy.**—But

sister states cannot be judicially noticed and in so far as essential to a right of action upon the judgment must be pleaded,<sup>84</sup> though where not pleaded, in some jurisdictions it will be presumed that they are the same as those of the forum.<sup>85</sup> The declaration or complaint need but describe the judgment with such particularity as is necessary to identify it,<sup>86</sup> and a copy of the judgment need not be attached to the complaint,<sup>87</sup> or if one is attached as an exhibit, it need not be authenticated as provided by law.<sup>88</sup> It is not necessary to allege that a trial was had in the action,<sup>89</sup> or to set forth the proceedings therein,<sup>90</sup> or

the procedure obtaining in the state where the action on the judgment is brought cannot impair the efficacy of a judgment of another state or deny an adequate remedy for its enforcement. *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705.

84. See *infra* this section. See also 5 ENCY. OF EV. 806, and the title "Statutes."

[a] But in an action on a decree in equity it is not necessary to plead a statute rendering the plaintiff in such suit liable for costs. *Davis v. Cohn*, 96 Mo. App. 587, 70 S. W. 727.

85. Cal.—*Murphy v. Murphy*, 145 Cal. 482, 78 Pac. 1053. Okla.—*Harn v. Cole*, 20 Okla. 553, 95 Pac. 415. Ore. *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705.

See 5 ENCY. OF EV. 813, 820, and supplement thereto.

86. Ala.—*Andrews v. Flack*, 88 Ala. 294, 6 So. 907. Ga.—*Little Rock*, etc. Co. *v. Hodge*, 109 Ga. 434, 34 S. E. 667. Ind.—*Wormer v. Smith*, 2 Ind. 235. Ia. *Blake v. Burley*, 9 Iowa 592. Minn. *Smith v. Mulliken*, 2 Minn. 319. N. J. *Chemical Nat. Bank v. Kellogg*, 71 N. J. L. 126, 58 Atl. 397. Ohio.—*Spencer v. Brockway*, 1 Ohio 259, 13 Am. Dec. 615. Pa.—*Mink v. Shaffer*, 124 Pa. 280, 16 Atl. 805. Tex.—*Whitley v. General Electric Co.*, 18 Tex. Civ. App. 674, 45 S. W. 959; *Thurmond v. Bank of Georgia* (Tex. Civ. App.), 27 S. W. 317. Wash. *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204.

See *supra*, III, B, 1, g, (II).

[a] "A complaint declaring on a judgment is sufficient, in the matter of description, when it sets forth the court in which it was rendered, the place at which the court was held, the names of the parties in favor of, and against whom it was entered, the date

of its rendition, and the sum recovered." *Andrews v. Flack*, 88 Ala. 294, 6 So. 907.

[b] A complaint, which alleges the recovery of a judgment against the defendant in a court of another state and that the court was a court of general jurisdiction and that the judgment directed the payment to plaintiff of certain specified sums of money, is sufficient. *Crane v. Crane*, 19 N. Y. Supp. 691, 46 N. Y. St. 569.

[c] A declaration on a judgment of a sister state is sufficient if it is in the ordinary form of debt on a domestic judgment. *Davis v. Lane*, 2 Ind. 548, 54 Am. Dec. 458.

87. Ind.—*Stephenson v. McNary*, 3 Blackf. 360. Ky.—*Kelly v. Lank*, 7 B. Mon. 220. Mo.—*Campbell v. Wolf*, 33 Mo. 459. Ohio.—*Renniman v. Dean*, 3 Ohio Dec. (Reprint) 3. Tex.—*Hall v. Mackay*, 78 Tex. 248, 14 S. W. 615.

Compare *supra*, III, B, 1, g, (II).

[a] Attaching Copy Improper. Since "the code excludes from the petition all mere matters of evidence, and a transcript from the record is evidence merely, the court would be compelled to order it to be stricken out, if it were included in or attached as an exhibit to the petition." *Renniman v. Dean*, 3 Ohio Dec. (Reprint) 3.

[b] The failure to show jurisdiction of the court is not cured by attaching a copy of the judgment as an exhibit and making it part of the complaint. *Gebhard v. Garnier*, 12 Bush (Ky.) 321, 23 Am. Rep. 721.

88. *Cherry v. Chicago Life Ins. Co.*, 190 Ill. App. 70; *White v. Treon*, 25 Kan. 484.

89. *Fisher v. Fielding*, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236.

90. *Cherry v. Chicago Life Ins. Co.*, 190 Ill. App. 70.

to incorporate in the complaint the contract upon which the judgment is based,<sup>91</sup> or that the judgment was rendered in term time or at a certain term of court.<sup>92</sup> The complaint need not show that no appeal from the judgment had been taken or that the time for such appeal has expired,<sup>93</sup> but it must appear from the complaint that the judgment sued on is still in force.<sup>94</sup> The place in which the court was held should be stated when it is essential to a determination of the court's jurisdiction.<sup>95</sup>

(II.) **Averment of Jurisdiction.**—The jurisdiction of courts of general jurisdiction being presumed by law the plaintiff need not plead jurisdictional facts<sup>96</sup> where it is made to appear from the complaint that

91. *Wilbur v. Abbot*, 6 Fed. 814; *First Nat. Bank v. Crosby*, 179 Pa. 63, 36 Atl. 155; *Hogg v. Charlton*, 25 Pa. 200.

As to joinder of count on original cause of action, see *supra*, III, B, 1, e.

92. *Thurmond v. Bank of Georgia* (Tex. Civ. App.), 27 S. W. 317.

[a] "We cannot presume that the court rendered said judgment except in term time. There is nothing in the record showing that the laws of the state of Georgia required that the judgment should be rendered at the second term. In the absence of allegations and proof of what the laws of the state of Georgia were upon the subject, we must presume that they were the same as the laws of the state of Texas." *Thurmond v. Bank of Georgia* (Tex. Civ. App.), 27 S. W. 317.

93. *Coolot Co. v. Kahner & Co.*, 140 Fed. 836, 72 C. C. A. 248. See *supra*, III, B, 1, g, (II).

As to the effect of an appeal in preventing action on a judgment, see *supra*, III, B, 1, a, (III), (C), (2); III, B, 2, a, (II), (B).

94. *Dimick v. Brooks*, 21 Vt. 569. See *supra*, III, B, 1, g, (II).

[a] An allegation that the sum claimed is still due is a sufficient substitute for the usual allegation that the judgment is still in full force and effect and is not satisfied. *Blake v. Burley*, 9 Iowa 592.

[b] But non-payment of the amount of the judgment need not be alleged. *Williams v. Preston*, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179. Compare *supra*, III, B, 1, g, (II).

[c] **Remittitur After Appeal.** Where in an action on a judgment it is alleged in the complaint that the judgment had been vacated by the court in which it was rendered and that the

supreme court on a writ of certiorari reversed the order of the lower court, the complaint does not show the existence of a judgment in favor of plaintiff upon which an action can be maintained, unless it is averred, that a remittitur was sent to the superior court. *Cougill v. Farmers' & M. Ins. Co.*, 25 Ore. 360, 35 Pac. 975.

95. *Duyckinck v. Clinton Mut. Ins. Co.*, 23 N. J. L. 279.

[a] "When a court sits in different places for different districts, and where the territorial jurisdiction of the court varies with the place in which its sitting is held, the propriety and necessity (in declaring upon a judgment of such court) of stating definitely the place where the court was held when the judgment was rendered is sufficiently obvious. In that mode only, would the defendant be informed by the declaration of the real cause of action, and enabled to avail himself of every legitimate defence." *Duyckinck v. Clinton Mut. Ins. Co.*, 23 N. J. L. 279.

96. *Ala.*—*Forbes v. Davis*, 187 Ala. 71, 65 So. 516. *Cal.*—See *Low v. Burrows*, 12 Cal. 181. *Colo.*—*Bruckman v. Taussig*, 7 Colo. 561, 5 Pac. 152. *Conn.*—*Fisher v. Fielding*, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236. *Ill.*—*Light v. Reed*, 234 Ill. 626, 85 N. E. 282; *Cherry v. Chicago Life Ins. Co.*, 190 Ill. App. 70. *Ky.*—*Williams v. Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 179. *Minn.*—*Gunn v. Peakes*, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661. *Nev.*—*Phelps v. Duffy*, 11 Nev. 80. *Okla.*—*Shufeldt v. Bank of Mound City*, 160 Pac. 923. *Pa.*—*Mink v. Shaffer*, 124 Pa. 280, 16 Atl. 805.

As to presumption of jurisdiction, see the title "Judgments."

As to right to collaterally attack the judgment in spite of the presumption

the court which rendered the judgment was one of general jurisdiction.<sup>97</sup> In some cases even such an averment is held unnecessary where

of jurisdiction, see the title "Judgments."

[a] "I can see no good reason why the same rules should not prevail in pleading the judgments of a court of record of a sister state, as in pleading the judgments of such courts of our own state. Judgments of the courts of the several states have the like effect in all the states which they have in the states where rendered, and, when pleaded in an action, the same rules should govern as in pleading our own judgments; and if the allegations of the complaint be controverted, the plaintiff will then be required to establish, on the trial, the facts showing jurisdiction, in the court rendering the judgment, over the subject-matter, and over the person of the defendant." *Halstead v. Black*, 17 Abb. Pr. (N. Y.) 227.

[b] "Courts of general jurisdiction are presumed to have had jurisdiction, until the contrary appears. . . . Prima facie the plaintiff would not be required to prove the jurisdiction of the court, being one of general jurisdiction, and he was not bound to allege any fact which he was not compelled to prove." *Reid v. Boyd*, 13 Tex. 241, 65 Am. Dec. 61.

[c] But where it appears from the complaint that the defendant did not reside in the state in which the judgment was rendered, the complaint must contain an allegation of service of process or an appearance on the part of the defendant. *Downs v. Downs*, 123 Ky. 405, 96 S. W. 536. See also *Wilbur v. Abbot*, 6 Fed. 814.

97. U. S.—*Pennington v. Gibson*, 16 How. 65, 14 L. ed. 847; *Tenney v. Townsend*, 9 Blatchf. 274, 23 Fed. Cas. No. 13,832. Cal.—*Meredith v. Santa Clara Min. Assn.*, 56 Cal. 178. Colo.—*Bruckman v. Taussig*, 7 Colo. 561, 5 Pac. 152. Ill.—*Dunbar v. Hollowell*, 34 Ill. 168. Ind.—*Hardin v. Hardin*, 168 Ind. 352, 81 N. E. 60; *Roberts v. Leutzke*, 39 Ind. App. 577, 78 N. E. 635; *Gates v. Newman*, 18 Ind. App. 392, 46 N. E. 654. Ky.—*Montgomery v. Consolidated Store Co.*, 115 Ky. 156, 72 S. W. 816, 103 Am. St. Rep. 302. Mont.—*State ex rel. Nipp v. District Court*, 46 Mont. 425, 128 Pac. 590, Ann. Cas. 1916B, 256. N. Y.—*Crane v. Crane*, 19 N. Y. Supp.

691, 46 N. Y. St. 569. Pa.—*Thompson v. Owen*, 8 Kulp 36. S. D.—*Gude v. Dakota F. & M. Ins. Co.*, 7 S. D. 644, 65 N. W. 27, 58 Am. St. Rep. 860. Wash.—*Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204. Wis.—*Kunze v. Kunze*, 94 Wis. 54, 68 N. W. 391, 59 Am. St. Rep. 857; *Jarvis v. Robinson*, 21 Wis. 523, 94 Am. Dec. 560.

[a] "Had it appeared by the complaint that the McLean Circuit Court was one of general jurisdiction, that would have been sufficient to show its jurisdiction in the proceeding, and, under the rule affirmed by our own decisions and those of the Federal Courts, the legal presumption could be indulged that it, being one of general jurisdiction, proceeding within the general scope of its powers, acted rightly, and all intendments of the law would be presumed in favor of its acts. Under these circumstances, in the absence of anything to the contrary, it would be presumed to have had jurisdiction to give the decree which it rendered, and this presumption would embrace jurisdiction not only of the subject-matter of the action in which the decree was given, but also jurisdiction over the parties thereto." *Hardin v. Hardin*, 168 Ind. 352, 81 N. E. 60.

[b] The "law does not presume that because a court in a sister state assumed to render a judgment it had jurisdiction to do so, nor can the courts of this state take judicial notice of the jurisdiction of such courts. . . . Even in respect to our own courts of special jurisdiction, it is necessary in pleading their judgments to allege generally that such judgment 'was duly given' (sec. 148, Civil Code), and but for the statute it would be necessary to state the facts giving jurisdiction. It results therefore that as we do not know whether the circuit court of Dearborn County, Indiana, is a court of general or special jurisdiction, to presume in favor of its jurisdiction would be to place its judgments above the judgments of our own courts. Nor can the defect in the petition be cured by the record made part thereof; first, because defects in a petition can not be cured by reference to an exhibit made part

because of its name or otherwise the fact that the court is one of general jurisdiction is judicially noticed.<sup>98</sup> Where the jurisdiction of the court is purely statutory it is deemed a court of limited jurisdiction

of it; . . . and secondly, because, even if the petition could be aided by the exhibit, the exhibit would not prove that the court had jurisdiction of the subject-matter of the action, whatever it might prove as to jurisdiction of the person of the defendant. 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state;' but this has no reference to the rules of pleading. It relates solely to the effect of such records when offered in evidence. . . . Before such a record can be made available it must appear by appropriate allegations, and, if they are denied, by proof, that the court rendering the judgment had power to render it; and that can only be manifested by showing that it had jurisdiction both of the subject-matter and of the person of the defendant. It is only after a judgment of another state is shown to have been rendered by a court having jurisdiction that it comes within the provision of the Federal Constitution and the act of Congress prescribing the manner in which such records shall be proved, and declaring the effect thereof. . . . Until it is shown that the court rendering the alleged judgment had jurisdiction, it does not appear that such judgment was entitled to any faith or credit in the state where it was rendered. . . . When the jurisdiction of the court is established, then the record is as conclusive here as if it were the record of a domestic judgment. It is conclusive of the merits of the controversy therein decided; and in that respect, and in that alone, it differs from the record of a judgment rendered by a court of a foreign government, which is only *prima facie* evidence." *Gebhard v. Garnier*, 12 Bush (Ky.) 321, 23 Am. Rep. 721.

[c] "A judgment emanating from a court thus constituted, is in itself *prima facie* evidence of jurisdiction; and that it is not necessary for the party introducing the judgment to set out affirmatively . . . the jurisdictional facts upon which the power and authority of the court pronouncing the judgment depend." *Bank of United States v. Merchants Bank*, 7 Gill (Md.) 415.

[d] An allegation "that on the 3rd day of November, A. D. 1877, at Baltimore, in the State of Maryland, the Baltimore City Court, being a court of general jurisdiction, in an action therein pending between the above-named plaintiff and defendant, by its judgment duly given and made, adjudged that the plaintiff have and recover of the defendant the sum of \$10,350" is a sufficient averment of the jurisdiction of the court. *Meredith v. Santa Clara Min. Assn.*, 56 Cal. 178.

[e] Where the complaint is in the ordinary form in debt on a domestic judgment of a court of record, and it is added "as by the record and proceedings thereof remaining in said court fully appears," such averment is sufficient to show that the court rendering the judgment was a court of record. *Davis v. Lane*, 2 Ind. 548, 54 Am. Dec. 458.

[f] Special Judge.—It is not necessary to plead the laws of a state authorizing the rendition of a judgment by a special judge of a court of general jurisdiction. *Henry v. Allen*, 82 Tex. 35, 17 S. W. 515.

98. Ill.—*Rae v. Hulbert*, 17 Ill. 572. Kan.—*Butcher v. Bank of Brownsville*, 2 Kan. 70, 83 Am. Dec. 446. Neb.—*Specklemeyer v. Dailey*, 23 Neb. 101, 36 N. W. 356, 8 Am. St. Rep. 119. Okla.—See *Shufeldt v. Bank of Mound City*, 160 Pac. 923. Tex.—*Whitley v. General Electric Co.*, 18 Tex. Civ. App. 674, 45 S. W. 959. Wis.—*Kunze v. Kunze*, 94 Wis. 54, 68 N. W. 391, 59 Am. St. Rep. 857; *Jarvis v. Robinson*, 21 Wis. 523, 94 Am. Dec. 560.

But see *Tessier v. Englehart Co.*, 18 Neb. 167, 24 N. W. 734; *McLaughlin v. Nichols*, 13 Abb. Pr. (N. Y.) 244, and the preceding note.

As to judicial notice of the character and jurisdiction of courts of other states or countries, see fully 7 ENCY. OF EV. 996.

[a] In *Jarvis v. Robinson*, 21 Wis. 523, 94 Am. Dec. 560, it is said: "I think, where the title clearly indicates a court of general jurisdiction, it must be so understood, and is equivalent in pleading to an express averment to that effect. Such is the title here. We all

and in an action on its judgment the complaint must show that the judgment sued upon was rendered in the exercise of the statutory authority.<sup>99</sup> A judgment rendered by a court of another state may be pleaded in accordance with a statute providing that in pleading a judgment of a court of general jurisdiction it shall be sufficient to allege that the judgment was duly given or made,<sup>1</sup> even though it does not appear from the complaint that the court which rendered the judgment is a court of general jurisdiction.<sup>2</sup>

**Courts of Limited Jurisdiction.**—A complaint on a judgment rendered in another state by a court of inferior jurisdiction must set forth facts showing that the court had jurisdiction both of the person and the subject-matter,<sup>3</sup> since there is no presumption of jurisdiction as to such courts.<sup>4</sup> A general averment of jurisdiction is not sufficient but the statute giving such jurisdiction must be pleaded,<sup>5</sup> unless an allegation that the judgment was duly given or made is made sufficient by

know that the circuit courts of the several states are courts of general jurisdiction, as well as we know that courts of justice of the peace are not; and why should judges assume a degree of ignorance on the bench, which would be unpardonable in them when off of it? It is at most but a question of the degree of certainty required in the statement. I think the statement is practically clear and certain enough as it is. If it is denied, the plaintiff will then be required to establish on the trial the facts showing the jurisdiction of the court in which the judgment was rendered.”

99. *Ala.*—*Gunn v. Howell*, 27 *Ala.* 663, 62 *Am. Dec.* 785. *Ind.*—*Hardin v. Hardin*, 168 *Ind.* 352, 81 *N. E.* 60. *Mass.*—*Kelley v. Kelley*, 161 *Mass.* 111, 36 *N. E.* 837, 42 *Am. St. Rep.* 389, 25 *L. R. A.* 806. *Ohio.*—*Wilhelm & Son v. Parker*, 17 *Ohio Cir. Ct.* 234.

But see generally 15 *STANDARD PROC.* 629, et seq.

[a] **Divorce Decree.**—“It is historical and elementary, that under the common-law rule the jurisdiction over divorce cases rested entirely with the ecclesiastical courts of the realm, but in the several states of the Union that jurisdiction is purely statutory, and rests alone with those courts upon which it has been expressly conferred by legislative enactments. . . . That being true, no presumption of jurisdiction obtains in such proceeding in any court of any of the states of the Union; and all courts exercising jurisdiction in any such case must be taken

(and held to be courts of inferior or limited jurisdiction, and in pleading here such a judgment of a court of another state, it is absolutely necessary to aver in appropriate language its jurisdiction over the parties and the subject-matter of the suit, or to allege in the language of our statute, . . . that the judgment thereof was ‘duly given or made.’” *State ex rel. Stack v. Grimm*, 239 *Mo.* 340, 143 *S. W.* 450, *Ann. Cas.* 1913B, 1188.

1. *State ex rel. Stack v. Grimm*, 239 *Mo.* 340, 143 *S. W.* 450, *Ann. Cas.* 1913B, 1188; *Dodd v. Groll*, 19 *Ohio Cir. Ct.* 718, 8 *Ohio Cir. Dec.* 334. See *Stephens v. Roby*, 27 *Miss.* 744, and *supra*, III, B, 1, g, (II).

2. *Benedict v. Clarke*, 139 *App. Div.* 242, 123 *N. Y. Supp.* 964.

3. *Ala.*—*Gunn v. Howell*, 27 *Ala.* 663, 62 *Am. Dec.* 785; *Ellis v. White*, 25 *Ala.* 540. *Ind.*—*Toledo W. & W. Ry. Co. v. McNulty*, 34 *Ind.* 531. *Ia.*—*Gay v. Lloyd*, 1 *G. Gr.* 78, 46 *Am. Dec.* 499. *Ky.*—*Morgan Lumber Co. v. Williams*, 143 *Ky.* 115, 136 *S. W.* 131. *N. Y.*—*McLaughlin v. Nichols*, 13 *Abb. Pr.* 244. *Ohio.*—*Pelton v. Platner*, 13 *Ohio* 209, 42 *Am. Dec.* 197. *Tex.*—*Beal v. Smith*, 14 *Tex.* 305.

4. See *supra*, III, B, 1, g, (II), and 15 *STANDARD PROC.* 629, et seq.

5. *Ala.*—*Ellis v. White*, 25 *Ala.* 540. *Ind.*—*Snyder v. Snyder*, 25 *Ind.* 399. *N. Y.*—*Sheldon v. Hopkins*, 7 *Wend.* 435. *Tex.*—*Grant v. Bledsoe*, 20 *Tex.* 456.

[a] **Facts Must Be Pledged.**—Where it is averred in the complaint that

statute.<sup>6</sup> In the latter case the language of the statute should be strictly followed.<sup>7</sup>

e. *Plea or Answer.*—(I.) **Generally.**—Generally in an action on a judgment of a court of another state nul tiel record is the proper general issue,<sup>8</sup> and nil debet is not a good plea,<sup>9</sup> since by virtue of the federal constitution the judgment must be given the same effect as it has

the justice of the peace had jurisdiction of the person and the subject-matter, and that his court was created by, and he held the same under, the authority of the statutes of the state of Missouri, such averment is not sufficient to show jurisdiction, but "the plaintiff must not only aver the jurisdiction of the justice of the peace of another state, but in pursuance of the rule in pleading the proceedings of inferior jurisdiction, he must aver the facts which confer authority; or, in other words, he must plead the statute of the sister state which gives the jurisdiction." *Grant v. Bledsoe*, 20 Tex. 456.

[b] **The statute giving jurisdiction on appeal** from the justice to the circuit court must be alleged in an action on a judgment of the latter on such an appeal. *Kellam v. Toms*, 38 Wis. 592.

6. *Snyder v. Snyder*, 25 Ind. 399; *Crake v. Crake*, 18 Ind. 156; *Etz v. Wheeler*, 23 Mo. App. 449. See *supra*, this section, and III, B, 1, g, (II).

[a] But see *Karns v. Kunkle*, 2 Minn. 313, holding that notwithstanding such a statutory provision a general averment that a judgment of a court of limited jurisdiction of another state has been duly given or made is not sufficient, as such statute applies to domestic judgments only.

7. See *supra*, III, B, 1, g, (II).

[a] "It is well settled that in pleading a judgment of a court of special or limited jurisdiction all the facts must be alleged specifically showing jurisdiction both of the subject-matter and of the person, unless the statutory method . . . is followed. . . . In this state, as well as nearly, if not all the states of the Union, the necessity of setting forth all the facts showing jurisdiction as required at common law is dispensed with by statute. . . . The weight of authority seems to be that the pleading must be couched in the exact words of the statute, or in words of exactly the equivalent meaning. . . . The complaint in the case at bar does not conform to the statute

above mentioned. . . . It merely alleges a conclusion of law that the justice had jurisdiction as such to render the judgment sued upon. We therefore hold that this complaint fails to state facts sufficient to constitute a cause of action." *Strecker v. Railson*, 16 N. D. 68, 111 N. W. 612, 8 L. R. A. (N. S.) 1099.

8. **U. S.**—*Maxwell v. Stewart*, 21 Wall. 71, 2 Wall. 77, 22 L. ed. 564; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *McElmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177; *Hampton v. McConnell*, 3 Wheat. 234, 4 L. ed. 378. **Ala.**—*Hunt v. Mayfield*, 2 Stew. 124. **Ark.**—*Egan v. Tewksbury*, 32 Ark. 43; *Hensley v. Force*, 12 Ark. 756. **Conn.**—*Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683. **Ga.**—*Little Rock, etc. Co. v. Hodge*, 112 Ga. 521, 37 S. E. 743. **Ill.**—*Zepp v. Hager*, 70 Ill. 223; *Knickerbocker L. Ins. Co. v. Barker*, 55 Ill. 241; *Lawrence v. Jarvis*, 32 Ill. 304. **Ind.**—*Buchanan v. Port*, 5 Ind. 264; *Davis v. Lane*, 2 Ind. 548, 54 Am. Dec. 458. **Ia.**—*Hindman v. Mackall*, 3 G. Gr. 170. **Md.**—*Duvall v. Fearson*, 18 Md. 502; *Hughes v. Davis*, 8 Md. 271. **Mass.**—*Brainard v. Fowler*, 119 Mass. 262; *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356. **Miss.**—*Marx v. Logue*, 71 Miss. 905, 15 So. 890; *Wright v. Weisinger*, 5 Smed. & M. 210. **N. Y.**—*Shumway v. Stillman*, 4 Cow. 292, 15 Am. Dec. 374. **N. C.**—*Carter v. Wilson*, 18 N. C. 362, replication. **Pa.**—*Benton v. Burgot*, 10 Serg. & R. 240. **Va.**—*Bowler v. Huston*, 30 Gratt. (71 Va.) 266, 32 Am. Rep. 673.

9. **U. S.**—*Hampton v. McConnell*, 3 Wheat. 234, 4 L. ed. 378; *Mills v. Dur- yee*, 7 Cranch 431, 3 L. ed. 411; *Short v. Wilkinson*, 2 Cranch 22, 22 Fed. Cas. No. 12,810. **Ala.**—*Andrews v. Flack*, 88 Ala. 294, 6 So. 907. **Ark.**—*Morehead v. Grisham*, 13 Ark. 431; *Hensley v. Force*, 12 Ark. 756. **Ill.**—*Knickerbocker L. Ins. Co. v. Barber*, 55 Ill. 241; *Lawrence v. Jarvis*, 32 Ill. 304; *Chipps v. Yancey*, 1 Ill. 19; *Raymond v. Varnum*, 185 Ill. App. 289. **Ind.**—*Buchanan v.*

where rendered, and it is there ordinarily conclusive as to the question of indebtedness when collaterally in question.<sup>10</sup> Where, however, the judgment is for any reason not conclusive but merely *prima facie* evidence of indebtedness a plea of *nil debet* would be proper.<sup>11</sup> And the same is true where the judgment is not regarded as being within the constitutional provision,<sup>12</sup> as in the case of judgments of courts of

Port, 5 Ind. 264; *Davis v. Lane*, 2 Ind. 548, 54 Am. Dec. 458. **Ky.**—*Garland v. Tucker*, 1 Bibb 361. **Md.**—*Hughes v. Davis*, 8 Md. 271. **Miss.**—*Marx v. Logue*, 71 Miss. 905, 15 So. 890. **N. J.** *Lanning v. Shute*, 5 N. J. L. 778; *Curtis v. Gibbs*, 2 N. J. L. 399. **Pa.** *Evans v. Tatem*, 9 Serg. & R. 252, 11 Am. Dec. 717; *Jones v. Quaker City Ins. Co.*, 23 Pa. Co. Ct. 529. **Tenn.** *Earthman's Admrs. v. Jones*, 2 Yerg. 484. **Vt.**—*Newcomb v. Peck*, 17 Vt. 302, 44 Am. Dec. 340; *St. Albans v. Bush*, 4 Vt. 58, 23 Am. Dec. 246. **Va.** *Bowler v. Huston*, 30 Gratt. (71 Va.) 266, 32 Am. Rep. 673; *Kemp v. Mundell*, 9 Leigh (36 Va.) 12; *Clarke's Admr. v. Day*, 2 Leigh (29 Va.) 172.

[a] Judgments of courts of another state, "are not to be regarded as foreign, but as domestic judgments, and the only question that can be inquired into is, whether the court which pronounced the judgment had jurisdiction of the subject matter and the persons of the parties. Accordingly, it has been held that *nil debet* is not a good plea in an action of debt on a judgment rendered in a sister state." *Zepp v. Hager*, 70 Ill. 223.

[b] It "is very clear that the defendant can interpose no plea, which denies the record. The record does not derive its efficacy from the fact of notice to the parties; but it is valid and effectual, in consequence of its being the judgment of a court of record. . . . It appears to us that the averments in the pleas of the defendants do expressly contradict the record, and that the defendants' only remedy, if the facts are as they have stated them to be, is to apply to the court where the judgment was rendered to vacate the judgment. . . . And, indeed, notwithstanding some decisions to the contrary, in some of the states, we do not see how this fact, appearing in the record, can be denied and traversed, without setting aside the record altogether; and, from the decisions made in this state, . . . we do not consider

it now an open question. With respect, therefore, to the plea of *nil debet* in this action, we consider it is bad, as the debt, on which the plaintiff declares, is a debt of record." *Newcomb v. Peck*, 17 Vt. 302, 44 Am. Dec. 340.

[c] If, however, the court rendering the judgment did not have jurisdiction, the judgment is absolutely void, and in such case, a special plea in bar, going to matters anterior to its rendition may be interposed. *Andrews v. Flack*, 88 Ala. 294, 6 So. 907.

10. See 15 STANDARD PROC. 644, et seq.

[a] "The circumstance that the declaration does not show, in express terms, that the court had jurisdiction of the person of the defendant, can be no ground for the plea of *nil debet*. That plea is only admissible where the suit is founded on a matter of fact. The foundation of the present suit is a judgment of a court of record in Mississippi. Had the suit been brought in that state, the defendant could not have pleaded *nil debet*, because the common law, which must be presumed to be in force there, does not permit such plea to a suit on a record. By the constitution of the United States, and an act of congress of 1790, the judgment of a court in any one of the states has the same faith and credit in the other states that it has in the state where it was rendered. . . . The judgment before us, therefore, being matter of record in Mississippi, must be treated as matter of record here; and the general issue to the suit is, not *nil debet*, but *nil tiel record*." *Davis v. Lane*, 2 Ind. 548, 54 Am. Dec. 458.

11. **Me.**—*Tourigny v. Houle*, 88 Me. 406, 34 Atl. 158. **Mass.**—*Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356. **N. H.**—*Dix v. Flanders*, 1 N. H. 246. **Pa.**—See *Evans v. Tatem*, 9 Serg. & R. 252, 11 Am. Dec. 717.

See *infra*, III, B. 4, c.

12. See note following.

[a] "Congress, by their act, pre-

limited jurisdiction which some courts have treated as outside the scope of the full faith and credit clause,<sup>13</sup> though this is not now recognized as the correct rule.<sup>14</sup> If the action be on a decree in equity, it has been held that neither a plea of nil debet nor nul tiel record is proper.<sup>15</sup>

A general denial under the code system of pleading is equivalent to a plea of nul tiel record.<sup>16</sup> A plea of nul tiel record does not put in issue the validity of the assignment of the judgment sued on,<sup>17</sup> neither the pendency of an appeal,<sup>18</sup> nor the levy of an execution,<sup>19</sup> constitute a defense to the action unless the plea or answer shows that such proceedings would prevent action in the state where the judgment was rendered. According to some authorities the plea of nul tiel record

scribed what was the faith and credit to be given in one state to judgments rendered in another; or, as is said in some cases, what was the effect and operation of such judgments; but they were not authorized, and did not assume to direct anything as to the course of proceedings or the forms of pleadings in the courts of the states. And in order to settle what was the effect of a judgment of another state, or the faith and credit to be given to it, it was not necessary to interfere with the rules of pleading. Those rules were matters of purely municipal regulation, to be governed in each state by its own laws. . . . The judgment, . . . as presented to the court by the record, furnished no evidence that the defendant had notice, or appeared to the suit; and it could not be presumed that the act of Congress applied to it, and the plea of nil debet was therefore a good plea, as it would be to any foreign judgment." *Judkins v. Union Mut. F. Ins. Co.*, 37 N. H. 470.

13. See *Warren v. Flagg*, 2 Pick. (Mass.) 448; *Silver Lake Bank v. Harding*, 5 Ohio 545. But see 15 STANDARD PROC. 658.

[a] "The judgments of justices of the peace of other states are not to be considered of greater dignity than the judgments of foreign courts, and therefore, it is our opinion that in an action of debt brought in this state, on a judgment obtained before a justice of the peace of another state, nil debet is a proper plea." *Graham v. Grigg*, 3 Harr. (Del.) 408.

14. See 15 STANDARD PROC. 658, and 7 ENCY. OF EV. 842.

[a] The plea of nul tiel record to an action of debt on a judgment of a justice of the peace in another state is

a mere nullity. *Collins v. Modisett*, 1 Blackf. (Ind.) 60. See also *McElfatrick v. Taft & Son*, 10 Bush (Ky.) 160.

15. *Evans v. Tatem*, 9 Serg. & R. (Pa.) 252, 11 Am. Dec. 717, since such a decree is not a "record." The plea should be framed to meet the averment in the declaration, and conclude to the country.

16. *Little Rock, etc. Co. v. Hodge*, 112 Ga. 521, 37 S. E. 743; *Rice v. Countant*, 38 App. Div. 543, 56 N. Y. Supp. 351. See *supra*, III, B, 1, g, (III), (A).

[a] Denial of Indebtedness.—"The denial of indebtedness puts nothing in issue. The statement that the obligation upon which the Iowa judgment was recovered had been paid prior to the recovery of the judgment, is immaterial. It is not the statement of a possible defense to this action. The question of payment might have been litigated in the original suit, but the parties are concluded by the judgment." *Harter v. Shull*, 17 Colo. App. 162, 67 Pac. 911.

17. *Marx v. Logue*, 71 Miss. 905, 15 So. 890.

18. See *supra*, III, B, 2, a, (II), (B).

[a] An allegation in the answer that an appeal from the judgment sued on is pending without a statement that under the laws of the state, where the judgment was rendered, the effect of an appeal is to suspend the judgment appealed from does not state any defense to an action on a judgment of a court of another state. *Taylor v. Shew*, 39 Cal. 536, 2 Am. Rep. 478.

19. See *supra*, III, B, 2, a, (II), (B).

should be verified,<sup>20</sup> while others hold it should conclude to the contrary.<sup>21</sup>

(II.) **Want of Jurisdiction.**—While the regularity of the proceedings in a court of another state cannot be inquired into,<sup>22</sup> a court is not precluded from inquiring into the jurisdiction of the court of another state which rendered the judgment sued upon,<sup>23</sup> notwithstanding express recitals in the judgment as to the jurisdictional facts.<sup>24</sup> Want of jurisdiction, however, when not apparent on the face of the record,

20. **U. S.**—*Wittmore v. Malcomson*, 28 Fed. 605. **Me.**—*Endicott v. Morgan*, 66 Me. 456. **Mass.**—*Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356.

See *supra*, III, B, 1, g, (III), (A), and the title "Nul Tiel Record."

21. *Baldwin v. Hale*, 17 Johns. (N. Y.) 272. See *Wright v. Weisinger*, 5 Smed. & M. (Miss.) 210.

22. See 15 STANDARD PROC. 669, et seq.

[a] If "a court of another state, having jurisdiction over the subject and parties, has rendered a judgment, such judgment will bind the party against whom it is rendered, and he will not be permitted to look into the transaction in an action brought on the judgment, in order to show that such judgment should not have been rendered. The judgment will have the same credit, validity and effect in every other court in the United States, which it has in the state where pronounced, and whatever pleas would be good to a suit thereon in such state, and no others, can be pleaded in any other court in the United States." *Lawrence v. Jarvis*, 32 Ill. 304.

23. 15 STANDARD PROC. 662. See also the following: **U. S.**—*Lincoln v. Tower*, 2 McLean 473, 15 Fed. Cas. No. 8,355. **Ky.**—*Bryant v. Shute's Exr.*, 147 Ky. 268, 144 S. W. 28. **Me.**—*McKim v. Odom*, 12 Me. 94. **Md.**—*Mundy v. Jacques*, 116 Md. 11, 81 Atl. 289.

[a] "When a judgment debtor is sued here upon a judgment the defenses open to him depend upon the fact as to where the judgment was entered. If in our own courts the defense of want of service and that he never appeared is not open, and usually can be availed of only by proceedings to revise or annul the judgment. . . . But when the judgment sued on here is not a domestic judgment, and is one rendered in another state or jurisdiction, the defendant may plead and prove that he

was not duly served with process and did not authorize an appearance in the action in which the judgment was entered." *Chicago Title & Tr. Co. v. Smith*, 185 Mass. 363, 70 N. E. 426, 102 Am. St. Rep. 350.

[b] "The defendant may show, in bar of an action on the record of a judgment of another state, that the judgment was fraudulently obtained, or that the court pronouncing it had neither jurisdiction of his person, nor of the subject matter of the action. If he succeed in establishing any one of these defenses, the judgment is entitled to no credit, and the plaintiff is driven to his suit on the original cause of action." *Welch v. Sykes*, 8 Ill. 197, 44 Am. Dec. 689.

24. 15 STANDARD PROC. 667.

See also the following: **U. S.**—*Hill v. Mendenhall*, 21 Wall. 453, 22 L. ed. 616; *Knowles v. Gaslight Co.*, 19 Wall. 58, 22 L. ed. 70; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897. **Del.**—*Mitchell, Vance & Co. v. Ferris & Co.*, 5 Houst. 34. **Mo.**—*Wise v. Loring*, 54 Mo. App. 258. **Tex.**—*Chunn v. Gray*, 51 Tex. 112. **Wash.**—*Aultman, Miller & Co. v. Mills*, 9 Wash. 68, 36 Pac. 1046; *Ritchie v. Carpenter*, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877. But see *Wright v. Weisinger*, 5 Smed. & M. (Miss.) 210.

[a] The plea averring lack of jurisdiction "is always open to defendant, and both as to the parties and subject-matter, and even when the jurisdictional facts are recited in the judgment." *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969.

[b] It "is perfectly competent for a defendant in an action in one state, on a judgment rendered in another, to plead and show in his defense that he was not summoned and did not appear in person or by attorney in the suit in such other court; and that, too, even though it be expressly stated in the

must be specially pleaded,<sup>25</sup> and a plea denying the jurisdiction of the court of another state must negative by express averment every fact upon which such jurisdiction can be predicated,<sup>26</sup> and if by any rea-

record of the suit in that court that he was actually summoned or did so appear. The judgment is not conclusive on either of those points, though it may be conclusive on the merits if the court have jurisdiction of the case." *Bowler v. Huston*, 30 Gratt. (71 Va.) 266, 32 Am. Rep. 673.

25. *Chemical Nat. Bank v. Kellogg*, 71 N. J. L. 126, 58 Atl. 397; *Bowler v. Huston*, 30 Gratt. (71 Va.) 266, 32 Am. Rep. 673.

[a] Under a plea of nul tiel record want of jurisdiction, which does not appear upon the face of the record, cannot be shown. "A defense contradicting the record must be pleaded that the facts may be put in issue. A defect appearing upon the face of the record may be taken advantage of under a plea of nul tiel record, but those requiring extrinsic proof to make them apparent, must be alleged before proved. This is in accord with precedents and the elementary principles of good pleading." *Wood v. Agostines*, 72 Vt. 51, 47 Atl. 108.

[b] A general denial (1) under the code pleading does not put want of jurisdiction in issue. "The general denial goes only to the extent of denying the existence of the facts necessary to the cause of action, not to the jurisdiction of the court in which the judgment on which this action is based was found, and is in effect to plead nul tiel record." *Rice v. Coutant*, 38 App. Div. 543, 56 N. Y. Supp. 351. See also *Little Rock, etc. Co. v. Hodge*, 112 Ga. 521, 37 S. E. 743. (2) The defendant may, however, show under a general denial that the appearance of the person who assumed to act as his attorney was without authority. *Hays v. Merkle*, 67 Mo. App. 55.

[c] Objection Prior to Trial.—(1) The objection on the ground that the court had no jurisdiction must be raised prior to the trial of the action (*McDermott, etc. Co. v. Dixon*, 68 N. J. L. 49, 52 Atl. 283; *Ferry v. Miltimore Elastic Steel C. W. Co.*, 71 Vt. 457, 45 Atl. 1035, 76 Am. St. Rep. 787), (2) and cannot be first raised on appeal. *Latterett v. Cook*, 1 Iowa 1, 63 Am. Dec. 428.

26. U. S.—*L'Engle v. Gates*, 74 Fed. 513. Ala.—*Foster v. Glazener*, 27 Ala. 391; *Puckett v. Pope*, 3 Ala. 552; *McGee v. Sheffield*, 3 Stew. & P. 351. Conn. *Smith v. Rhoades*, 1 Day 168. Fla. *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526. Ill.—*Welch v. Sykes*, 8 Ill. 197, 44 Am. Dec. 689. Ia.—*Latterett v. Cook*, 1 Iowa 1, 63 Am. Dec. 428. Mo.—*Wilson v. Jackson*, 10 Mo. 329; *Hays v. Merkle*, 67 Mo. App. 55. N. J. *Moulin v. Trenton, etc. Ins. Co.*, 24 N. J. L. 222. N. Y.—*Starbuck v. Murray*, 5 Wend. 148, 21 Am. Dec. 172; *Rice v. Coutant*, 38 App. Div. 543, 56 N. Y. Supp. 351. Ore.—*Foshier v. Narver*, 24 Ore. 441, 34 Pac. 21, 41 Am. St. Rep. 874. Vt.—*Waddams v. Burnham*, 1 Tyler 233. Va.—*Bowler v. Huston*, 30 Gratt. (71 Va.) 266, 32 Am. Rep. 673; *Wilson v. Bank of Mt. Pleasant*, 6 Leigh (33 Va.) 570. Wash.—*Aultman, Miller & Co. v. Mills*, 9 Wash. 68, 36 Pac. 1046; *Ritchie v. Carpenter*, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877.

[a] General Allegation Insufficient. Judgments of courts of record of another state cannot "be impugned by a mere allegation of want of jurisdiction. But he who would defeat a judgment on this ground, must show the want of jurisdiction by appropriate allegations of fact, unless it appear on the face of the judgment. . . . The laws of Ohio, in virtue of which the judgment is alleged to be invalid, must here be specially pleaded. It is not enough, therefore, to say, that by reason of such and such facts, en pais, the proceeding was unauthorized, or beyond the jurisdiction of the court, and therefore void, unless such facts are sufficient of themselves, as by some universal law, to show that the proceeding was entitled to no effect, as if a judgment was rendered against an individual without appearance or notice, actual or constructive." *Davis v. Connelly's Exrs.*, 4 B. Mon. (Ky.) 136. To the same effect, *Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. ed. 133.

[b] "The facts necessary to show that the court did not acquire such jur-

sonable intendment the facts alleged can exist and the court which rendered the judgment sued on still have had jurisdiction, the plea is bad.<sup>27</sup> Thus, an allegation in an answer that the defendant at the time of the commencement of the action and ever since was not a resident of the state wherein the judgment was rendered is insufficient as it does not exclude the possibility of defendant having been served with process while temporarily in that state,<sup>28</sup> and in such case it should also be averred that the defendant did not voluntarily appear in the action.<sup>29</sup> The jurisdiction of the court, however, is sufficiently denied by an averment that the defendant was neither served with process nor entered an appearance in the action.<sup>30</sup>

(III.) **Fraud.**—An answer showing a state of facts which would be sufficient to avoid the judgment in the state wherein it was rendered on the ground of fraud is generally deemed a good defense to an ac-

isdiction (of the person) were the negative of every means by which jurisdiction might have been acquired. To this the defendant avers in his plea that he was not served with process; that he had no notice whatever of the existence of the suit; that he made no appearance to the action either in person or by attorney and that when the suit was brought as well as when the judgment was rendered he was a non-resident of the state of Louisiana. We know of no other means by which the court could have acquired jurisdiction of the person, and if there was none and these averments are true . . . then the court of Louisiana did not acquire jurisdiction of his person; and we have said that this was a valid defense at law. The plea is in apt form; and we think the circuit court erred in sustaining the demurrer to it." *Barkman v. Hopkins*, 11 Ark. 157.

[c] An averment that defendants were not "legally served" without a statement of facts showing the reason for such claim, where the record shows that they were "summoned," is insufficient. *Motter v. Welty*, 12 Pa. Co. Ct. 82.

[d] **Jurisdiction of Subject-Matter.** Where defendant alleges that he never was served with process in the original proceeding and that the court had no jurisdiction of his person, such a defense raises no issue of jurisdiction as to the subject-matter. *Latterett v. Cook*, 1 Iowa 1, 63 Am. Dec. 428.

[e] **Unauthorized Appearance by Attorney.**—An allegation that the person who assumed to act as defendant's

attorney appeared in the action without defendant's knowledge or consent is insufficient unless it is also shown that the attorney was not retained by the defendant. *Home Friendly Soc. v. Tyler*, 2 Pa. Dist. 693.

[f] **Allegation that original complaint did not state a cause of action** is not sufficient to show lack of jurisdiction. *Williams v. Renvick*, 52 Ark. 160, 12 S. W. 331.

27. *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526.

28. **Ala.**—*Andrews v. Flack*, 88 Ala. 294, 6 So. 907; *M'Gee v. Sheffield*, 3 Stew. & P. 351. **Conn.**—*Smith v. Rhoades*, 1 Day 168. **Ia.**—*Struble v. Malone*, 3 Iowa 586. **Mo.**—*Wilson v. Jackson*, 10 Mo. 329. **N. Y.**—*Shumway v. Stillman*, 4 Cow. 292, 15 Am. Dec. 374.

29. *Harrod v. Barretto*, 1 Hall (N. Y.) 155.

[a] **Allegation on Non-Appearance Necessary.**—An averment that defendant at the time of the alleged service of the summons was not a resident of the state, where the judgment was rendered, that he was not served with notice of the pendency of the suit and that he had no one in such state authorized to appear for him is insufficient, unless there is added an allegation that he did not appear or that he did not voluntarily submit his case to the court. *Struble v. Malone*, 3 Iowa 586.

30. **Ill.**—*Shufeldt v. Buckley*, 45 Ill. 223. **Ind. Ter.**—*Minter v. Green*, 3 Ind. Ter. 761, 49 S. W. 48. **N. J.**—*McDermott, etc. Co. v. Dixon*, 68 N. J. L. 49, 52 Atl. 283.

tion on a judgment of another state,<sup>31</sup> though there are some decisions which seem to hold that fraud is not available as a defense.<sup>32</sup> But

31. **Fla.**—*Sammis v. Wightman*, 31 Fla. 10, 12 So. 526. **Ill.**—*Forrest v. Fey*, 218 Ill. 165, 75 N. E. 789, 109 Am. St. Rep. 249, 1 L. R. A. (N. S.) 740; *Field v. Field*, 215 Ill. 496, 74 N. E. 443; *Van Matre v. Sankey*, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; *Ambler v. Whipple*, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202. **Ind.**—*Brown v. Eaton*, 98 Ind. 591; *Lee v. Back*, 30 Ind. 148; *Sherrard v. Nevius*, 2 Ind. 241, 52 Am. Dec. 508. **Ia.**—*Dunlap & Co. v. Cody*, 31 Iowa 260, 7 Am. Rep. 129. **Kan.**—*Abercrombie v. Abercrombie*, 64 Kan. 29, 67 Pac. 539. **Ky.** *Clark v. Ogilvie*, 111 Ky. 181, 63 S. W. 429. **Miss.**—*White v. Trotter*, 14 Smed. & M. 30, 53 Am. Dec. 112. **Mo.** *Payne v. O'Shea*, 84 Mo. 129; *Ward v. Quinlavin*, 57 Mo. 425; *Wyeth, etc. Co. v. Lang & Co.*, 54 Mo. App. 147. **Neb.**—*Snyder v. Critchfield*, 44 Neb. 66, 62 N. W. 306; *Keeler v. Elston*, 22 Neb. 310, 34 N. W. 891; *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365. **N. J.**—*Wilson v. Anthony*, 72 N. J. Eq. 836, 66 Atl. 907; *Davis v. Headley*, 22 N. J. Eq. 115. **N. Y.**—*Gray v. Richmond Co.*, 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Malone v. Bocker*, 82 Misc. 438, 143 N. Y. Supp. 1095. **N. C.**—*Roberts v. Pratt*, 152 N. C. 731, 68 S. E. 240; *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969; *Levin v. Gladstein*, 142 N. C. 482, 55 S. E. 371, 115 Am. St. Rep. 747, 32 L. R. A. (N. S.) 905. **Ore.**—*Murray v. Murray*, 6 Ore. 17. **Tenn.**—*Coffee v. Neely*, 2 Heisk. 304. **Tex.**—*Drinkard v. Ingram*, 21 Tex. 650, 73 Am. Dec. 250; *Norwood v. Cobb*, 20 Tex. 588; *Babcock v. Marshall*, 21 Tex. Civ. App. 145, 50 S. W. 728. **Va.**—*Vaught v. Meador*, 99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908. **W. Va.**—*Black v. Smith*, 13 W. Va. 780. **Wis.**—*Brown v. Parker*, 28 Wis. 21. **Wyo.**—*United States Fidelity & G. Co. v. Parker*, 20 Wyo. 29, 121 Pac. 531; *Bank of Chadron v. Anderson*, 6 Wyo. 518, 48 Pac. 197.

See 15 STANDARD PROC. 668.

[a] "There has been much discussion in the courts of the United States and of the various states respecting

the right to impeach such judgments for fraud in their procurement, by reason of the provisions of the constitution and statutes of the United States respecting the faith and credit to be given by each state to the public acts, records, and judicial proceedings in the courts of other states, but the general trend of authority and the great weight thereof is in favor of allowing such a defense if it would have been permissible in a suit upon the judgment in the state where it was rendered." *Bank of Chadron v. Anderson*, 6 Wyo. 518, 48 Pac. 197.

[b] In *Rogers v. Gwinn*, 21 Iowa 58, it is said: "If the judgment sued on had been rendered by a court in Iowa, the facts found by the court below, would be a good defense, at least in equity, to an action upon it, or sufficient to require a court of equity, upon petition filed for that purpose, to cancel it. And we cannot doubt that they would be so regarded by the courts of Kentucky, if this action had been brought in that state, or if the defendant, in that state, had sought relief against the judgment. So that if we should hold, as the appellant insists we should, we would be giving to the judgment of the court of one sister state, a greater force and effect than it would have there, and a greater force and effect than we would give to a like judgment rendered by our own courts. This the constitution of the United States and the act of congress do not require. We are only required to give to it the same effect here that it would have in the state of Kentucky."

32. See the following cases: **U. S.** *Maxwell v. Stewart*, 21 Wall. 71, 22 Wall. 77, 22 L. ed. 564; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Peninsular Iron Co. v. Eells*, 68 Fed. 24, 15 C. C. A. 189. **Ala.**—*Lucas v. Copeland*, 2 Stew. 151. **D. C.**—*Richmond & D. R. Co. v. Gorman*, 7 App. Cas. 91. **Md.**—*Glenn v. Williams*, 60 Md. 93. **Mass.**—*Brainard v. Fowler*, 119 Mass. 262; *Goodrich v. Stevens*, 116 Mass. 170. **Mich.**—*Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067. **N. H.** *McDonald v. Drew*, 64 N. H. 547, 15 Atl. 148. **Ohio.**—*Anderson v. Anderson*,

where fraud is a defense, it is not sufficient to allege it in general terms, but the facts constituting the alleged fraud must be fully set forth.<sup>34</sup> The defendant cannot under such plea reopen the issues determined by the original judgment.<sup>34</sup>

f. *Replication*.—A replication to a plea that the judgment sued on was rendered without jurisdiction, follows the general rules governing replications.<sup>35</sup>

g. *Trial*.—(I.) *Generally*.—The issue raised by a plea of nul tiel record or its equivalent is triable by the court alone.<sup>36</sup> But where ques-

8 Ohio 108. **Pa.**—*Benton v. Burgot*, 10 Serg. & R. 240.

[a] In *Hambleton v. Glenn*, 72 Md. 331, 20 Atl. 115, it is said in regard thereto: "It has been strongly argued, however, that as fraud vitiates everything, even the most solemn judgments or decrees of the highest courts, the allegation of fraud as affecting a decree of a sister state ought to be allowed, if supported by facts, as a defense to an action founded on the decree; and this notwithstanding the provision of the constitution and laws of the United States, that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state;'. . . The general proposition contended for, as applied to judgments and decrees, is undoubtedly true. But the question here is, whether such defense can be taken in a *collateral proceeding*, founded upon a decree, where, to give effect to such defense, the decree of a court of competent jurisdiction of a sister state is required to be reviewed, and declared null and void by the court in which such defense is made? This is a federal question, and the court of last resort for the determination of such question would seem to have definitely settled, that the allegation of fraud in obtaining the judgment or decree sued on in a state other than that in which the judgment or decree was obtained, is not allowable as a defense; but that resort must be had for relief to some appropriate direct proceeding."

33. **U. S.**—*Ritchie v. McMullen*, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. ed. 133. **N. C.**—*Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969. **Tex.**—*Miller v. Lovell* (Tex. Civ. App.), 40 S. W. 835.

See the title "Fraud and Deceit."

34. *Field v. Sanderson*, 34 Mo. 542, 86 Am. Dec. 124.

35. See generally the title "Replication and Reply."

[a] *Previous Adjudication of Jurisdiction*.—An averment in a reply that the defendant had moved to vacate the judgment upon the ground of want of jurisdiction and that such motion was denied, is insufficient unless the statute giving the court jurisdiction to hear such motion is specifically pleaded. *Kohn v. Haas*, 95 Ala. 478, 12 So. 577.

[b] *Facts Showing Notice*.—(1) Where plaintiff in reply to an answer denying the court's jurisdiction pleads that the defendant "was personally duly notified," without stating the nature of the notice, such replication is bad on demurrer. *Long v. Long*, 1 Hill (N. Y.) 597. (2) The general averments, in the first part of the answer, that the judgment was "an irregular and void judgment" and, in the second part, that "said judgment was irregular," and, "without any jurisdiction or authority on the part of the court to enter such a judgment upon the facts and upon the pleadings in said action" are but averments of legal conclusions, and wholly insufficient to impeach the judgment.

36. **Ga.**—*Stewart v. Sholl*, 99 Ga. 534, 26 S. E. 757. **Ia.**—*Rea v. Scully*, 76 Iowa 343, 41 N. W. 36. **N. C.** *Carter v. Wilson*, 18 N. C. 362.

See *supra*, III, B, 1, h.

[a] "The issue made of nul tiel record was only triable by the court. It could not be inquired into by the jury. The truth of this plea can only be tried by an inspection of the record by the court, and if the court find from an examination that the record offered in evidence is the record declared on, they must find upon this

tions of fact are put in issue the decision thereof may be left to the jury.<sup>37</sup> In the absence of evidence offered on behalf of the defense it is proper to instruct the jury to return a verdict for the plaintiff.<sup>38</sup> In determining the effect of a judgment of a court of another state the whole record must be considered by the court,<sup>39</sup> but it cannot go behind the judgment and inquire into the original cause of action.<sup>40</sup>

(II.) **Variance.**—Actions on judgments of sister states are governed as to variance, by the general rules elsewhere treated.<sup>41</sup> If the judgment sued upon is sufficiently described in the complaint, so that the defendant cannot be misled, in reference to the court which rendered the judgment sued upon,<sup>42</sup> or as to the time when it was rendered,<sup>43</sup> or the parties to the action,<sup>44</sup> or the amount of the judgment,<sup>45</sup> a variance in any of these respects is immaterial. Where a copy of the judgment

issue for the plaintiff." *Hindman v. Mackall*, 3 Greene (Iowa) 170.

[b] **Damages.**—"Error is predicated on the fact that the jury was not allowed to assess the amount of plaintiff's recovery. If plaintiff's were entitled to recover at all, the measure thereof would be the amount due on the judgment. . . . There was nothing for a jury to do which might not properly be done by the court." *Longueville v. May*, 115 Iowa 709, 87 N. W. 432. But see *Mudd's Admr. v. Beauchamp*, 4 Bibb (Ky.) 483.

37. *Hindman v. Mackall*, 3 G. Gr. (Iowa) 170; *Kahn v. Lesser*, 28 Abb. N. C. 77, 18 N. Y. Supp. 98, 43 N. Y. St. 149. See generally the title "**Providence of Judge and Jury.**"

38. *Rea v. Scully*, 76 Iowa 343, 41 N. W. 36; *Coskery v. Wood*, 52 S. C. 516, 30 S. E. 475. See generally the title "**Verdict.**"

39. *McIntyre v. Moore*, 105 Ga. 112, 31 S. E. 144, the judgment apparently showing a joint liability is controlled by the remainder of the record showing a several liability.

40. *Lawrence v. Jarvis*, 32 Ill. 304.

41. See *supra*, III, B, 1, h, (II), and the title "**Variance and Failure of Proof.**"

[a] There are some very technical rules in some jurisdictions, and were at common law, respecting the variance between the allegations and the proof, especially upon the plea of nul tiel record; but we do not think that these rules in their strictness apply or should apply under the civil code. *Brady v. Palmer*, 19 Ohio Cir. Ct. 687.

42. *Ky.*—*Dudley v. Lindsey*, 9 B. Mon. 486, 50 Am. Dec. 522. *Miss.*

*Barringer v. Boyd*, 27 Miss. 473. *Mo.* *Chandler v. Garr*, 8 Mo. 428.

43. *Campbell v. Wolf*, 33 Mo. 459.

44. *Cal.*—*Stewart v. Spaulding*, 72 Cal. 264, 13 Pac. 661. *Mo.*—*Campbell v. Wolf*, 33 Mo. 459; *Randolph v. Keiler*, 21 Mo. 557. *N. Y.*—*Talamo v. Ermano*, 62 N. Y. Supp. 246. *Ohio.*—*Brady v. Palmer*, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27.

[a] **Partners.**—Where action on a foreign judgment is brought against defendants as partners and the judgment sued on was rendered against them as individuals, the variance is immaterial. "After the judgment was rendered, it affected them as individuals; and so far as the rights of the plaintiff were concerned, it was immaterial whether they were described as partners or not in this suit, as a judgment against them as individuals would bind both the individual and partnership property." *Stephens v. Roby*, 27 Miss. 744.

45. *Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593; *Iglehart v. Hobart*, 19 Ill. 637; *Ritchie v. Carpenter*, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877. See *supra*, III, B, 1, h, (II).

[a] **Costs.**—Where the declaration alleges a judgment for costs in a specified sum, but the record shows a judgment for costs generally and that they were subsequently in some manner not apparent, there is no variance. *Hunt v. Middlesworth*, 44 Mich. 448, 7 N. W. 57.

[b] **A judgment specifying payment in gold coin** does not vary from an allegation of a judgment in a specified

ment is attached to the complaint a variance between the allegations of the complaint and the judgment introduced in evidence is not material.<sup>46</sup> But a variance as to the place wherein,<sup>47</sup> or as to the court by which<sup>48</sup> the judgment sued upon was rendered, is fatal.

(III.) Judgment. — As a rule judgment can be rendered only for the amount for which execution under the original judgment could have been issued,<sup>49</sup> and the effect of the judgment sued on must be limited by the force it has in the state wherein it was rendered.<sup>50</sup> The failure to allege the law allowing interest in the state of rendition defeats the right to its allowance, in some jurisdictions,<sup>51</sup> unless the judgment itself provides for interest at a specified rate,<sup>52</sup> but in others, judgments of courts of record of other states, under the statute, bear the same rate of interest as domestic judgments,<sup>53</sup> or the presumption as to the foreign law being the same as the domestic supplies the place of an averment as to interest.<sup>54</sup> Where costs are regarded as part of the judgment, interest on them is also allowed,<sup>55</sup> but not otherwise.<sup>56</sup> If the original judgment be subsequently reversed, the judgment based upon it may be set aside.<sup>57</sup>

3. Judgments of State in Federal Courts and Vice Versa. — Action may be maintained in a state court upon a judgment rendered in a

sum. Belford v. Woodward, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593.

46. Varn v. Arnold Hat Co. (Tex. Civ. App.), 124 S. W. 693. See *supra*, III, B, 1, h, (II).

47. Pearsall v. Phelps, 3 Ala. 525.

48. Huie v. Devore, 138 App. Div. 677, 123 N. Y. Supp. 12.

49. Maxwell v. Collier, 6 Rob. (La.) 86; Arnold v. Roraback, 8 Allen (Mass.) 429; Battey v. Holbrook, 11 Gray (Mass.) 212.

50. See *supra*, III, B, 2, a, (II), and 15 STANDARD PROC. 649, et seq.

[a] "The judgment sued on can have no greater or larger extent or force in this state than it is entitled to in the state where it was recovered, and in that state, . . . this judgment, whatever may have been the pleadings or lack or omission of pleading, did not charge the administrator personally, but affected only the assets in his hands belonging to the estate of his intestate. . . . This being the law of Pennsylvania under which the judgment now sued on was recovered, the same law must be applied to it in this state when it is sought to be enforced against the administrator personally." Coates v. Mackey, 56 Md. 416.

51. Brady v. Palmer, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27. See Har-

ison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227. But see Mahurin v. Bickford, 6 N. H. 567.

52. Hudson v. Daily, 13 Ala. 722.

53. Reynolds v. Powers, 96 Ky. 481, 29 S. W. 299.

[a] Where the statute provides that interest shall be allowed on all moneys due upon any judgment it is broad enough to cover not only domestic judgments but also judgments of courts of another state. Shickle v. Watts, 94 Mo. 410, 7 S. W. 274.

54. See Murphy v. Murphy, 145 Cal. 482, 78 Pac. 1053. But see Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318.

55. Mellin v. Horlick, 31 Fed. 865.

[a] "The record of the judgment from New York shows that the plaintiff's costs were included in, and formed parcel of, the judgment. We are to presume that this is in conformity with the laws of that state. . . . Being therefore lawfully part of the judgment, interest would be as certainly an incident of that portion of it as any other. The judgment is a unit. It all bears interest or none." Wetherill v. Stillman, 65 Pa. 105.

56. Gatewood v. Palmer, 10 Humph. (Tenn.) 466.

57. Heckling v. Allen, 15 Fed. 196, on motion.

United States court,<sup>58</sup> and vice versa.<sup>59</sup> A state statute requiring leave to sue to be first obtained from the court in which the judgment was rendered, has no application to judgments of a federal court,<sup>60</sup> or to suits brought in the federal court.<sup>61</sup>

4. **On Judgments of Foreign Tribunals.**<sup>62</sup>—a. *Right of Action.* The tendency of more recent decisions seems to be to eliminate all distinctions between judgments of foreign tribunals and judgments of courts of sister states, and to apply to the former the principles which are applicable to the latter.<sup>63</sup> Formerly, however, judgments of foreign

58. *Morton v. Palmer*, 60 Hun 583, 14 N. Y. Supp. 912, 21 Civ. Proc. 94, 39 N. Y. St. 236; *Goodyear D. V. Co. v. Frisselle*, 22 Hun (N. Y.) 174; *Whitley v. General Elec. Co.*, 18 Tex. Civ. App. 674, 45 S. W. 959. See also 15 STANDARD PROC. 686.

As to the relation between state and federal courts with respect to the operation and effect of their judgments, see the title "Judgments."

[a] "The petition alleged that on a certain date, at a certain term of a circuit court of the United States, a court of record, naming the particular court and place of sitting, the certain judgment was rendered by such court in favor of plaintiff against the defendant in a cause therein pending in which they were parties plaintiff and defendant respectively, of which cause said court had jurisdiction. Our opinion is that the petition in this case alleged everything that has ever been held essential in such a pleading. . . . We judicially know that the circuit courts of the United States are courts of record, and where it is alleged that it rendered a judgment, it will be presumed that it was done in such form as to make it an adjudication by a court of record. It was even unnecessary for the petition to allege that said court had had jurisdiction of the particular case. . . . The contrary was a matter of defense." *Whitley v. General Elec. Co.*, 18 Tex. Civ. App. 674, 45 S. W. 959.

59. *First Nat. Bank v. Duel County*, 74 Fed. 373; *Union Trust Co. v. Rochester, etc. Co.*, 29 Fed. 609. See 15 STANDARD PROC. 682.

[a] **Reason.**—The principle that a court may refuse to allow a defendant to be vexed by a second action does not apply when such action is brought in another jurisdiction, as the "court has no power over the judgment ob-

tained in the state court, and is not clothed with the right to issue process for its enforcement. The present plaintiff is a nonresident corporation, carrying on business in the state of Missouri, and as such is entitled to invoke for the protection and enforcement of its rights the jurisdiction of the federal court; and the exercise of such jurisdiction cannot be declined by this court on the ground that there is in existence a judgment in the state court upon the same cause of action. Furthermore, the present plaintiff was not the plaintiff in the state court. This action is brought in the name of the assignee of the original judgment, in order that its right to enforce payment . . . shall be judicially determined,—a fact which shows that the second action was not brought simply to unduly vex the defendant county. For these reasons it cannot be held that this court should refuse to take jurisdiction." *First Nat. Bank v. Duel County*, 74 Fed. 373.

60. *Morton v. Palmer*, 60 Hun 583, 14 N. Y. Supp. 912, 21 Civ. Proc. 94, 39 N. Y. St. 236.

[a] **Federal Court Judgment Docketed in State Court.**—Although a judgment of the United States circuit court is docketed in the county clerk's office, it does not thereby become a judgment of a court of this state and does not come within the statute providing that in order to bring an action on a judgment of a court of this state it is necessary to obtain leave of court to sue. *Goodyear D. V. Co. v. Frisselle*, 22 Hun (N. Y.) 174.

61. *Union Trust Co. v. Rochester, etc. Co.*, 29 Fed. 609.

62. **Actions on domestic judgments**, see *supra*, IV, B, 1.

**Actions on judgments of sister states**, see *supra*, IV, B, 2.

63. **U. S.**—*Hilton v. Guyott*, 42 Fed.

tribunals were held to be only *prima facie* but not conclusive evidence of the debt,<sup>64</sup> and the doctrine of reciprocity in the recognition of foreign judgments has been applied.<sup>65</sup> But inasmuch as the recognition of a foreign judgment is wholly a matter of comity, an action cannot be maintained upon it unless it possesses certain fundamental requisites essential to a valid and subsisting judgment.<sup>66</sup> The court must have had jurisdiction both of the subject-matter and the person of the defendant.<sup>67</sup> Service of process on or appearance by the defendant is essential,<sup>68</sup> no matter what validity a judgment without it may have in the foreign country;<sup>69</sup> personal service upon the defendant outside the jurisdiction of the court rendering the judgment is not enough.<sup>70</sup>

b. *Form of Action.*—Assumpsit is the proper action on a judgment of a foreign tribunal where it is regarded as only *prima facie*

249. **III.**—*Baker v. Palmer*, 83 Ill. 568, 571, 572, 574. **N. Y.**—*Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404; *Cummings v. Banks*, 2 Barb. 602.

As to the conclusiveness of foreign judgments and their effect as a merger or bar, see the title "Judgments."

64. *Buttrick v. Allen*, 8 Mass. 273, 5 Am. Dec. 105.

[a] A distinction has been made between the effect of a foreign judgment as the basis of an action and as a defense, holding it conclusive only in the latter case. See *Griswold v. Pitcairn*, 2 Conn. 85; *Cummings v. Banks*, 2 Barb. (N. Y.) 602; *Monroe v. Douglas*, 4 Sandf. Ch. (N. Y.) 126.

65. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95.

66. See *supra*, III, B, 1, a, (II); III, B, 2, a, (II); and generally the title "Judgments."

[a] The law upon which it is based must be in harmony with the generally recognized principles of justice. *De Brimont v. Penniman*, 10 Blatchf. (U. S.) 436, 7 Fed. Cas. No. 3,715.

67. See *supra*, III, B, 2, a, (II), and 15 STANDARD PROC. 687, et seq.

68. *Monroe v. Douglas*, 4 Sandf. Ch. (N. Y.) 126.

69. *Bischoff v. Wethered*, 9 Wall. (U. S.) 812, 19 L. ed. 829.

70. *Mich.*—*McEwan v. Zimmer*, 38 Mich. 765, 31 Am. Rep. 332. **N. Y.** *Shepard v. Wright*, 113 N. Y. 582, 21 N. E. 724. **Wis.**—*Smith v. Grady*, 68 Wis. 215, 31 N. W. 477.

[a] "The judgment upon which this action was brought appears to have been rendered in the dominion of Canada by the court of chancery for Ontario, and is a personal judgment

against the defendant. The record shows that he did not appear in the action, and discloses as the ground of jurisdiction over his person the service of process upon him at his place of residence in this state. It is beyond question that such service was ineffectual to give the judgment validity here if the defendant was not a citizen of Canada or domiciled within that jurisdiction. . . . The contention of the appellant is that the court of chancery for Ontario was shown to be a court of general jurisdiction whose judgment stood presumptively valid until some defect was shown, and the defendant should have alleged and proved that he was not a citizen of Canada when the service was made nor domiciled there. The question thus becomes one of pleading and proof. The complaint alleged as the ground of jurisdiction by the Canadian court that the defendant appeared in the action and averred no other. The answer of the defendant denied this allegation, and affirmatively alleged that the Canadian court had no jurisdiction to render the judgment against him; because he neither appeared in the action nor was process served upon him in Canada. When this issue came to trial the plaintiff introduced the record, and that showed on its face that the service was made upon the defendant at his residence within this state. . . . No rule of comity requires us to give effect to a personal judgment rendered under a foreign law where, on the face of the record, it appears that jurisdiction of the person was not obtained." *Shepard v. Wright*, 113 N. Y. 582, 21 N. E. 724.

evidence,<sup>71</sup> but where it is given conclusive effect as an adjudication, debt would seem to be a more appropriate form of action,<sup>72</sup> unless the statute permits *assumpsit*.<sup>73</sup>

c. *Pleading*. — It has been held that the jurisdiction of the foreign tribunal need not be averred,<sup>74</sup> and that an allegation that the judgment sued on was duly given, made and entered by the foreign court is sufficient as against a general demurrer.<sup>75</sup> Want of jurisdiction may be pleaded as a defense to an action brought upon a judgment of a foreign country.<sup>76</sup> So too, an allegation that the judgment sued upon was procured by fraud constitutes a good defense to an action on a foreign judgment.<sup>77</sup> Where the amount of judgment is stated in foreign money, an averment that on the day of the judgment its value was a certain sum in lawful money of the United States sufficiently states the amount of the judgment.<sup>78</sup>

Plea or Answer. — *Nul tiel* record is not regarded as a proper plea to an action on a foreign judgment since such a judgment is not conclusive except as a matter of comity,<sup>79</sup> or reciprocity.<sup>80</sup>

d. *Trial*. — The construction and effect of a judgment of a foreign country is a question of law to be determined by the court.<sup>81</sup>

The judgment must not be broader in its terms than the judgment upon which the action is brought.<sup>82</sup>

71. *Buttrick v. Allen*, 8 Mass. 273, 5 Am. Dec. 105; *Boston I. Rubber Factory v. Hoyt*, 14 Vt. 92.

[a] Debt or *assumpsit* may be maintained, but a complaint in the common counts only is insufficient; the complaint should show the recovery of the judgment and contain all the essential averments of a complaint in an action of debt. *Mellin v. Horlick*, 31 Fed. 865. See also *Gooding v. Hingston*, 20 Mich. 439.

72. See *McKim v. Odom*, 12 Me. 94, and *supra*, III, B, 2, b.

73. See *supra*, III, B, 2, b.

74. *Gunn v. Peakes*, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661, overruling *Karns v. Kunkle*, 2 Minn. 268.

75. *Dore v. Thornburgh*, 90 Cal. 64, 27 Pac. 30, 25 Am. St. Rep. 100.

[a] Where the complaint on a judgment of a foreign country contains the allegation that the Queen's Bench division had jurisdiction of the subject-matter of the action and of the parties thereto and that the judgment was duly given, made and entered in and by said court, the jurisdiction in the absence of a demurrer is sufficiently alleged. *Murphy v. Murphy*, 145 Cal. 482, 78 Pac. 1053.

76. *Thorn v. Salmonson*, 37 Kan.

441, 15 Pac. 588; *Shepard v. Wright*, 113 N. Y. 582, 21 N. E. 724; *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404. See *supra*, III, B, 2, e, (II).

77. *Rankin v. Goddard*, 54 Me. 28, 89 Am. Dec. 718; *Monroe v. Douglas*, 4 Sandf. Ch. (N. Y.) 126. See *supra*, III, B, 2, e, (III).

78. *Murphy v. Murphy*, 145 Cal. 482, 78 Pac. 1053.

79. See 7 STANDARD PROC. 65, n. 81, and *Judkins v. Union Mut. F. Ins. Co.*, 37 N. H. 470. See *Evans v. Tatam*, 9 Serg. & R. (Pa.) 252, 11 Am. Dec. 717. Compare *supra*, III, B, 2, e, (I).

80. *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95.

81. *Christian Co. v. Coleman*, 125 Ala. 158, 27 So. 786.

82. See *supra*, III, B, 1, h, (III); III, B, 2, g, (III).

[a] **Judgment Limited by Original Judgment.**—Where the judgment rendered by a court of England contained a provision limiting its execution to the separate estate which the defendant "might have free from restraint of alienation or anticipation," it is error to render a personal judgment against the defendant without adding thereto the limitation imposed by the English judgment. "A party may ask to have a foreign judgment enforced,

**C. SUIT IN EQUITY. — 1. Jurisdiction and Right to Equitable Relief.**<sup>83</sup> — The general rule is that a court of equity will not lend its aid to the enforcement of a judgment at law unless the legal remedies have been exhausted,<sup>84</sup> or are inadequate to afford the relief sought to be obtained,<sup>85</sup> as where the judgment is purely in rem.<sup>86</sup> An exception to the rule that equity will not interfere to enforce a judgment is made in cases of peculiarly equitable cognizance.<sup>87</sup> Thus, a judgment

but the enforcement must be in accordance with its precise terms. He may be entitled to have it enforced as written, but he can be entitled to nothing more. If it be replied that there is no such judgment in personam known to our laws as the judgment here sought to be enforced, that, surely, is no reason why the plaintiff should be granted another and a different judgment, merely because the latter is known to our laws." *Sanguinetti v. Roche*, 15 N. Y. Supp. 185.

**83. As to creditors' suits**, see the title "**Creditors' Suits.**"

**As to discovery**, see generally the title "**Discovery**," and *infra*, this section.

**As to setting aside conveyances**, see the title "**Fraudulent Conveyances.**"

**As to sequestration**, see the title "**Sequestration.**"

**84. Ark.**—*Branch v. Horner*, 28 Ark. 341. **D. C.**—*Davis v. Harper*, 14 App. Cas. 463. **Ga.**—*Macon & W. R. R. Co. v. Parker*, 9 Ga. 377. **Ky.**—*Edwards v. Bohannon*, 2 Dana 98; *Adkins v. Meadows*, 9 Ky. Op. 124. **Me.**—*Howe v. Whitney*, 66 Me. 17; *Bubier v. Bubier*, 24 Me. 42. **Neb.**—*Weaver v. Cressman*, 21 Neb. 675, 33 N. W. 478. **N. C.**—*Powell v. Howell*, 63 N. C. 283.

**85. U. S.**—*Kessler v. Eldred*, 206 U. S. 285, 27 Sup. Ct. 611, 51 L. ed. 1065; *Tilford v. Oakley*, Hempst. 197, 23 Fed. Cas. No. 14,038a. **Ill.**—*City of East St. Louis v. Millard*, 14 Ill. App. 483. **Ia.**—*Mudge v. Livermore*, 148 Iowa 472, 123 N. W. 199. **Kan.**—*Howe Machine Co. v. Miner*, 28 Kan. 441. **Mo.**—*Griswold v. Johnson*, 22 Mo. App. 466. **Tenn.**—*Stark v. Cheatham*, 2 Tenn. Ch. 300.

[a] **Enforcing Lien of Judgment.** Where the statute provides that a judgment against a railroad corporation for injuries sustained or labor done shall constitute a lien on the property of the corporation superior to all other liens but furnishes no remedy to enforce such right, a court of equity

may be resorted to in order to make the judgment effectual. *Gilchrist v. Helena H. S. & S. Co.*, 58 Fed. 708.

**86. As to action on judgment in rem**, see *supra*, III, B, 1, a, (II), (I).

[a] Where a judgment in rem gave plaintiffs only a lien on defendant's remainder interest in certain land and could not be enforced by execution, the plaintiffs would be without remedy, unless they be permitted to maintain an action in equity to enforce the judgment. *Ritchey v. Buricke's Admrs.*, 21 Ky. L. Rep. 1120, 54 S. W. 173.

**87. D. C.**—*Raub v. Hurt*, 24 App. Cas. 211. **N. Y.**—*Donovan v. Finn*, 1 Hopk. Ch. 59, 14 Am. Dec. 531. **Tenn.**—*Stark v. Cheatham*, 2 Tenn. Ch. 300, under statute.

See the title "**Bills To Enforce Decrees.**"

[a] A judgment creditor may enforce his claim in a court of equity "in all those classes of cases over which that court has acknowledged jurisdiction, such as trusts, frauds, mistakes, etc., creditors' bills, the sale of real estate in aid of personality, and the marshalling of assets in the estates of decedents." *Solomons v. Shaw*, 25 S. C. 112.

[b] **Judgment Erroneously Satisfied.** Where execution was levied upon property of the defendant and it appeared thereafter that defendant had no interest in that property, an action may be brought in equity to set aside the credit on the execution and have the original judgment revived for the sum credited on the execution. *Scherr v. Himmelmann*, 53 Cal. 312. As to vacating entry of satisfaction, see the title "**Judgments, Satisfaction of.**"

[c] **Suit To Remove Cloud on Property Subject to Judgment Lien.**—A suit may be maintained in equity on a judgment which is not dormant and is a lien upon the property of the debtor in order to remove a cloud from said property which impairs the efficacy of the lien without resorting in the first

creditor may maintain an action in equity to subject equitable assets of the debtor to the satisfaction of his judgment,<sup>88</sup> to enforce a judgment lien upon the death of the debtor,<sup>89</sup> to set aside a fraudulent conveyance of property owned by the judgment debtor,<sup>90</sup> or to declare a homestead claim of the debtor invalid.<sup>91</sup> But after the expiration of the statutory limitation a creditor cannot maintain a suit in equity to enforce his judgment and thereby avoid the effect of his own want of diligence.<sup>92</sup> Sometimes the statute authorizes a resort to equity to

instance to the process of execution, levy and sale. *Hull v. Naumberg*, 1 Tex. Civ. App. 132, 20 S. W. 1125.

88. **Ky.**—*Edwards v. Bohannon*, 2 Dana 98. **Miss.**—*Ferguson's Heirs v. Crowson*, 25 Miss. 430. **N. Y.**—*Edmeston v. Lyde*, 1 Paige Ch. 637, 19 Am. Dec. 454. **Tenn.**—*Chapron v. Cassaday*, 3 Humph. 661; *Stark v. Cheatham*, 2 Tenn. Ch. 300. **W. Va.**—*Laidley v. Hinchman*, 3 W. Va. 423.

See generally the title "Creditors' Suits."

[a] Where defendant has no legal title to any property but owns property which can be reached only through equity, it is not necessary to show in the complaint that an execution on the judgment sued on was issued and returned unsatisfied. *Rountree v. McKay*, 59 N. C. 87.

[b] **Property Held Under Deed of Trust.**—Where the property sought to be subjected to the payment of the judgment is held under a deed of trust, equity will interpose its aid to the enforcement of the judgment. *Bansimer v. Fell*, 39 W. Va. 448, 19 S. E. 545; *Laidley v. Hinchman*, 3 W. Va. 423.

89. *Enslen v. Wheeler*, 98 Ala. 200, 13 So. 473. *Contra*, *Miami, etc. Co. Bank v. Turpin*, 3 Ohio 514.

[a] **Enforcement of Lien After Debtor's Death.**—"The judgment is a lien by mere force of the statute. When once it fastens on the land it sticks to it notwithstanding the death of either party, and may be enforced in equity without revival, revival being necessary only for the purpose of issuing execution. The lien does not come from an execution. It is not a part of the action in which the judgment was rendered. It comes from the statute, and may be enforced always in equity." *Laidley v. Reynolds*, 58 W. Va. 418, 52 S. E. 405.

[b] **Revival Unnecessary.**—No good reason can be "suggested for requiring

the creditor to first revive his judgment at law against the personal representative before coming into equity. The execution issuing upon the judgment so revived would not be effectual, as the assets in the hands of the personal representative could not be seized, but would have to be administered by him according to law." *James' Exr. v. Life*, 92 Va. 702, 24 S. E. 275.

[c] **Conditions Precedent.**—A judgment creditor may upon the death of the judgment debtor maintain an action in equity to enforce a lien upon decedent's homestead, but he must show in his complaint that either he has exhausted the legal remedies by presentation of his claim to the estate or that the decedent left no other property. *Griswold v. Johnson*, 22 Mo. App. 466.

90. *Howe Machine Co. v. Miner*, 28 Kan. 441; *Hull v. Naumberg*, 1 Tex. Civ. App. 132, 20 S. W. 1125.

91. *Hull v. Naumberg*, 1 Tex. Civ. App. 132, 20 S. W. 1125.

92. **Minn.**—*Dole v. Wilson*, 39 Minn. 330, 40 N. W. 161. **Miss.**—*Hall v. Green*, 60 Miss. 47. **S. C.**—*Solomons v. Shaw*, 25 S. C. 112. **Tex.**—*Boyd v. Ghent*, 95 Tex. 46, 64 S. W. 929. **Va.** *Brown v. Butler*, 87 Va. 621, 13 S. E. 71. **W. Va.**—*Reilly v. Clark*, 31 W. Va. 571, 8 S. E. 509.

[a] **But where a party was prevented from enforcing execution on a judgment, by reason of an injunction, and in the meantime the right to execution became barred by the statute of limitations "he may come into equity and enjoin the adverse party from availing himself of the advantage which he has obtained, and may if necessary have a decree securing to him the benefit of the legal right, which he has lost by the unjustifiable conduct of the adverse party."** *Davis v. Hoopes*, 33 Miss. 173.

reach property not subject to execution.<sup>93</sup> In some jurisdictions a court of equity cannot subject choses in action to the payment of a judgment,<sup>94</sup> while in others statutes have been enacted giving courts of equity the power to subject choses in action to the satisfaction of the judgment sued upon.<sup>95</sup> In some jurisdictions the plaintiff may on return of the execution unsatisfied file a bill in equity for discovery of property subject to execution.<sup>96</sup> The general rules pertaining to jurisdiction of courts are applicable to suits in equity for the enforcement of judgments.<sup>97</sup>

93. See the statutes.

[a] A contract of lease granting a license to operate an oil well upon certain premises may be subjected to the payment of a judgment by an action under the statute. *Meridian Nat. Bank v. McConica*, 8 Ohio Cir. Ct. 442, 4 Ohio Cir. Dec. 106.

As to property not subject to execution, see *supra*, II, B, 5.

94. *Goodman v. Georgia Life Ins. Co.*, 189 Ala. 130, 66 So. 649; *Stewart v. English*, 6 Ind. 176; *Shaw v. Aveline*, 5 Ind. 380.

[a] "The cause thus considered, presents these facts. A creditor has obtained judgment against his debtor, in a court of law; an execution has been issued against the property of the debtor; and the sheriff has returned that none is found. The debtor has property, consisting in a debt due to him; and the creditor by judgment, now asks this court, to compel the debtor of his debtor to make payment to him, in satisfaction of the judgment. Has this court jurisdiction in such a case, or power to give such relief? . . . According to our distribution of jurisdictions, suits for the recovery of ordinary debts, are appropriated to the courts of common law; and the proceedings for enforcing the judgments rendered in such suits, are alike allotted to those courts. In any such case, where the subject of the suit is exclusively of legal cognizance, a court of equity has no jurisdiction to enforce the judgment, by its own methods of proceeding, or to give a better remedy than the law gives. If the remedies of the law are imperfect, equity, as has been often said in the English chancery, has no jurisdiction to give execution in aid of the infirmity of the law. When any fact giving equitable jurisdiction, intervenes in the transactions between cred-

itor and debtor, such a fact becomes a foundation of relief in this court; but in any ordinary case free from fraud or injustice, the execution of the judgment, and the methods of compelling satisfaction, are confined to the courts of law." *Donovan v. Finn*, 1 Hopk. Ch. (N. Y.) 59, 14 Am. Dec. 531.

As to attachment or garnishment of choses in action, see the titles "Attachment;" "Garnishment."

As to execution on choses in action, see 15 STANDARD PROC. 834, et seq.

95. *Ky.*—*Davis v. Sharron*, 15 B. Mon. 64. *N. J.*—*Tantum v. Green*, 21 N. J. Eq. 364. *Ohio.*—*Douglass v. Huston*, 6 Ohio 156.

96. *Slaughter v. Mattingly*, 155 Ky. 407, 159 S. W. 980. See generally the title "Discovery."

As to proceedings supplementary to execution, see the title "Supplementary Proceedings."

[a] The holder of a judgment against a railroad corporation "has the right to enforce the collection of its judgment at law, by compelling the company or officers or agents to disclose and surrender any property, choses in action, or equitable or legal interest in any property, which it may own, or they may hold for it, and to disclose the existence of any such property, held by or for it, by strangers or persons now in his employ." *Louisville & N. R. Co. v. Hall*, 8 Ky. Op. 690.

[b] "This remedy is cumulative, and may be repeated until the debt is satisfied. The dismissal of one action cannot operate as a bar to another for the same purpose; and hence, so long as a debtor desires, he may continue the case on the docket, and by that means avoid a multiplicity of actions." *Smith v. Meisenheimer*, 20 Ky. L. Rep. 1718, 49 S. W. 968.

97. *Trabue v. Connors*, 84 Ky. 283,

2. **Parties.**<sup>98</sup>—A judgment creditor suing in equity to enforce his judgment lien must join as defendants all persons claiming liens on the property of the judgment debtor,<sup>99</sup> and where the property is held in trust, the trustee as well as the trust creditors must be made parties to the suit.<sup>1</sup> The holder of the legal title of the property in which the judgment debtor is claimed to have an equitable interest is a necessary party to a suit to reach such equitable interest,<sup>2</sup> and where the debtor has assigned his property to a third party he nevertheless must be made a party defendant to the suit to enforce the judgment in equity.<sup>3</sup> But where plaintiff seeks to enforce a judgment, rendered against several defendants jointly, upon the property of one of the defendants only, the co-defendant in the original action is not a necessary party to the suit.<sup>4</sup>

3. **Pleadings.**<sup>5</sup>—The general rules of pleading judgments apply to suits in equity brought upon judgments at law.<sup>6</sup> The complaint must show that plaintiff is entitled to relief in equity,<sup>7</sup> and that defendant is liable on the judgment.<sup>8</sup> The complaint must show that plaintiff has no available legal remedy.<sup>9</sup>

1 S. W. 470; *De Wolf v. Mallett's Admr.*, 3 Dana (Ky.) 214.

See the titles "Equity Jurisdiction and Procedure;" "Jurisdiction;" "Legal Remedy."

98. See *supra*, III, B, 1, f; III, B, 2, c.

99. *Rountree v. McKay*, 59 N. C. 87; *Bansimer v. Fell*, 39 W. Va. 448, 19 S. E. 545; *Livesay v. Peamster*, 21 W. Va. 83.

1. *Georgetown Water Co. v. Central T. H. Co.*, 17 Ky. L. Rep. 1270, 34 S. W. 435, 35 S. W. 636; *Bansimer v. Fell*, 39 W. Va. 448, 19 S. E. 545; *Laidley v. Hinchman*, 3 W. Va. 423.

2. *Edwards v. Bohannon*, 2 Dana (Ky.) 98.

3. *Weaver v. Cressman*, 21 Neb. 675, 33 N. W. 478.

4. *Howard v. Stephenson*, 33 W. Va. 116, 10 S. E. 66.

5. See *supra*, III, B, 1, g; III, B, 2, d and e.

6. See *supra*, III, B.

[a] In a suit by an assignee of the judgment the complaint should set forth the judgment as well as the assignment relied upon. *Brookshire v. Lomax*, 20 Ind. 512.

7. **U. S.**—*Rhodes v. Farmer*, 17 How. 464, 15 L. ed. 152; *Knox v. Smith*, 4 How. 298, 11 L. ed. 983. **Ill.**—*Chisholm v. McDonald*, 30 Ill. App. 176. **Ia.**—*Mudge v. Livermore*, 148 Iowa 472, 123 N. W. 199. **Ohio.**—*Miami, etc. Co. Bank v. Turpin*, 3 Ohio 514.

[a] **Existence of Lien.**—A judgment creditor who asserts a lien and seeks a foreclosure thereof must show in his complaint that the lien has not ceased to exist at the time of bringing the suit. *Boyd v. Ghent*, 95 Tex. 46, 64 S. W. 929.

[b] **Essentials of Bill.**—In *Adkins v. Meadows*, 9 Ky. Op. 124, the court, referring to the Kentucky statute, holds that a bill in equity to collect a judgment debt "should contain the following allegations, or their equivalents: First, that the plaintiff has recovered a judgment in person, and against the defendant whose property or effects he seeks to attach. Second, that the judgment remains in whole or in part unsatisfied. Third, that the plaintiff has caused execution of fieri facias to issue on the judgment directed to the county in which the judgment was rendered, or in which the defendant resided. Fourth, that the execution was placed, while alive and in force, in the hands of the proper officer. Fifth, that it had been returned by the officer indorsed, in substance, no property found. And if the judgment was rendered in the county in which the suit to enforce it is brought the suit must be in the court from which the execution issued."

8. *Smith v. Ballantyne*, 10 Paige (N. Y.) 101.

9. *Branch v. Horner*, 28 Ark. 341. See the title "Legal Remedy."

4. **Hearing and Determination.**<sup>10</sup> — A court of equity, when called upon to aid in executing a judgment of a court of law has no power in such ancillary proceeding to go behind the judgment in search of errors, however gross.<sup>11</sup> The plaintiff cannot obtain in equity any relief beyond what he is entitled to under the judgment,<sup>12</sup> and it is error to render a decree against parties who are not liable under the original judgment,<sup>13</sup> or to adjudge the rights of the co-defendants jointly liable under the judgment as between themselves.<sup>14</sup> A court of equity has no power to enter a decree for the debt, where it appears that plaintiff has no judgment lien for the enforcement of which the suit is brought,<sup>15</sup> but it may, upon foreclosure of a judgment lien, render a deficiency decree for the balance due on the judgment.<sup>16</sup>

**IV. RELIEF FROM ENFORCEMENT.** — A. **QUASHING OR VACATING THE WRIT.**<sup>17</sup> — 1. **Grounds.** — a. *Absence of Valid Enforceable Judgment.* — (I.) **Generally.** — Where the writ issued has no<sup>18</sup> judgment

[a] A mere allegation that the debtor has no property subject to execution out of which the judgment can be satisfied is not sufficient, but the plaintiff must also show that the execution was returned unsatisfied. *Adkins v. Meadows*, 9 Ky. Op. 124.

[b] Where Complaint Shows Adequate Legal Remedy. — "Plaintiff says that the defendants deny the validity of its judgment lien upon the premises, and then alleges facts which show that defendants' claim is not only without foundation, but also without color of right. Why, then, should the interference of a court of equity be invoked? . . . We find neither statute nor precedent authorizing the transfer of the general lien of a judgment into the specific lien of a decree in equity; and there are no facts stated in the petition which show that plaintiff's legal remedy is not plain and adequate in the fullest sense of those terms, or which according to the well settled rules call for the interference of a court of equity." *Howe Machine Co. v. Miner*, 28 Kan. 441.

10. See *supra*, III, B, 1, i; III, B, 2, g.

11. *Cushman v. Warren-Scharf A. Pav. Co.*, 220 Fed. 857, 135 C. C. A. 289.

[a] It will be presumed in a suit to enforce a judgment that it was regularly obtained on due proof of all necessary allegations and the court of equity will not inquire into the regularity of the judgment. *Schley v. Dixon*, 24 Ga. 273, 71 Am. Dec. 121.

12. *Lang v. Brown*, 21 Ala. 179, 56 Am. Dec. 244.

[a] The decree should be "for the aggregate due at the date of the judgment or decree, including all that is then due on the original judgment of which the costs as well as the interest is a part, with interest on such aggregate from the date of the said judgment or decree." *Douglass v. McCoy*, 24 W. Va. 722.

[b] It is error to direct an accounting of the rents and profits of the land, upon which plaintiff has a judgment lien. *Leake v. Ferguson*, 2 Gratt. (43 Va.) 419.

13. *Roper v. Hackney*, 15 Fla. 323.

14. *Kent, Paine & Co. v. Chapman*, 18 W. Va. 485.

15. *Glascock v. Stringer* (Tex. Civ. App.), 32 S. W. 920.

16. *Sinnett v. Cralle's Admr.*, 4 W. Va. 600.

17. As to quashing or setting aside the levy, see *infra*, IV, C.

As to quashing process generally, see the title "Process."

18. U. S. — *Murphy v. Lewis, Hempst.* 17, 17 Fed. Cas. No. 9,950a. Ala. — *Crenshaw v. Hardy*, 3 Ala. 653; *Page v. Coleman*, 9 Port. 275. Ind. — *Lasselle v. Moore*, 1 Blackf. 226. Md. — *Hall v. Clagett*, 63 Md. 57. N. Y. — *Davies v. Skidmore*, 5 Hill 501; *Lambert v. Converse*, 22 How. Pr. 265; *Burch v. Burch*, 116 App. Div. 865, 102 N. Y. Supp. 305, reversing 51 Misc. 232, 100 N. Y. Supp. 814. Ohio. — *Miller v. Longacre*,

or decree authorizing its issuance, or the judgment is wholly void,<sup>19</sup> the writ may be quashed.

(II.) **Defects in Judgment or Proceedings.**—(A.) **IN GENERAL.**—The general rule is that defects in the judgment, or in the proceedings resulting in the judgment, cannot be taken advantage of by a motion to quash the execution issued thereon.<sup>20</sup> But if such judgment be utterly

26 Ohio St. 291. **W. Va.**—*Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20, execution issued upon verdict.

[a] “When the process of the court appears on the face of it, to have been wrongfully issued as for instance when a *fieri facias* has been issued by the clerk without a judgment to support it, the court has an undoubted right to interfere, and on the suggestion of the party injured, or even *ex proprio motu* to arrest such unlawful proceedings.” *Piernas v. Milliet*, 10 La. Ann. 286.

[b] **Judgment Subsequently Vacated.**—An execution issuing upon a judgment rendered on the first trial of the case, which judgment was subsequently vacated by the judgment in a new trial awarded, is properly quashed. *Miller v. Longacre*, 26 Ohio St. 291.

19. See *infra*, IV, A, 1, (II), (A).

20. **Ala.**—*Werborn v. Pinney*, 74 Ala. 591; *Shorter's Admr. v. Mims*, 18 Ala. 655. **Ark.**—*Black v. Nettles*, 25 Ark. 606. **Cal.**—*Town of Hayward v. Pimental*, 107 Cal. 386, 40 Pac. 545; *Edwards v. Hellings*, 103 Cal. 204, 37 Pac. 218. **Ky.**—*Stephens v. Wilson*, 14 B. Mon. 88. **Md.**—*Jones v. George*, 80 Md. 294, 30 Atl. 635; *Union Nat. Bank v. Shriver*, 68 Md. 435, 13 Atl. 332; *Hall v. Clagett*, 63 Md. 57; *Schultze v. State*, 43 Md. 295. **Mo.**—*Holzhour v. Meer*, 59 Mo. 434; *Brackett v. Brackett*, 53 Mo. 265; *Harbert v. Durden*, 116 Mo. App. 512, 92 S. W. 746; *Hathaway v. St. Louis, K. & S. Ry. Co.*, 94 Mo. App. 343, 68 S. W. 109; *Seaman v. Paddock*, 51 Mo. App. 465; *Horstmeyer v. Connors*, 51 Mo. App. 394; *Ewing v. Donnelly*, 20 Mo. App. 6, 2 West. Rep. 445; *Adams v. Tracy*, 13 Mo. App. 579. **Mont.**—*Pierson v. Daly*, 143 Pac. 957. **N. C.**—*Carter v. Spencer*, 29 N. C. 14. **Tenn.**—*Dornan v. Benham Furn. Co.*, 102 Tenn. 303, 52 S. W. 38. **Tex.**—*Skinner v. Sullivan & Co.* (Tex. Civ. App.), 134 S. W. 426. **Va.**—*May v. State Bank*, 2 Rob. (41 Va.) 56, 40 Am. Dec. 726. **W. Va.**—*Blair v. Hen-*

*derson*, 49 W. Va. 282, 38 S. E. 552.

[a] **Reason for Rule.**—“Where a judgment of a court which has jurisdiction of the subject-matter and of the parties is either erroneous or irregularly entered, but stands unreversed and unvacated, and with no attempt made to supersede, alter, or in any way reform it, it would seem clear, on principle, that an execution issued on it cannot be quashed on the ground of error or informality in the judgment. If the action of the court is presumptively valid, and error must be shown by a direct and appropriate proceeding, if no such error is shown, it is difficult to see why the presumption does not become conclusive. It is no hardship that a defendant should be concluded by a judgment of which he has not complained; and a contrary holding, to the effect that upon a motion to quash the execution a defendant might attack the judgment for error or irregularity, would indefinitely extend the time allowed for that purpose and unreasonably protract litigation.” *Merrick v. Merrick*, 5 Mo. App. 123, quoted with approval in *Hammett v. Hatton*, 189 Mo. App. 567, 176 S. W. 1078.

[b] **An erroneous statement in the opinion** by the appellate court, of a fact contained in the record, affords no ground for motion to quash the writ. *Overton v. White*, 126 Mo. App. 363, 103 S. W. 512.

[c] **Not a Substitute for Writ of Error.**—A motion to quash an execution cannot be made to perform the office of a writ of error or appellate proceeding. *Union Nat. Bank v. Shriver*, 68 Md. 435, 13 Atl. 332; *Sappington v. Lenz*, 53 Mo. App. 44; *Horstmeyer v. Connors*, 51 Mo. App. 394; *Seaman v. Paddock*, 51 Mo. App. 465.

[d] “The objection that the verdict is not responsive to the issue, and does not authorize the judgment, cannot be raised by a motion to quash the execution.” *Hodgson v. Banking House*, 9 Mo. App. 573.

void, a motion to quash has been deemed a proper remedy.<sup>21</sup> However, as such a motion is not a bar to the issuance of a subsequent writ on the same judgment,<sup>22</sup> the better course for the defendant to pursue is to procure an order vacating the void judgment, as well as one quashing the writ.<sup>23</sup>

(B.) OF JUSTICE'S JUDGMENT DOCKETED IN COURT OF RECORD. — The general rule that defects or irregularities in the judgment or in the proceedings resulting in a judgment cannot be taken advantage of by a motion to quash the writ issuing thereon<sup>24</sup> applies also to motions to quash an execution issued upon a transcript of the judgment of a justice of the peace.<sup>25</sup> But where the judgment rendered by the justice is void for lack of jurisdiction, or other reason, the execution issued upon the transcript should be quashed.<sup>26</sup>

[e] **Taxation of excessive amount of costs** is no ground for quashing the writ, the proper remedy being by motion to retax costs. **Ala.**—Anonymous, 2 Stew. 228. **Cal.**—Meeker v. Harris, 23 Cal. 285. **D. C.**—Adriance, Platt & Co. v. Heiskell, 8 App. Cas. 240. **Ky.** Walton v. Brashears, 4 Bibb 18. **W. Va.** Deveny v. Cook, 70 W. Va. 232, 73 S. E. 921.

See 5 STANDARD PROC. 957, et seq.

**21. Ala.**—Mayor & Council of Columbian v. Kelley & Co., 172 Ala. 336, 55 So. 526. **Cal.**—Seamman v. Bonslett, 118 Cal. 93, 50 Pac. 272; Town of Hayward v. Pimental, 107 Cal. 386, 40 Pac. 545; Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740; Sanchez v. Carriaga, 31 Cal. 170; Logan v. Hillegass, 16 Cal. 200. **Colo.**—Irwin v. Beggs, 24 Colo. App. 158, 132 Pac. 385. **Ky.** Amyx v. Smith's Admx., 1 Met. 529. **Md.**—Schultze v. State, 43 Md. 295. **Mo.** Holzhour v. Meer, 59 Mo. 434; *Ex parte* James, 59 Mo. 280; State *ex rel.* Behrens v. Wilson, 176 Mo. App. 268, 161 S. W. 1179; Horstmeyer v. Connors, 51 Mo. App. 394; Ewing v. Donnelly, 20 Mo. App. 6, court without jurisdiction. **Mont.**—Pierson v. Daly, 143 Pac. 957. **N. Y.**—Burch v. Burch, 116 App. Div. 865, 102 N. Y. Supp. 305, reversing 51 Misc. 232, 100 N. Y. Supp. 814; Campbell v. Bristol, 19 Wend. 101, where attorney without authority to prosecute suit. **Pa.**—Ash v. Conyers, 2 Miles 94. **Tenn.**—Mabry v. State, 9 Yerg. 207. **W. Va.**—Farquhar & Co. v. Dehaven, 70 W. Va. 738, 75 S. E. 65, Ann. Cas. 1914A, 640; Rousey v. Stilwagon, 70 W. Va. 570, 74 S. E. 732, Ann. Cas. 1914A, 1084; Blair v. Henderson, 49 W. Va. 282, 38 S. E. 552.

**22.** See *infra*, IV, A, 2, i, (II).

**23. Ala.**—Mayor & Council of Columbian v. Kelley & Co., 172 Ala. 336, 55 So. 526; Martin v. Atkinson, 108 Ala. 314, 18 So. 888. But see Ewing v. Peek, 26 Ala. 413. **Miss.**—Kramer v. Holster, 55 Miss. 243. **N. Y.**—Burch v. Burch, 116 App. Div. 865, 102 N. Y. Supp. 305, reversing 51 Misc. 232, 100 N. Y. Supp. 814.

**24.** See *supra*, IV, A, 1, a, (I).

**25. Mo.**—Hammett v. Hatton, 189 Mo. App. 567, 176 S. W. 1078; Seaman v. Paddock, 51 Mo. App. 465; Bauer v. Miller, 16 Mo. App. 252; Klein v. Wielandy, 15 Mo. App. 581. **N. Y.** McCunn v. Barnett, 2 E. D. Smith 521. **Pa.**—Brandes & Bro. v. Struphauer, 2 Chest. Co. Rep. 319.

[a] "A motion to quash an execution is not a substitute for an appeal to reach errors and irregularities in a justice's court, which are not jurisdictional in their nature." Sappington v. Lenz, 53 Mo. App. 44. To same effect see Hammett v. Hatton, 189 Mo. App. 567, 176 S. W. 1078; Seaman v. Paddock, 51 Mo. App. 465; Bauer v. Miller, 16 Mo. App. 252.

[b] The reason for this is that the proceedings before the justice of the peace are not in such case properly before the court at all, and the transcript is to be treated as if it contained only a record of the judgment, upon which execution cannot be restrained by the superior court, even if the judgment is in fact void, because there is nothing to show that the judgment has no foundation. Brandes & Bro. v. Struphauer, 2 Chest. Co. Rep. (Pa.) 319.

**26.** Hammett v. Hatton, 189 Mo.

(III.) Satisfaction of Judgment. — (A.) GENERALLY. — A writ issued after a satisfaction of the judgment upon which it is based, may be quashed.<sup>27</sup>

(B.) DISCHARGE IN BANKRUPTCY. — An execution issued upon a judgment which has been discharged or satisfied by a discharge in bankruptcy of the judgment debtor may be quashed on motion.<sup>28</sup> But where the discharge is received before<sup>29</sup> the judgment against the execution

App. 567, 176 S. W. 1078; Sappington v. Lenz, 53 Mo. App. 44; Rousey v. Stilwagon, 70 W. Va. 570, 74 S. E. 732, Ann. Cas. 1914A, 1084. But see Brandes & Bro. v. Struphauer, 2 Chest. Co. Rep. (Pa.) 319, and preceding note.

27. Ala.—Smith, Stewart & Co. v. Dean, 166 Ala. 116, 52 So. 335; Rice v. Dillahunt, 20 Ala. 399. Ark.—American Ins. Co. v. McGeehee Liquor Co., 113 Ark. 486, 169 S. W. 251; Anthony v. Shannon, 8 Ark. 52. Colo.—Irwin v. Beggs, 24 Colo. App. 158, 132 Pac. 385. Ill.—Sandburg v. Papineau, 81 Ill. 446; McHenry v. Watkins, 12 Ill. 233. Ky. Columbia Bldg. L. & Sav. Assn. v. Gregory, 33 Ky. L. Rep. 1011, 112 S. W. 608. Mo.—Hull v. Sherwood, 59 Mo. 172; Johnson v. Sherrodd, 141 Mo. App. 366, 125 S. W. 212; Parker v. Oxendine, 85 Mo. App. 212; Sinclair v. Missouri, K. & T. Ry. Co., 74 Mo. App. 500; Wyatt v. Fromme, 70 Mo. App. 613; Johnson v. Greve, 60 Mo. App. 170. N. C.—Adams v. Smallwood, 53 N. C. 258. Ore.—Gobbi v. Refrano, 33 Ore. 26, 52 Pac. 761. Tenn. Hunn v. Hough, 5 Heisk. 708; Baldwin v. Merrill, 8 Humph. 132; Camp v. Laird, 6 Yerg. 246; Love v. Smith, 4 Yerg. 117; Barnes v. Robinson, 4 Yerg. 186; Erwin v. Rutherford, 1 Yerg. 169.

[a] If a judgment has been paid but not satisfied of record the execution may be recalled. Meredith v. S. C. M. A. of Baltimore, 60 Cal. 617.

[b] A tender of money in payment of a judgment, will not authorize the quashing an execution issued thereon, unless the tender is followed by the payment of the money into court, and a motion to enter satisfaction on the record. Shumaker v. Nichols, 6 Gratt. (47 Va.) 592.

28. Ala.—Ewing v. Peck, 17 Ala. 339. Ky.—Chambers v. Neal, 13 B. Mon. 256. N. J.—Linn v. Hamilton, 34 N. J. L. 305. N. Y.—Alcott v. Avery, 1 Barb. Ch. 347; Boyd v. Vanderkemp, 1 Barb. Ch. 273; Dresser v. Shufeldt, 7

How. Pr. 85. N. C.—Dawson v. Hartsfield, 79 N. C. 334. Eng.—Barrow v. Poile, 1 Barn. & Ad. 629, 109 Eng. Reprint 921; Davis v. Shapley, 1 Barn. & Ad. 54, 109 Eng. Reprint 707.

As to effect of order of quashal on this ground, see *infra*, IV, A, 2, i, (II).

[a] Debt Not Affected by Discharge.—But where the motion is based on such a ground, the court will not quash without giving the plaintiff an opportunity to show that the discharge is inoperative as against his debt, and, when necessary will direct an issue to try the facts, or will determine the question on affidavits, in a summary manner. Linn v. Hamilton, 34 N. J. L. 305; Alcott v. Avery, 1 Barb. Ch. (N. Y.) 347; Bangs v. Strong, 1 How. Pr. (N. Y.) 181 (by action); Dresser v. Shufeldt, 7 How. Pr. (N. Y.) 85, by action and not upon affidavits.

[b] “Under the English statutes, the plaintiff may resist the application for relief in a summary way by showing that the certificate was fraudulently obtained, or that the bankrupt was not within the statute, or that, for any of the reasons mentioned in the statute, the discharge did not affect his debt. Lister v. Mundell, 1 B. & P. 427; Yeo v. Allen, 3 Doug. 214; Bamfield v. Anderson, 5 J. B. Moore 331.” Linn v. Hamilton, 34 N. J. L. 305.

[c] A mere adjudication of bankruptcy does not operate to discharge a defendant, nor does it operate as a stay against the enforcement of a judgment and is therefore no ground for the quashal of an execution. Maas v. Kuhn, 130 App. Div. 68, 114 N. Y. Supp. 444. See 3 STANDARD PROC. 938.

29. Paschall v. Bullock, 80 N. C. 329; People's Trust Co. v. Ehrhart, 56 Pa. Super. 101.

[a] Matter of Defense Available at Trial.—Defendant's discharge should have been set up as a defense to the

debtor was rendered, a motion to quash an execution issued on such judgment is not proper.

(IV.) **Dormant Judgment.**—Where it does not appear that an execution was issued on the judgment within the time limited by statute, any execution issuing after that time, without such judgment being revived, may be properly quashed on motion.<sup>30</sup>

(V.) **Death of Judgment Debtor.**—In those jurisdictions where upon the death of the judgment debtor a revivor of a judgment in favor of or against his representative is a prerequisite to the issuance of execution thereon,<sup>31</sup> an execution issuing without such a revivor is subject to quashal.<sup>32</sup> But where one only of several defendants has died, an execution issuing against all the defendants without a revival of the judgment cannot be quashed.<sup>33</sup>

b. *Alteration in Judgment.*—An alteration in the judgment after its entry which changes its character will be ground for quashing an execution issuing upon the judgment as altered.<sup>34</sup>

c. *Errors in Issuance of Writ.*—(I.) **In General.**<sup>35</sup>—Questions which go to the regularity of the issuance of the writ may properly be determined on a motion to quash or vacate the writ.<sup>36</sup> Thus, the fact

action; or if not then, it might have been set up in opposition to plaintiff's application for leave to issue execution upon the dormant judgment. Thereafter it is too late to offer it. *Paschall v. Bullock*, 80 N. C. 329; *People's Trust Co. v. Ehrhart*, 56 Pa. Super. 101.

30. **U. S.**—*Griffith v. Bogert*, 18 How. 158, 15 L. ed. 307. **Ala.**—*State ex rel. Jernigan v. Ham*, 13 Ala. App. 648, 69 So. 253. **Ark.**—*Braeken v. Wood*, 12 Ark. 605. **Cal.**—*McMann v. Superior Court*, 74 Cal. 106, 15 Pac. 448; *Mayo v. Bryte*, 47 Cal. 626. **Ky.**—*Noe v. Conyers*, 6 J. J. Marsh. 514; *Miller v. Anderson*, Litt. Sel. Cas. 169; *Columbia Bldg. L. & Sav. Assn. v. Gregory*, 33 Ky. L. Rep. 1011, 112 S. W. 608. **Md.**—*Mitchell v. Chestnut*, 31 Md. 521; *Trail v. Snouffer*, 6 Md. 308. **Miss.**—*Bacon v. Red*, 27 Miss. 469; *Reeves v. Burnham*, 3 How. 25. **Mo.**—*Bolton v. Landsdown*, 21 Mo. 399. **N. Y.**—*Bank of Genesee v. Spencer*, 18 N. Y. 150; *Union Bank v. Sargeant*, 53 Barb. 422, 35 How. Pr. 87; *Winebrener v. Johnson*, 7 Abb. Pr. (N. S.) 202; *Frean v. Garrett*, 24 Hun 16 (discretionary with court to quash on such ground); *Aultman & Taylor Co. v. Syme*, 56 App. Div. 165, 67 N. Y. Supp. 530, 163 N. Y. 54, 65, 57 N. E. 173. **N. C.**—*Murphrey v. Wood*, 47 N. C. 63. **Ohio.**—*Lytte v. Cincinnati Mfg. Co.*, 4 Ohio 459. **Tenn.**—*Cannon v. Laman*, 7

*Lea* 513. **Va.**—*Beale's Admr. v. Bote-tourt Justices*, 10 Gratt. (51 Va.) 282. See also 15 STANDARD PROC. 736.

As to revival of judgment, see the title "Judgments and Decrees, Revival of."

31. See 15 STANDARD PROC. 767, et seq.

32. **U. S.**—*Wilson v. Hurst*, Pet. C. C. 140, 30 Fed. Cas. No. 17,808. **Ala.**—*Moore v. Bell*, 13 Ala. 469. **Ky.**—*Amyx v. Smith's Admx.*, 1 Met. 529; *Wagnon v. McCoy's Exr.*, 2 Bibb 198. **Md.**—*Trail v. Snouffer*, 6 Md. 308. **Miss.**—*Harrington v. O'Reilly*, 9 Smed. & M. 216, 48 Am. Dec. 704; *Davis v. Helm*, 3 Smed. & M. 17. **Mo.**—*Welch v. St. Louis*, 12 Mo. App. 516. **N. Y.**—*Duryee v. Botsford*, 24 Hun 317, prior to provisions in present Code Civ. Proc., §1376.

33. *Thompson v. Bondurant*, 15 Ala. 346, 50 Am. Dec. 136; *Lucas v. Johnson*, 6 How. Pr. (N. Y.) 121.

34. *Flach v. Temple*, 2 Penne. (Del.) 129, 45 Atl. 539.

35. **Errors in issuance of process generally**, see the title "Process."

36. **U. S.**—*Boyle v. Zacharie*, 6 Pet. 648, 8 L. ed. 532. **Cal.**—*Sanchez v. Carriaga*, 31 Cal. 170. **Colo.**—*Irwin v. Beggs*, 24 Colo. App. 158, 132 Pac. 385. **Dak.**—*Dorsey v. Hall*, 5 Dak. 505, 41 N. W. 471. **Ind.**—*Johnson v. Murray*, 112 Ind. 154, 13 N. E. 273, 2

that the writ has issued prematurely,<sup>37</sup> or in contravention of a statute,<sup>38</sup> makes it subject to being quashed on motion. An execution issued by an administrator, who has the power to prosecute but not power to collect or compromise, is subject to quashal on motion.<sup>39</sup> Where two executions of the same date, upon the same judgment, and of the same tenor, are issued to the sheriff of the same county, one may be quashed on motion.<sup>40</sup>

(II.) **Alias and Pluries Writs.**—An alias or pluries writ issued before a disposal<sup>41</sup> of a levy made under the original writ and a return there-

Am. St. Rep. 174. **La.**—*Piernas v. Millet*, 10 La. Ann. 286. **Md.**—*Hall v. Clagett*, 63 Md. 57; *Schultz v. State*, 43 Md. 295. **N. Y.**—*Harrison v. Wilkin*, 78 N. Y. 390. **Ohio.**—*Buckingham & Co. v. Granville Alexandria Soc.*, 2 Ohio 360. **Ore.**—*Marks v. Stephens*, 38 Ore. 65, 63 Pac. 824, 84 Am. St. Rep. 750. **S. D.**—*Cable v. Magpie Gold Min. Co.*, 22 S. D. 566, 119 N. W. 174; *Froelich v. Aylward*, 11 S. D. 635, 80 N. W. 131. **Vt.**—*Mattocks v. Judson*, 9 Vt. 343. **W. Va.**—*Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20.

[a] Even though the order allowing the execution is an appealable order, such motion is the proper remedy. *Buell v. Buell*, 92 Cal. 393, 28 Pac. 443; *Dorland v. Hanson*, 81 Cal. 202, 22 Pac. 552, 15 Am. St. Rep. 44.

[b] "Defects only that are apparent on the face of the execution and records on which the questions presented under the motion arise can be reached by a motion to quash." *Meader Co. v. Aringdale*, 58 Tex. 447.

37. **U. S.**—*Brown v. Evans*, 18 Fed. 56, 8 Sawy. 502. **Ill.**—*Merrifield v. Western Cottage Piano & O. Co.*, 238 Ill. 526, 87 N. E. 379; *Knights v. Martin*, 155 Ill. 486, 40 N. E. 358, 56 Ill. App. 65. **Ky.**—*Guelot v. Pearce*, 18 Ky. L. Rep. 1004, 38 S. W. 892. **Me.**—*Allen v. Portland Stage Co.*, 8 Greenl. 207. **Ore.**—*Bentley v. Jones*, 8 Ore. 47. **Pa.**—*Hanika's Estate*, 138 Pa. 320, 22 Atl. 90, 21 Am. St. Rep. 907. **Vt.**—*Mattocks v. Judson*, 9 Vt. 343. **Can.**—*Whitla v. Spence*, 5 Manitoba 392.

Issuance before revival of judgment, see *supra*, IV, A, 1, a, (IV) and (V).

[a] Issuance pending stay of execution (1) subjects writ to quashal upon motion. *Griffith v. Bogert*, 18 How. (U. S.) 158, 15 L. ed. 307; *Stockton v. Bishop*, 2 How. (U. S.) 74, 11 L. ed. 184; *Jackson v. Smith*, 16 Abb. Pr. (N. Y.) 201, 25 How. Pr. 476; *Sul-*

*livan v. Van Valkenburg*, 128 N. Y. Supp. 624. (2) But the right to have the execution issued prior to the lapse of such period, quashed, is personal to the defendant, and the writ will not be quashed at the instance of the trustee to whom the defendant had conveyed his property in trust. *Shelton v. Fels*, 61 N. C. 178, 93 Am. Dec. 586.

[b] An execution issued in violation of an express agreement not to do so, except in a certain contingency which had not happened, will be set aside. *Merritt v. Baker*, 11 How. Pr. (N. Y.) 456; *Feagley v. Norbeck*, 127 Pa. 238, 17 Atl. 900; *Holmes v. Delabourdine*, 1 Browne (Pa.) 130. See *Ashdown v. Dederick*, 2 Manitoba (Can.) 212, wherein the court dismissed an appeal taken from an order setting aside an execution issued in violation of an agreement.

[c] Pending Motion for New Trial. An execution is properly quashed where it issued pending a motion for new trial, in a jurisdiction where, pending such a motion as a prerequisite of an appeal, an execution cannot be issued. *State v. Kumpff*, 62 Mo. App. 332.

As to when execution may issue, see 15 STANDARD PROC. 750.

38. *Matter of Royal Bank*, 140 App. Div. 480, 125 N. Y. Supp. 322; *Bloomington v. Richardson*, 140 App. Div. 350, 125 N. Y. Supp. 320.

39. *Lambert v. Metropolitan St. Ry. Co.*, 33 Misc. 579, 68 N. Y. Supp. 877.

[a] The fact that the power to collect was subsequently acquired did not remedy the defect existing when the execution was issued. *Lambert v. Metropolitan St. Ry. Co.*, 33 Misc. 579, 68 N. Y. Supp. 877.

40. *Wright v. Young*, 6 Ore. 87.

41. *Cairns v. Smith*, 8 Johns. (N. Y.) 337; *Lampman v. Lampman*, 74 Ore. 386, 145 Pac. 641.

of, or after another writ has been returned satisfied,<sup>42</sup> will be quashed on motion. But a second execution will not be quashed merely because it was not entitled an "alias" execution.<sup>43</sup>

(III.) Upon Transcript of Justice's Judgment. — It is not a ground for the quashing of a writ issued upon a transcript of a justice's judgment that the transcript does not set out the manner of service made upon the defendant to revive the judgment.<sup>44</sup> But an execution issuing out of the superior court will be quashed where it is shown that conditions precedent to the filing of the transcript and issuing of execution thereon were not performed in the justice's court.<sup>45</sup>

d. *Defects in Writ.* — (I.) In General.<sup>46</sup> — A motion to quash a writ of execution is the proper remedy for reaching and determining questions which go to the validity of the process.<sup>47</sup> Thus, where the writ does not substantially conform to the judgment or decree upon which it issues,<sup>48</sup> or where it lacks some of the essential formalities,<sup>49</sup> or con-

42. *Harkens v. Clemens*, 1 Port. (Ala.) 30; *Browns v. Julian*, 5 J. J. Marsh. (Ky.) 312.

43. *Bushong v. Taylor*, 82 Mo. 671.

44. *Bauer v. Miller*, 16 Mo. App. 252.

45. *Johnson v. Latta*, 84 Mo. 139 (execution issued by justice returned before its regular legal return day); *Norton v. Quimby*, 45 Mo. 388; *Ruby v. Hannibal & St. J. R. Co.*, 39 Mo. 480; *Dillon v. Rash*, 27 Mo. 243.

[a] A sale made upon an execution issuing out of a superior court upon a justice's transcript will not be set aside because the execution in the justice's court was returned unsatisfied before its regular return day. Although the writ might be quashed in direct proceeding for such irregularity, it will not be in a collateral proceeding when the rights of third persons intervene. *Norton v. Quimby*, 45 Mo. 388.

46. As to defects in process generally, see the title "Process."

47. *Colo.*—*Irwin v. Beggs*, 24 Colo. App. 158, 132 Pac. 385. *Ky.*—*Columbia Bldg. L. & Sav. Assn. v. Gregory*, 32 Ky. L. Rep. 1011, 112 S. W. 608. *Md.*—*Schultze v. State*, 43 Md. 295. *N. C.*—*Williams v. Dunn*, 158 N. C. 399, 74 S. E. 99; *Foard v. Alexander*, 64 N. C. 69.

48. *U. S.*—*Murphy v. Lewis*, Hempst. 17, 17 Fed. Cas. No. 9,950a. *Ala.* *Smith v. Knight*, 11 Ala. 618. *Ky.* *Davie v. Long's Adm.*, 4 Bush 574. *N. J.*—*Dawes v. Dawes* (N. J. L.), 43 Atl. 984. *N. Y.*—*Alger v. Conger*, 17 Hun 45. *Tenn.*—*Dornan v. Benham Furn. Co.*, 102 Tenn. 303, 52 S. W. 38;

*Jennings v. Pray*, 8 Yerg. 85. *W. Va.* *Taney v. Woodmansee*, 23 W. Va. 709. *Eng.*—*Cobbold v. Chilver*, 1 Dowl. P. C. N. S. 726, 43 E. C. L. 41, 4 Man. & G. 62, 134 Eng. Reprint 26.

[a] Immaterial variance not ground for quashal. *Graham v. Price*, 3 A. K. Marsh. (Ky.) 522, 13 Am. Dec. 199; *Sanders v. Kentucky Ins. Co.*, 4 Bibb (Ky.) 471.

[b] *Conformity as to Parties.*—(1) An execution issuing against two persons upon a decree against one only is fatally defective and should be quashed. *Thompson v. Bondurant*, 15 Ala. 346, 50 Am. Dec. 136; *Taney v. Woodmansee*, 23 W. Va. 709. (2) So also an execution issuing against a person who is no party to the judgment on which it is issued, is fatally defective, and must be quashed. *Bridges v. Caldwell's Exrs.*, 2 A. K. Marsh. (Ky.) 195. (3) And an execution issuing against only part of the defendants should be quashed. *Merrifield v. Western Cottage Piano Co.*, 149 Ill. App. 1; *Baltimore & O. R. Co. v. Vanerwarker*, 19 W. Va. 265.

Against whom writ issued, see 15 STANDARD PROC. 749.

*Necessity for writ conforming to judgment*, see 15 STANDARD PROC. 811.

49. *Flint v. Phipps*, 20 Ore. 340, 25 Pac. 725, 23 Am. St. Rep. 124; *Harlan v. Harlan*, 14 Lea (Tenn.) 107; *Lee v. Crossna*, 6 Humph. (Tenn.) 281.

[a] An execution not under the seal of the court is void, and should be quashed. *Weaver v. Peasley & Co.*, 163 Ill. 251, 45 N. E. 119. *Necessity*

tains improper or insufficient directions,<sup>50</sup> it may be quashed.

An unauthorized endorsement on an execution, being a mere nullity, will not afford a sufficient ground for quashing the entire writ,<sup>51</sup> but the endorsement should be quashed.<sup>52</sup>

(II.) Amount. — The general rule is<sup>53</sup> that an execution issued for too

generally for seal, see 15 STANDARD PROC. 815.

50. As to the directions of the writ, see 15 STANDARD PROC. 804, et seq.

[a] Writ not directed to proper officer subject to quashal. *Johnson v. Foran*, 58 Md. 148; *Tuggle v. Smith*, 6 T. B. Mon. (Ky.) 76. To whom writ directed, see 15 STANDARD PROC. 804.

[b] Improper or insufficient directions (1) as to the character of the property to be taken. *Baker v. Underwood*, 63 Mo. 384. (2) An execution against an administrator should be suspended when it does not appear on its face whether it is to be satisfied out of the individual property of the defendant or out of the property of his intestate. *Higgins v. Driggs*, 21 Fla. 103. See *Davies v. Skidmore*, 5 Hill (N. Y.) 501. Directions in writ as to property levied on, see 15 STANDARD PROC. 806.

[c] The fact that nothing has been collected by the execution containing an erroneous direction as to whose property is to be levied upon, and that the writ will probably be returned nulla bona is of no importance and will not hinder a defendant from moving to quash such writ for the irregularity, as further proceedings against him may be based upon the issue and return of the writ. *Davies v. Skidmore*, 5 Hill (N. Y.) 501.

[d] Erroneous direction as to the return day (1) not a sufficient ground for quashal where sheriff made his return according to law (*McDaniel v. Johnston*, 110 Ala. 526, 19 So. 35), (2) but a writ directing return to be made to a wrong court (*Powell v. Summers*, 17 Ala. 647), (3) or to a wrong term of court, should be quashed. *Chambers v. Stone*, 9 Ala. 260; *Harrell v. Martin*, *Pleasants & Co.*, 4 Ala. 650.

51. Ala.—*McDaniel v. Johnston*, 110 Ala. 526, 19 So. 35. Ky.—*McGowan v. Hoy*, 2 Dana 347. N. Y. *Barnard v. Darling*, 1 How. Pr. 223, wrong indorsement on an execution returned nulla bona not a sufficient ground to set aside the writ.

52. *McDaniel v. Johnston*, 110 Ala. 526, 19 So. 35; *McGowan v. Hoy*, 2 Dana (Ky.) 347.

53. U. S.—*Murphy v. Lewis*, *Hempst* 17, 17 Fed. Cas. No. 9,950a. Ala. Anonymous, 2 Stew. 228. Kan.—*St. Louis & S. F. Ry. Co. v. Rierison*, 38 Kan. 359, 16 Pac. 443; *Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 793. Ky.—*Wiedemann v. Crawford*, 149 Ky. 202, 147 S. W. 951. But see also *Davie v. Long's Admx.*, 4 Bush 574; *Craig v. Reardon*, *Sneed* 328. Mo.—*Warrensburg v. Simpson*, 22 Mo. App. 695. N. J.—*Griffith v. Jones*, 3 N. J. L. 932. Tenn.—*Barnes v. Robinson*, 4 Yerg. 186. W. Va.—*Deveny v. Cook*, 70 W. Va. 282, 73 S. E. 921.

[a] Judgment Partly Paid.—(1) An execution which on its face commands the officer to make the full amount rendered when a payment had been made thereon, will not for that reason be quashed where the payment made is credited on the back of the execution. *St. Louis & S. F. Ry. Co. v. Rierison*, 38 Kan. 359, 16 Pac. 443. (2) An execution will not be set aside, because an amount paid on the judgment has not been credited, as application may be made to compel it to be done. *Noyes v. White*, 10 N. J. L. J. 183; *Smock v. Dade*, 5 Rand. (26 Va.) 639, 16 Am. Dec. 780.

[b] Writ Corrected After Motion Made To Quash.—A motion to quash a writ upon the grounds that certain credits were not endorsed thereon will be denied, where prior to the hearing on such motion and to the sale made under the writ, such credits were endorsed on the writ by the clerk. The court saying: "As the credits to which the defendants in error were entitled, had been duly endorsed on the execution, by the clerk, before the sale was made, so that it conformed in every respect to the judgment, it is difficult to perceive any sufficient reason or just ground for quashing the execution, which existed at the time of the hearing of said motion." As no possible injury or grievance "resulted

large an amount, is not, in the absence of fraud, subject to quashal upon motion, except as to the excess.<sup>54</sup>

e. *Errors Subsequent to Issuance.*—The fact that the sheriff retained too large a sum for his fees and the expenses of levy and sale under the original execution, is not a ground for setting aside an alias execution.<sup>55</sup> The writ should not be quashed for matters appearing in the advertisement of sale.<sup>56</sup>

An erroneous appraisal has been held insufficient as a ground for quashing the writ.<sup>57</sup>

2. *Motion To Procure Quashal or Vacation.*—a. *Nature of.*—A motion to vacate a writ of execution is a new and original proceeding.<sup>58</sup> It is a substitute for the ancient writ of *audita querela*,<sup>59</sup> and writ of *error coram nobis*.<sup>60</sup> It is a cumulative remedy.<sup>61</sup>

b. *Power and Jurisdiction.*—(I.) *In General.*—Every court has inherent power to quash an execution issued by its ministerial officer<sup>62</sup>

to the defendants, by the endorsement of the credits, but on the contrary a positive benefit, . . . it would be unreasonable to quash the same for this reason, and require the plaintiff in error to issue another execution, in order to reach the same end which had already been attained without injury to the defendants." But as such endorsements were not made until after the defendants had made a motion to quash and served notice thereof on the plaintiff, they are entitled to the costs of such motion and notice. *Williamson v Ong*, 1 W. Va. 84.

[c] Where a judgment has been reduced in amount by consent, such reduction does not justify the court in vacating an execution issued thereon, but the writ should merely be reduced in amount. *Homans v. Tyng*, 56 App. Div. 383, 67 N. Y. Supp. 792.

[d] A direction to collect a rate of interest in excess of that allowed by law on the judgment is ground for quashal. *Mason v. Eakle*, 1 Ill. 83.

54. See generally the cases cited in the preceding note, and 15 *STANDARD PROC.* 803.

55. *Bank of Sheboygan v. Trilling* 75 Wis. 163, 43 N. W. 830.

56. *Fink v. Remick*, 33 Mo. App. 624, writ should not be quashed because the advertisement shows that the sheriff proposes to sell property in which the defendant has no interest.

As to whether or not such error is a ground for proceeding by affidavit of illegality, see *infra*, IV, B, 4, a.

57. *Straat v. Rinkle*, 16 Mo. App. 115.

58. *Cal.*—*Buell v. Buell*, 92 Cal. 393 28 Pac. 443. *Mo.*—*Ex parte James*, 59 Mo. 280. *S. C.*—*Duncan, Malony & Co v. Brown*, 15 S. C. 414.

59. *Ky.*—*Woolley v. Louisville*, 118 Ky. 897, 82 S. W. 608; *Chambers v. Neal*, 13 B. Mon. 256; *Columbia Bldg. L. & Sav. Assn. v. Gregory*, 33 Ky. L. Rep. 1011, 112 S. W. 608. *Mo.*—*Ex parte James*, 59 Mo. 280. *N. J.*—*Linn v. Hamilton*, 34 N. J. L. 305. *N. C.* *Foard v. Alexander*, 64 N. C. 69. *Tenn.* *Barnes v. Robinson*, 4 Yerg. 186. *Vt.* *Porter v. Vaughn*, 24 Vt. 211. *Va.* *Lowenbach's Admr. v. Kelley*, 111 Va. 439, 69 S. E. 352; *Smock v. Dade*, 5 Rand. (26 Va.) 639, 16 Am. Dec. 780.

See generally 3 *STANDARD PROC.* 877.

60. *Ex parte James*, 59 Mo. 280.

61. *Me.*—*Folan v. Folan*, 59 Me. 566. *Mass.*—*Johnson v. Harvey*, 4 Mass. 483. *Okla.*—*Rader v. Gvozdanovic*, 35 Okla. 421, 130 Pac. 159. *Vt.*—*Porter v. Vaughn*, 24 Vt. 211; *Stanley v. McClure*, 17 Vt. 253.

As to whether or not a disposal of a motion to quash ousts a court of equity of its jurisdiction to restrain the execution on the judgment, see *infra*, IV, E, 2.

62. *U. S.*—*Krippendorff v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. ed. 145. *Ala.*—*Rhodes v. Smith*, 66 Ala. 175. *Ark.* *American Ins. Co. v. McGehee Liquor Co.*, 113 Ark. 486, 169 S. W. 251. *Ill.* *Jenkins v. Merriweather*, 109 Ill. 647; *Sandburg v. Papineau*, 81 Ill. 446. *Kan.* *Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 793. *Ky.*—*Woolley v. Louisville*, 118 Ky. 897, 82 S. W. 608; *Columbia Bldg. L. & Sav. Assn. v. Gregory*, 33 Ky. L. Rep.

irregularly and improvidently, except as against innocent purchasers at a sale under the irregular writ.<sup>63</sup>

The court issuing the execution is the proper tribunal to pass upon a motion to quash or vacate such writ.<sup>64</sup>

(II.) Where Transcript of Justice's Judgment Filed in Superior Court. Where a transcript of a judgment of a justice of the peace has been filed in a superior court and becomes thereby a judgment of the latter, the writ issues from the superior court,<sup>65</sup> and a motion to quash such a writ is properly made only in the court in which the transcript is

1011, 112 S. W. 608. **Miss.**—Harrington v. O'Reilly, 9 Smed. & M. 216, 48 Am. Dec. 704. **Mo.**—Buzard v. Robertson, 107 Mo. App. 557, 81 S. W. 914. **N. C.**—Williams v. Dunn, 158 N. C. 399, 74 S. E. 99; Aldridge v. Loftin, 104 N. C. 122, 10 S. E. 210, clerk. **Okla.** Trudgeon v. Gallamore, 38 Okla. 536, 134 Pac. 664; Barnett v. Bohannon, 27 Okla. 368, 112 Pac. 987. **P. R.**—Lamboglia v. School Board of Guayama, 15 Porto Rico 299. **Utah.**—State *ex rel.* Newell v. Third District Court, 37 Utah 418, 108 Pac. 1121. **Vt.**—Mattocks v. Judson, 9 Vt. 343. **Va.**—Hendricks v. Dundass, 2 Wash. 50.

[a] **In Absence of Statute.**—"There is no principle of law better recognized than that which gives to courts of record power over the process of their courts. It is essential to the administration of justice, and it by no means depends upon statutory enactment, but the power is coeval with the common law courts; and such courts will recall their process and quash the same, when it is shown that it would be illegal or inequitable to permit its further use, and to allow it to be enforced." Sandburg v. Papineau, 81 Ill. 446. See Piermas v. Milliet, 10 La. Ann. 286.

[b] **Justice of the peace** has the power, and it is his duty, to withdraw an execution which is wholly unauthorized by the judgment. Chase v. De Wolf, 69 Ill. 47.

63. **Ill.**—Jenkins v. Merriweather, 109 Ill. 647; Day v. Graham, 6 Ill. 435. **Miss.**—Harrington v. O'Reilly, 9 Smed. & M. 216, 48 Am. Dec. 704. **Mo.**—Whitman v. Taylor, 60 Mo. 127; Norton v. Quimby, 45 Mo. 388. **N. C.**—Williams v. Dunn, 158 N. C. 399, 74 S. E. 99; Sheppard v. Bland, 87 N. C. 163.

As to effect of quashal on sale, see *infra*, IV, A, 2, i, (IV).

64. **Ala.**—Martin v. Atkinson, 108 Ala. 314, 18 So. 888; Atkins v. Siddons, 66 Ala. 453; Phillips v. Brazeal, 14 Ala.

746. **Cal.**—Dorland v. Hanson, 81 Cal. 202, 22 Pac. 552, 15 Am. St. Rep. 443. **Colo.**—Irwin v. Beggs, 24 Colo. App. 158, 132 Pac. 385. **Dak.**—Dorsey v. Hall, 5 Dak. 505, 41 N. W. 471. **Ky.** Woolley v. Louisville, 118 Ky. 897, 82 S. W. 608. **Mich.**—Ismond v. Scougale, 119 Mich. 501, 78 N. W. 546. **Mo.** Norman v. Eastburn, 230 Mo. 168, 130 S. W. 276; Mellier v. Bartlett, 89 Mo. 134, 1 S. W. 220; Nelson v. Brown, 23 Mo. 13. **N. J.**—Linn v. Hamilton, 34 N. J. L. 305. **N. C.**—Williams v. Dunn, 158 N. C. 399, 74 S. E. 99; Hamer v. McCall, 121 N. C. 197, 28 S. E. 298; Bennett v. Taylor, 53 N. C. 281. **Ohio.** Miller v. Longacre, 26 Ohio St. 291; Sample v. Ross' Admr., 16 Ohio 419. **Ore.**—Marks v. Stephens, 38 Ore. 65, 63 Pac. 824, 84 Am. St. Rep. 750. **Pa.** Loomis v. Lane, 29 Pa. 242, 72 Am. Dec. 625. **Utah.**—State *ex rel.* Newell v. Third District Court, 37 Utah 418, 108 Pac. 1121.

[a] **Different Departments of Same Court.**—One department of a superior court may vacate an execution wrongfully allowed by another department of the same court. Dorland v. Hanson, 81 Cal. 202, 22 Pac. 552, 15 Am. St. Rep. 443.

[b] **Execution of Justice of the Peace.**—(1) The superior court has no jurisdiction of an original motion to set aside an execution and order of sale issued by a justice of the peace upon a judgment rendered by him, even though an appeal from his judgment is pending in the superior court. Hamel v. McCall, 121 N. C. 197, 28 S. E. 298. (2) Nor can a writ of prohibition be issued by the circuit court to quash, or prevent proceedings under an execution improperly issued by a justice of the peace. Atkins v. Siddons, 66 Ala. 453.

By what court execution issued, see 15 STANDARD PROC. 743.

65. See 15 STANDARD PROC. 742.

filed;<sup>66</sup> but in those jurisdictions, where the filing of the transcript has the effect merely of making the justice's judgment a lien upon the lands of the defendant,<sup>67</sup> the justice's court retains jurisdiction to quash or vacate the writ.<sup>68</sup>

(III.) Courts of Equity.—Equity courts will not take jurisdiction where the only relief sought is the quashal or vacation of a writ upon a judgment,<sup>69</sup> but where other relief, not attainable in a court of law, is sought, a court of equity may, in connection with such other relief, quash the execution.<sup>70</sup>

c. *Parties*.—The general rule is that only an execution defendant,<sup>71</sup> or his legal representative,<sup>72</sup> or, where the statute authorizes it,

66. **N. Y.**—*Ex parte* Thompson, 5 Cow. 31; *Rowe v. Peckham*, 30 App. Div. 173, 51 N. Y. Supp. 889. **Ore.** *Gobbi v. Refrano*, 33 Ore. 26, 52 Pac. 761. **Utah**.—*Ducheneau v. Ireland*, 5 Utah 108, 13 Pac. 87.

[a] See also the following cases wherein, although the question of jurisdiction was not raised, it seems to be the practice to make the motion to quash in the court wherein the transcript is filed. *Ruby v. Hannibal & St. J. R. Co.*, 39 Mo. 480; *Grisson v. Allen*, 10 Mo. 303; *Hammett v. Hatton*, 189 Mo. App. 567, 176 S. W. 1078; *Sappington v. Lenz*, 53 Mo. App. 44; *Bauer v. Miller*, 16 Mo. App. 252.

67. See 15 STANDARD PROC. 742.

68. **Cal.**—*Gates v. Lane*, 49 Cal. 266. **Mont.**—*Pierson v. Daly*, 143 Pac. 957. **N. C.**—*Bennett v. Taylor*, 53 N. C. 281. **Pa.**—*Boyd v. Miller*, 52 Pa. 431; *Brandes & Bro. v. Struphauer*, 2 Chest. Co. Rep. 319.

[a] Although the clerk of the court wherein the transcript is filed issues the execution, "he issues it upon the judgment of the justice, as such, and not upon it as a judgment of the district court, made such by transformation of the justice's judgment. The fact that the clerk issues the execution does not divest the justice of his control over it; . . . and since the control of its process is vested exclusively in the court upon whose authority it issues, the justice has exclusive control of the execution, whether issued by himself or by the clerk, and it is his exclusive province to recall and quash it, if for any reason it ought not to have been issued." *Pierson v. Daly*, 49 Mont. 478, 143 Pac. 957.

69. **Ala.**—*Wallace v. F. W. Cook Brew. Co.*, 72 So. 93. **Ark.**—*Anthony v. Shannon*, 8 Ark. 52. **Cal.**—*Mayo v.*

*Bryte*, 47 Cal. 626. **Ind.**—*Murphy v. Blair*, 12 Ind. 184. **Ore.**—*Marks v. Stephens*, 38 Ore. 65, 63 Pac. 824, 84 Am. St. Rep. 750. **Vt.**—*Shedd & Co. v. Bank of Brattleboro*, 32 Vt. 709.

See *infra*, IV, E, 2.

70. *American Ins. Co. v. McGehee Liquor Co.*, 113 Ark. 486, 169 S. W. 251; *Murphy v. Blair*, 12 Ind. 184. See *Karle v. Badeaux*, 185 Ill. App. 402.

[a] Where complicated questions of law or of fact, such as can only be properly presented and tried upon appropriate pleadings, are involved, the party should seek his remedy in a court of equity by injunction. *Irwin v. Beggs*, 24 Colo. App. 158, 132 Pac. 385.

71. **Ill.**—*Bonnell v. Neely*, 43 Ill. 288, 290. **Ind.**—*Jones v. Carnahan*, 63 Ind. 229. **Miss.**—*Harrington v. O'Reilly*, 9 Smed. & M. 216, 48 Am. Dec. 704. **Mo.**—*State v. Clymer*, 81 Mo. 122; *Fiske, Knight & Co. v. Lamoreaux*, 48 Mo. 523; *Bick v. Carter*, 123 Mo. App. 311, 100 S. W. 531. **N. Y.**—*Howland v. Ralph*, 3 Johns. 20; *Frink v. Morrison*, 13 Abb. Pr. 80; *Oakley v. Becker*, 2 Cow. 454. **N. C.**—*Shelton v. Fels*, 61 N. C. 178, 93 Am. Dec. 586; *Murphrey v. Wood*, 47 N. C. 63. **Pa.**—*Hanika's Estate*, 138 Pa. 330, 22 Atl. 90, 21 Am. St. Rep. 907; *In re Lowber's Appeal*, 8 Watts & S. 387, 42 Am. Dec. 302. **S. D.** *Cable v. Magpie Gold Min. Co.*, 22 S. D. 566, 119 N. W. 174. **Utah**.—*State ex rel. Newell v. Third District Court*, 37 Utah 418, 108 Pac. 1121. **Va.**—*Wallop's Admr. v. Scarborough*, 5 Gratt. (46 Va.) 1.

72. **Miss.**—*Harrington v. O'Reilly*, 9 Smed. & M. 216, 48 Am. Dec. 704. **Pa.**—*In re Lowber's Appeal*, 8 Watts & S. 387, 42 Am. Dec. 302. **Utah**. *State ex rel. Newell v. Third District Court*, 37 Utah 418, 108 Pac. 1121.

a person against whose property the execution is issued,<sup>73</sup> may move to quash an execution for irregularities. Generally, however, a stranger to the record, is not a proper person to make a motion to quash a writ,<sup>74</sup> unless he is so related to a party that he would be prejudicially affected by the enforcement of the writ.<sup>75</sup>

The execution creditor is the adverse party,<sup>76</sup> though it has been held

73. Mo.—Rev. St., 1909, §2244. But see, *State v. Clymer*, 81 Mo. 122, holding that a stranger to the action cannot move to quash the writ upon the ground that he is the true owner of the land, as the title to real estate cannot be tried in such manner. And see also *Bick v. Carter*, 123 Mo. App. 311, 100 S. W. 531, where the motion to quash the writ was allowed to be made by a person claiming to own the property levied upon, for the reason that the execution defendant was dead at the time of the issuance of the writ. N. J.—*Canan v. Carryell*, 1 N. J. L. 3. R. I.—*Hodges v. White*, 19 R. I. 717, 36 Atl. 838.

[a] In *Bonnell v. Neely*, 43 Ill. 288, the court in discussing whether or not a stranger to the execution could move to quash the writ says: "The statute can never have been intended to authorize third persons to assert adverse rights by the summary means of a motion and have them adjusted without the aid of regular pleadings. If this proceeding can be sustained, then we should be obliged to hold that the claimant of personal property which has been levied on under an execution to which he is not a party, may have his title tried by means of a motion instead of being driven to an action of replevin or a trial before a jury of the right of property. We cannot hold this. When process is abused, as, for example, if the execution has been paid to the sheriff, and he still proceeds to sell, it is very proper that as between the parties this summary remedy should be allowed. But that strangers should be allowed to have adverse and often complex rights settled in this mode is inconsistent with the spirit of our law." To same effect, see *State v. Clymer*, 81 Mo. 122.

74. Ill.—*Bonnell v. Neely*, 43 Ill. 288; *Swiggart v. Harber*, 5 Ill. 364, 39 Am. Dec. 418; *Canty v. Kelley*, 154 Ill. App. 283. Ky.—*Watkins v. Walker*, 1 Bibb 411. S. D.—*Cable v. Magpie Gold Min. Co.*, 22 S. D. 566, 119 N. W. 174.

[a] **Death of plaintiff in an execution**, after a levy of it, will not authorize a stranger to the execution to insist on a quashal of the execution or levy. *Kennedy v. Holloway's Admrs.*, 6 J. J. Marsh. (Ky.) 321.

[b] **A mere mortgagee** cannot move to set aside an execution against the land mortgaged, though such execution was irregularly issued after the death of the judgment-debtor, and without proceedings in the nature of scire facias. *Frink v. Morrison*, 13 Abb. Pr. (N. Y.) 80.

75. N. J.—*Canan v. Carryell*, 1 N. J. L. 3. N. Y.—*Matter of Royal Bank*, 140 App. Div. 480, 125 N. Y. Supp. 322 (junior judgment creditor); *Rowe v. Peckham*, 30 App. Div. 173, 51 N. Y. Supp. 889; *Jaffray v. Saussman*, 52 Hun 561, 5 N. Y. Supp. 629 (subsequent execution creditor); *Duryee v. Botsford*, 24 Hun 317 (purchaser of property of execution defendant prior to issuance of execution). Utah.—*State ex rel. Newell v. Third District Court*, 37 Utah 418, 108 Pac. 1121. Can. *Whitla v. Spence*, 5 Manitoba 392, where the issuance of the writ was not merely irregular, another execution creditor may move against it.

[a] **An assignee for the benefit of creditors** has been permitted to move to quash an execution issued upon a judgment confessed in vacation against his assignor. *Knights v. Martin*, 155 Ill. 486, 40 N. E. 358.

[b] **Sureties on an administrator's bond**, who have been released or discharged from liability on the bond, may properly move to quash a statutory execution against them, issued after the nulla bona return of a writ against the administrator. *Hudson v. Modawell*, 64 Ala. 481.

76. S. C.—*Duncan, Malony & Co. v. Brown*, 15 S. C. 414. Va.—*Wallop's Admr. v. Scarborough*, 5 Gratt. (46 Va.) 1. W. Va.—*Reinhard, Meyer & Co. v. Baker*, 13 W. Va. 805.

[a] **Trustee in Bankruptcy**.—Low-

that he may himself move to quash the writ.<sup>77</sup> The sheriff is not a necessary or proper party to the motion.<sup>78</sup>

d. *Preliminary Supersedeas or Stay*.—A motion to quash a writ, whatever may be the grounds on which it is based, does not of itself suspend the execution of the writ.<sup>79</sup> But in some jurisdictions it is permissible to apply to a judge in vacation, for an order staying proceedings as preliminary to a motion to be made in term time to quash the writ.<sup>80</sup>

e. *When and Where Made*.—Motions to quash are ordinarily required to be made and prosecuted with diligence, especially when founded on a mere irregularity.<sup>81</sup> The motion, generally, should be

enbach's Admr. v. Kelley, 111 Va. 439, 69 S. E. 352.

As to notice to adverse party, see *infra*, IV, A, 2, f.

77. Reinhard, Meyer & Co. v. Baker, 13 W. Va. 805.

78. Buffandeau v. Edmondson, 17 Cal. 436, 79 Am. Dec. 139.

79. Cal.—Bryan v. Berry, 8 Cal. 130. La.—Levi v. Converse, Harding & Co., 20 La. Ann. 558. Va.—Snavelly v. Harkrader, 30 Gratt. (71 Va.) 487, notice of motion does not operate as stay.

80. Ill.—Babeock v. McCamant, 53 Ill. 214; Bonnell v. Neely, 43 Ill. 288, 290. Mo.—Rev. St., 1909, §2244; Heuring v. Williams, 65 Mo. 446; *Ex parte* James, 59 Mo. 280. Ohio.—Miller v. Longacre, 26 Ohio St. 291. Va.—Shackelford v. Apperson, 6 Gratt. (47 Va.) 451.

[a] A petition for supersedeas made in vacation has been held sufficient as a motion to quash a writ, without the necessity of a formal motion made in term. *Oswitchee Co. v. Hope & Co.*, 5 Ala. 629; *Gates v. McDaniel*, 3 Port. (Ala.) 356.

[b] The purpose of the statute is "to give the defendant in the execution the privilege of applying to the judge at chambers, or in vacation for an order staying the execution until he can be heard in court as to whether it should be set aside or quashed. Where, however, the application is not made in vacation or during a recess of the court, but in open court, resort may be had to the customary form of proceeding by motion to quash execution at the return term in open court; and neither oath nor affirmation in support of the motion, is in such case necessary." *Heuring v. Williams*, 65 Mo. 446.

[c] But a supersedeas is not neces-

sary; where the motion to quash may be made ore tenus in term time. *Phillips v. Brazeal*, 14 Ala. 746.

81. U. S.—*Beebe v. United States*, 161 U. S. 104, 16 Sup. Ct. 532, 40 L. ed. 636. Ala.—*Gardner v. Mobile, etc.*, R. Co., 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84; *Berry v. Perry*, 81 Ala. 103, 1 So. 118 (delay of seven months, without good excuse, too long); *Steele v. Tutwiler*, 68 Ala. 107; *Henderson v. Henderson's Admr.*, 66 Ala. 556 (lapse of eight regular terms too long); *Atkins v. Siddons*, 66 Ala. 453. Ky.—*Bristow v. Payton's Admx.*, 2 Mon. 91, 15 Am. Dec. 134 (eleven years); *McKinneys v. Scott*, 1 Bibb 155 (nine years). And see *Miller v. Anderson*, Litt. Sel. Cas. 169, where motion allowed after lapse of seven years. Miss.—*Kerningham v. Scanland*, 6 How. 540, lapse of several terms. N. Y.—*Bank of Genesee v. Spencer*, 18 N. Y. 150; *Winebrener v. Johnson*, 7 Abb. Pr. (N. S.) 202; *Bowman v. Tallman*, 19 Abb. Pr. 84, 28 How. Pr. 482, 25 N. Y. Super. 632, 26 N. Y. Super. 633; *Aultman & Taylor Co. v. Syme*, 56 App. Div. 165, 67 N. Y. Supp. 530. N. C.—*Marphrey v. Wood*, 47 N. C. 63. Vt.—*Hapgood v. Goddard*, 26 Vt. 401. Va.—*Lowenbach's Admr. v. Kelley*, 111 Va. 439, 69 S. E. 352; *Beale's Admr. v. Bote-tourt Justices*, 10 Gratt. (51 Va.) 278.

[a] A motion to quash a summary execution issued upon a forfeited replevy bond may be acted on at any time when the court is in session, without regard to the term of the court at which the judgment in the original suit was rendered. *Harrison v. Hamner*, 99 Ala. 603, 12 So. 917; *Lamboglia v. School Board*, 15 Porto Rico 299, 302.

[b] Where no prejudice has resulted to the judgment creditor by reason of laches, a motion to quash a void exe-

made at the term to which the writ is returnable.<sup>82</sup> In some jurisdictions, a motion to quash an execution for a merely formal defect can not be filed after the writ has performed its function and been returned;<sup>83</sup> while in other jurisdictions, such motion may be made after the return day has passed, if the writ may still be the foundation of further proceedings.<sup>84</sup> Such motion may properly be made, though at the time an action to annul the judgment upon which the execution issued,<sup>85</sup> or a motion for new trial,<sup>86</sup> is pending. The motion should be made in the court whence the writ issues.<sup>87</sup> The statute sometimes authorizes the institution of the proceedings before the clerk.<sup>88</sup>

f. *Notice.*—(I.) *In General.*—Reasonable notice<sup>89</sup> of the motion

cution will not be barred merely because of such delay. *Lowenbach's Admr. v. Kelley*, 111 Va. 439, 69 S. E. 352.

[c] *Statute of Limitations Not Applicable to Motion To Quash.*—"It seems to be true that in our practice the motion to quash is a summary remedy in use in all cases where by the ancient practice the party would be entitled to a writ of audita querela. *Steele v. Boyd*, 6 Leigh 547, 552-3, 29 Am. Dec. 218. But it also seems that where that ancient writ is in use the statute of limitations does not apply unless it is expressly named. The reason given is, that since the party injured may neither know of a judgment or execution in the former proceeding or the manner of procuring the same until some time after the rendition of the judgment or the issue of the execution, he is not limited to a specific time within which he must sue out his writ." *Lowenbach's Admr. v. Kelley*, 111 Va. 439, 69 S. E. 352.

82. *Linthecum v. Jones*, 4 Cranch C. C. 572, 15 Fed. Cas. No. 8,376 (holding that the court has no jurisdiction to quash a writ before the term at which the writ is returnable); *Norman v. Eastburn*, 230 Mo. 168, 130 S. W. 276.

83. *Me.—Sturgis v. Reed*, 2 Greenl. 109. *N. Y.—Pinckney v. Hegeman*, 53 N. Y. 31. See also *Brown v. Ferguson*, 2 How. Pr. 178, holding a motion to quash will not lie after a withdrawal of the writ by the plaintiff. *Tex.—Meador Co. v. Avingdale*, 58 Tex. 447; *Cook v. Sparks*, 47 Tex. 28; *Martin v. Rice*, 16 Tex. 157; *Scott v. Allen*, 1 Tex. 508. *Wis.—Chouteau v. Hooe*, 1 Pin. 663, where writ is functus officio.

84. *Page v. Coleman*, 9 Port. (Ala.) 275; *Isaacs v. Judge*, 5 Stew. & P.

(Ala.) 402; *Reinhard, Meyer & Co. v. Baker*, 13 W. Va. 805.

85. *Piernas v. Milliet*, 10 La. Ann. 286.

86. *Barnett v. Bohannon*, 27 Okla. 368, 112 Pac. 987.

87. See *supra*, IV, A, 2, b.

88. *Williams v. Dunn*, 158 N. C. 399, 74 S. E. 99; *Aldridge v. Loftin*, 104 N. C. 122, 10 S. E. 210.

[a] After a return made, the better practice is to make the motion before the judge in term. *Williams v. Dunn*, 158 N. C. 399, 74 S. E. 99, especially where there are equitable claims to be adjusted.

89. *U. S.—Freeman v. Dawson*, 110 U. S. 264, 4 Sup. Ct. 94, 28 L. ed. 141. *Ala.—Atkins v. Siddons*, 66 Ala. 453. *Ark.—State Bank v. Marsh*, 10 Ark. 129; *Bently v. Cummins*, 8 Ark. 490. *Ill.—Dazey v. Orr*, 2 Ill. 535. *Ind.—Lasselle v. Moore*, 1 Blackf. 226; *Cline v. Green*, 1 Blackf. 53. *Ky.—Payne v. Payne's Exr.*, 8 B. Mon. 391; *Downing v. Brown*, Hard. 181. *Miss.—Kramer v. Holster*, 55 Miss. 243. *Mo.—Rev. St.*, 1909, §2244. *N. Y.—Harrison v. Wilkin*, 78 N. Y. 390. *N. C.—Faison v. McIlwaine*, 72 N. C. 312. *Pa.—National Furniture Co. v. McClintock*, 162 Pa. 141, 29 Atl. 348; *Irons v. McQueen*, 27 Pa. 196. *S. C.—Duncan, Malony & Co. v. Brown*, 15 S. C. 414, personal service upon plaintiff in execution necessary. *Utah.—State ex rel. Newell v. Third District Court*, 37 Utah 418, 108 Pac. 1121. *Va.—Ballard v. Whitlock*, 18 Gratt. (59 Va.) 235. *W. Va.—Rousey v. Stilwagon*, 70 W. Va. 570, 74 S. E. 732, Ann. Cas. 1914A, 1084; *Reinhard, Meyer & Co. v. Baker*, 13 W. Va. 805.

[a] Without such notice (1) a court is not bound to set aside execution.

should first be served upon the adverse party, his attorney of record or agent.<sup>90</sup>

(II.) **Requisites.**—The notice should state the grounds of irregularity upon which the application to quash is based.<sup>91</sup>

**Signature.**—Where motion to vacate or quash a writ of execution is a new and original proceeding,<sup>92</sup> it may properly be signed, without the necessity of a substitution, by attorneys other than those who appeared in the original action.<sup>93</sup>

**g. Form and Sufficiency.**—The grounds for quashing the writ must be specified in the motion,<sup>94</sup> which must set forth facts and not mere conclusions of law.<sup>95</sup>

**h. Hearing and Determination.**—(I.) **In General.**—The question to be decided on a motion to quash a writ is merely whether or not under the judgment rendered, and the attendant facts, the writ issued there-

Harrison v. Wilkin, 78 N. Y. 390. (2) The action of the judge in directing the recall of the executions in vacation, out of court, without notice to the judgment creditor, is irregular and unauthorized, and of no legal validity. Freeman v. Dawson, 110 U. S. 264, 4 Sup. Ct. 94, 28 L. ed. 141.

[b] **Waiver of Notice.**—Where a party appears generally and resists a motion to quash an execution without objection for want of notice of the motion, he thereby waives the notice thereof. Sterringer v. Mackie & Co., 57 W. Va. 63, 49 S. E. 942. See generally 2 STANDARD PROC. 536, et seq.

[c] **The sheriff** need not be given notice of the motion. Buffandeau v. Edmondson, 17 Cal. 436, 79 Am. Dec. 139.

90. Mo. Rev. St., 1909, §2244. See generally the title "Notice."

[a] **A service upon the attorney** who represented the execution plaintiff in the trial is not sufficient in those jurisdictions holding the motion to quash to be a new and original proceeding. Duncan, Malony & Co. v. Brown, 15 S. C. 414. As to whether motion is new, and original proceeding, see *supra*, IV, A, 2, a.

91. **Ala.**—Atkins v. Siddons, 66 Ala. 453. **Cal.**—Buell v. Buell, 92 Cal. 393, 28 Pac. 443. **Ky.**—Payne v. Payne's Exr., 8 B. Mon. 391. **N. Y.**—Montrait v. Hutchins, 49 How. Pr. 105.

See generally the titles "Motions;" "Notice."

[a] **No grounds can be relied upon** (1) but such as are specified in the notice. Payne v. Payne's Exr., 8 B. Mon. (Ky.) 391; Montrait v. Hutchins, 49

How. Pr. (N. Y.) 105. (2) But where reasons assigned for the motion to quash are changed to others very similar to those withdrawn, the subject-matter and the spirit being the same, though somewhat varied in the manner of setting out, no new points being presented requiring a different form of reasoning, other authorities or proof, no new notice of motion need be given. Watts v. Santa Fe County, 1 N. M. 286.

[b] **When Not Necessary To State Grounds.**—The issuing of an execution in violation of a stay of proceedings is a substantial grievance, and not a mere irregularity, within the rule that a notice of motion founded on an irregularity must specify it. Jackson v. Smith, 16 Abb. Pr. (N. Y.) 201, 25 How. Pr. 476.

[c] **Sufficient Notice.**—A notice stating that the party would move the court, at a time named, to vacate the writ, "for the reason that the said execution was wrongfully and unlawfully and improperly issued" and that such motion would be made on the record and papers on file, is sufficient. Buell v. Buell, 92 Cal. 393, 28 Pac. 443.

92. See *supra*, IV, A, 2, a.

93. Buell v. Buell, 92 Cal. 393, 28 Pac. 443.

94. Buzzard v. Robertson, 107 Mo. App. 557, 81 S. W. 914. See generally the title "Motions."

**Stating grounds in notice of motion,** see *supra*, IV, A, 2, f, (II).

95. Wilson v. Auld, 7 Ala. 302. See generally the title "Conclusions of Law."

for and its enforcement was warranted by law.<sup>96</sup> The court obviously cannot consider those matters which would not be grounds for quashing the writ.<sup>97</sup> On a motion to quash an execution issued upon a transcript of a justice of the peace, the court may inquire into the justice's jurisdiction.<sup>98</sup> Generally, unless the writ was issued without jurisdiction, its quashal upon the summary proceedings on motion, is a matter of sound discretion.<sup>99</sup> The court should look into all the circumstances, and if it be found that the party complaining is in any wise in fault, the court should refuse the motion.<sup>1</sup>

(II.) Issues to Jury.<sup>2</sup> — Questions of fact arising on a motion to quash

96. *Lamboglia v. The School Board*, 15 Porto Rico 299. See *Vanhouten v. Reily*, 6 Smed. & M. (Miss.) 440; *Buckingham & Co. v. Granville Alexandria Soc.*, 2 Ohio 360.

[a] On a motion to quash a writ under which realty has been seized, it is not necessary to determine whether the judgment is a lien upon the property. *Flagg v. Cooper*, 11 N. Y. Civ. Proc. 421.

97. As to the grounds for quashing writ, see *supra*, IV, A, 1.

[a] Questions (1) of irregularities occurring in taking and forfeiting a bond given for an appearance in court cannot be tried on motion to quash an execution issued thereon. *Schultze v. State*, 43 Md. 295. (2) The remedy for relief in such case is for the party affected to make proper and timely motion in the recognizance case. *Schultze v. State*, 43 Md. 295.

[b] The regularity of a previously quashed execution and bond will not be inquired into. *Jett v. Walker*, 1 Rand. (22 Va.) 211.

[c] Upon a motion made by the grantee of the judgment debtor, the court will not determine whether or not the conveyance was made with the intent to defraud the creditors of the judgment debtor. *Duryee v. Botsford*, 24 Hun (N. Y.) 317.

[d] The validity of the levy is not in issue upon a motion to quash the writ. *Catron v. Lafayette*, 125 Mo. 67, 28 S. W. 331; *Buzzard v. Robertson*, 107 Mo. App. 557, 81 S. W. 914; *Cope v. Snider*, 99 Mo. App. 496, 74 S. W. 10. As to effect of quashal of writ on the levy, see *infra*, IV, A, 2, i, (II).

98. *Rowe v. Peckham*, 30 App. Div. 173, 51 N. Y. Supp. 889; *Rousey v. Stilwagon*, 76 W. Va. 570, 74 S. E. 732. Ann. Cas. 1914A, 1084.

99. U. S.—*McCargo v. Chapman*, 20

How. 555, 15 L. ed. 1021; *Boyle v. Zacharie*, 6 Pet. 648, 8 L. ed. 532. N. Y. *Bank of Genesee v. Spencer*, 18 N. Y. 150; *Frean v. Garret*, 24 Hun 161. Okla. *Trudgeon v. Gallamore*, 38 Okla. 536, 134 Pac. 664; *Barnett v. Bohannon*, 27 Okla. 368, 112 Pac. 987.

[a] Where the judgment is valid and has never been satisfied and it appears that the facts would require leave to have been given if formally asked for, it is discretionary with the court to refuse to quash a writ issuing thereon more than five years after the recovery of the judgment for the first time without obtaining leave of court. *Bank of Genesee v. Spencer*, 18 N. Y. 150; *Frean v. Garrett*, 24 Hun (N. Y.) 161.

[b] Upon a refusal to grant the motion, the party is put to his writ of error or writ of audita querela. *Boyle v. Zacharie*, 6 Pet. (U. S.) 648, 8 L. ed. 532; *Brooks v. Hunt*, 17 Johns. (N. Y.) 484. As to review of ruling, see *infra*, IV, A, 2, j.

1. *Pepper v. Carter*, 11 Mo. 540; *Bank of Genesee v. Spencer*, 18 N. Y. 150; *Winebrener v. Johnson*, 7 Abb. Pr. N. S. (N. Y.) 202.

[a] Waiver of Irregularity.—A motion to quash based upon the ground that the writ was prematurely issued will be denied where it appears that the defendant waived the irregularity in the issuance. *Bell v. Bell*, 1 How. Pr. (N. Y.) 71.

[b] Previous Satisfaction.—Upon a motion to quash a writ upon the ground that the judgment has been previously satisfied, the court may investigate whether the release or satisfaction is void by reason of having been obtained by fraud and misrepresentation. *Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 793.

2. See generally the title "Issues in Pleading and Practice."

an execution, should be tried by the court, and not by a jury.<sup>3</sup>

(III.) Presumptions.—Presumptions in aid of the regularity of the issuance of a writ will be indulged in on a motion to quash a writ, in the absence of an averment to the contrary.<sup>4</sup>

i. *Effect of Adjudication.*<sup>5</sup>—(I.) As *Res Adjudicata*.—Where a denial of the motion is a final and appealable order,<sup>6</sup> it operates as a *res judicata* of the questions determined or which might have been determined and prevents a second motion.<sup>7</sup> But where such an order is not final and appealable,<sup>8</sup> it does not prevent a subsequent motion upon the same or different grounds.<sup>9</sup>

(II.) As a Bar to Further Proceedings on the Writ.—On the final determination of the question of irregularity, an absolute order quashing the writ operates as a permanent bar to any further proceedings under such writ,<sup>10</sup> but it does not bar the judgment creditor from issuing another writ upon the judgment.<sup>11</sup>

3. *Woolum v. Kelton*, 52 Ark. 445, 13 S. W. 78; *Loomis v. Lane*, 29 Pa. 242.

[a] "The court on a motion to set aside an execution may direct an issue to ascertain facts, but this is for its own satisfaction. The parties have no right to demand it." *Loomis v. Lane*, 29 Pa. 242.

[b] Where the evidence is contradictory, or where it may authorize conflicting inferences and either of the parties are desirous of referring it to that forum, submitting the issues to a jury is particularly proper. *Smock v. Dade*, 5 Rand. (26 Va.) 639, 16 Am. Dec. 780.

[c] A feigned issue will not be awarded to try the fact of payment of a judgment, where the amount in controversy does not justify the expense. *Brower v. Feeter*, 1 Wend. (N. Y.) 18.

4. *McDaniel v. Johnston*, 110 Ala. 526, 19 So. 35.

As to the presumption of regularity attending judicial proceedings, see 9 ENCY. OF EV. 927, et seq.; and also 15 STANDARD PROC. 468.

[a] On a motion to quash an execution, issued within ten years after the rendition of its judgment, when the motion contains no reference to the issuance of the previous execution within a year from the rendition of the judgment, and no denial thereof, it will be presumed that the execution was issued within a year after the rendition of judgment. *McDaniel v. Johnston*, 110 Ala. 526, 19 So. 35.

5. As to affect of adjudications gen-

erally see the titles "Judgments;" "Res Judicata."

6. See *infra*, IV, A, 2, j.

7. *Parker v. Obenchain*, 140 Ind. 211, 39 N. E. 869; *Johnson v. Latta*, 84 Mo. 139. See generally 15 STANDARD PROC. 485, et seq.

8. See *infra*, IV, A, 2, j.

9. *Rockwell v. District Court*, 17 Colo. 118, 29 Pac. 454.

10. *Buffandeau v. Edmondson*, 17 Cal. 436, 79 Am. Dec. 139; *Foard v. Alexander*, 64 N. C. 69.

[a] A writ which has been quashed by a court of competent jurisdiction must be considered as if it never had existence. *Pinckney v. Hegeman*, 53 N. Y. 31; *Claiborne v. Gross*, 7 Leigh (34 Va.) 331.

[b] Effect on Levy.—When a writ is quashed, a levy made thereunder falls. *Wellington v. Sedgwick*, 12 Cal. 469. See 15 STANDARD PROC. 901, et seq.

11. U. S.—*McCargo v. Chapman*, 20 How. 555, 15 L. ed. 1021. Ky.—*Davie v. Long's Admx.*, 4 Bush 574. Miss *Kramer v. Holster*, 55 Miss. 243.

See *supra*, IV, A, 1, a, (II), (A).

[a] But where an execution is quashed on the ground of the defendant's discharge in bankruptcy, although the court refuses to order satisfaction or discharge of the original judgment to be entered, or a perpetual stay of execution, the order of quashal relates back to the original judgment, and its effect, so far as respects the rights of the parties to that judgment, is to vacate all process issued for its satis-

(III.) On Original Judgment. — The original judgment is not destroyed or disturbed by an adjudication quashing a writ issued to enforce it.<sup>12</sup>

(IV.) On Sale. — The quashing of a writ will not defeat a sale previously made in pursuance of it, to the prejudice of an innocent purchaser, in the absence of a statute making such sales void.<sup>13</sup> But the execution creditor, not being ignorant, nor innocent of the irregularities, a quashal of the execution results in a vacation of a sale to him.<sup>14</sup>

j. *Review*. — In some jurisdictions, the order made granting or denying the motion to quash the execution is not regarded as a final order or judgment from which an appeal may be taken.<sup>15</sup> But under the statutes in other jurisdictions, the granting or refusal of an order to quash an execution is considered an order which finally disposes of a cause and is appealable.<sup>16</sup> Thus, the right to appeal from such an order has been held to be expressly granted under statutes defining a final order to be one made "upon a summary application in

faction. *Ewing v. Peek*, 26 Ala. 413. But see *supra*, IV, A, 1, a, (II), (A).

12. *Smith, Stewart & Co. v. Dean*, 166 Ala. 116, 52 So. 335; *Lamboglia v. School Board of Guayama*, 15 Porto Rico 299. But see *Ewing v. Peek*, 26 Ala. 413, and statement of facts in preceding note.

13. Ala.—*Chambers v. Stone*, 9 Ala 260; *Bumpass v. Webb*, 3 Ala. 109, 112 Ark.—*Adamson v. Cummins*, 10 Ark 541. Cal.—*Bryan v. Berry*, 8 Cal. 130 Ky.—*Cox v. Nelson*, 1 Mon. 94, 15 Am. Dec. 89; *Schobee v. Dedman*, 2 Litt. 116. Miss.—*Van Campen v. Snyder*, 2 How. 66, 32 Am. Dec. 311.

As to right to quash as against innocent purchaser, see *supra*, IV, A, 2, b, (I).

[a] It will not be presumed that the purchaser who appears upon the record as a stranger to the judgment, was privy to the irregularity. *Chambers v. Stone*, 9 Ala. 260; *Adamson v. Cummins*, 10 Ark. 541.

14. *Bryan v. Berry*, 8 Cal. 130; *Sander's Heirs v. Ruddle*, 2 Mon. (Ky.) 139, 15 Am. Dec. 148.

15. U. S.—*United States v. Abatoir Place*, 106 U. S. 160, 1 Sup. Ct. 169, 27 L. ed. 128; *Barton v. Forsyth*, 5 Wall. 190, 18 L. ed. 545; *McCargo v. Chapman*, 20 How. 555, 15 L. ed. 1021 (Mississippi); *Boyle v. Zacharie*, 6 Pet. 618, 8 L. ed. 532. Colo.—*Rockwell v. District Court*, 17 Colo. 118, 29 Pac. 454; *Good v. Martin*, 2 Colo. 292. Conn.—*Russell Lumber Co. v. Smith & Co.*, 82 Conn. 517, 71 Atl. 949. N. Y.—*Bank of*

*Genesee v. Spencer*, 18 N. Y. 150; *Brooks v. Hunt*, 17 Johns. 484.

[a] **Discretionary Orders Not Reviewable**.—"If the execution is voidable merely, whether it ought to be set aside or not is a question necessarily to be addressed to the discretion of the court below. Neglect on the part of the defendant to make his motion with due diligence would constitute a sufficient reason for denying the motion in such case. And whether due diligence had been used, or whether any apparent laches had been sufficiently excused, must, from the nature of things, be deemed merely matters of practice in that court. This court cannot review the discretion vested in that court in such matters." *Bank of Genesee v. Spencer*, 18 N. Y. 150.

[b] The appellate court can, upon an appeal from the final judgment, consider rulings made in the lower court upon incidental matters subsequent to final judgment, such as a motion to quash the writ. *Rockwell v. District Court*, 17 Colo. 118, 29 Pac. 454.

16. Ala.—*Phillips & Hudson v. Brazeal*, 14 Ala. 746; *Page v. Coleman*, 9 Port. 275. Ill.—*Sloo v. State Bank*, 2 Ill. 428. Ind.—*McAllister v. State*, 81 Ind. 256; *Wright v. Rogers*, 26 Ind. 218. Mo.—*Ex parte James*, 59 Mo. 280; *Johnson v. Greve*, 60 Mo. App. 170, holding also that a motion for new trial after an order on the motion to quash is not essential as a prerequisite to the right of appeal therefrom. S. D.—*Cable v. Magpie Gold Min. Co.*, 22 S.

an action after judgment."<sup>17</sup> The appeal may be taken by a person with sufficient interest, pursuant to the general rules elsewhere treated.<sup>18</sup>

A ground for a motion to quash cannot be set up for the first time in the appellate court.<sup>19</sup> Where a motion to quash is properly denied, the fact that the court placed its denial on the wrong ground will not require a reversal.<sup>20</sup> On affirmance of the order of a justice of the peace refusing to quash an execution the judgment should be merely for costs and not for the amount of the judgment upon which execution issued.<sup>21</sup>

**B. BY AFFIDAVIT OF ILLEGALITY. — 1. In General.** — An affidavit of illegality is the proper remedy in some jurisdictions, where an execution against the property issues illegally,<sup>22</sup> or is proceeding illegally;<sup>23</sup> this remedy is substituted for the writ of *audita querela*.<sup>24</sup>

D. 566, 119 N. W. 174. **Tex.**—*Scott v. Allen*, 1 Tex. 508. **W. Va.**—*Lowther v. Davis*, 33 W. Va. 132, 10 S. E. 20.

[a] Such motion must be preserved in a bill of exceptions to be considered. *Force v. Van Patton*, 149 Mo. 446, 50 S. W. 906; *Corby v. Tracy*, 62 Mo. 511. See generally 4 STANDARD PROC. 302, et seq.

[b] Exceptions reserved to a ruling on a motion based on several grounds, need not be several as to each of the grounds. *Harrison v. Hamner*, 99 Ala. 603, 12 So. 917.

17. **Cal.**—*Gilman v. Contra Costa*, 3 Cal. 52, 68 Am. Dec. 290. **Ind. Ter.** *Little v. Atchison, T. & S. F. Ry. Co.*, 2 Ind. Ter. 551, 53 S. W. 331. **Mont.** *Orr v. Haskell*, 2 Mont. 350. **Okla.** *Barnett v. Bohannon*, 27 Okla. 368, 112 Pac. 987. But compare *Buckholts v. Farrell*, 39 Okla. 713, 136 Pac. 745, holding no appeal lies from an order of the justices court disposing of such motion. **Wis.**—*Ernst v. The "Brooklyn,"* 24 Wis. 616.

[a] Unless abuse of discretion is shown an order quashing an execution will not be reversed. *Barnett v. Bohannon*, 27 Okla. 368, 112 Pac. 987.

[b] No appeal lies from an order of the justices court (1) disposing of a motion to quash an execution issuing from such court, such order not being a judgment within the meaning of the statutory provisions providing for appeals from the justice's court. *Buckholts v. Farrell*, 39 Okla. 713, 136 Pac. 745. (2) See also *Pierson v. Daly* (Mont.), 143 Pac. 957, holding that a judgment of a justice of the peace docketed to the district court not be-

ing a judgment of the district court, an order quashing the writ issued upon the transcript is not an appealable order within the meaning of the section authorizing appeals to be taken from the district court from any "special order made after final judgment."

18. See 2 STANDARD PROC. 194, et seq.

[a] **Sheriff.**—Having no interest in a motion to quash the execution, the sheriff cannot appeal from a judgment of quashal. *Demint v. Thompson*, 80 Ky. 255.

[b] **Purchaser at Sale.**—Where an execution has been quashed upon a motion made by the execution defendant simply for the purpose of defeating an action brought by a purchaser to recover possession of the property, the purchaser has such an interest in the judgment as gives him the right to appeal from the order setting such execution aside. *Murphrey v. Wood*, 47 N. C. 63.

19. *Sappington v. Lenz*, 53 Mo. App. 44.

20. *State ex rel. Jernigan v. Ham*, 13 Ala. App. 648, 69 So. 253. See generally 2 STANDARD PROC. 413.

21. *Woolum v. Kelton*, 52 Ark. 445, 13 S. W. 78, costs of both courts.

22. *McGee v. Anerum*, 23 Fla. 499, 15 So. 231; *Harris v. Woodard*, 133 Ga. 104, 65 S. E. 250.

23. *Harris v. Woodard*, 133 Ga. 104, 65 S. E. 250; *Robison v. Banks*, 17 Ga. 211.

24. *Manning v. Phillips*, 65 Ga. 518; *Hill v. De Launay*, 34 Ga. 427; *Robison v. Banks*, 17 Ga. 211; *Higgs v. Huson*, 8 Ga. 317.

The remedy afforded by the filing of an affidavit of illegality is purely statutory.<sup>25</sup>

**2. Who May Make and File.**—Only those persons who are enumerated in the statute are entitled to the relief afforded by an affidavit of illegality.<sup>26</sup> The remedy is generally open only to one who is a defendant in the execution levied,<sup>27</sup> and not then unless the property levied on is seized as his property.<sup>28</sup> But such an affidavit may be made and filed by an attorney in fact,<sup>29</sup> or an executor, administrator, or other trustee.<sup>30</sup>

**3. Time for Filing.**—The execution must have been levied upon his property before the defendant may file his affidavit.<sup>31</sup>

**4. Grounds of Affidavit.**—a. *In General.*—An execution issued without a judgment to support it is issued illegally, and is subject to

As to writ of audita querela, see 3 STANDARD PROC. 875.

25. *Hayes v. Frohock*, 56 Fla. 794, 47 So. 343; *Clinton v. Colclough*, 54 Fla. 520, 44 So. 878; *City of Atlanta v. Seaboard Air-Line Ry.*, 137 Ga. 805, 74 S. E. 268; *Harris v. Woodard*, 133 Ga. 104, 65 S. E. 250; *State v. Sallade*, 111 Ga. 700, 36 S. E. 922; *Manning v. Phillips*, 65 Ga. 548; *Emory v. Smith*, 51 Ga. 323.

26. *City of Atlanta v. Seaboard Air-Line Ry.*, 137 Ga. 805, 74 S. E. 268.

27. Fla. Comp. Laws, 1914, §1624; *Georgia Ry. & Elec. Co. v. Atlanta*, 144 Ga. 722, 87 S. E. 1058; *City of Atlanta v. Seaboard Air-Line Ry.*, 137 Ga. 805, 74 S. E. 268; *Walker v. Equitable Mortgage Co.*, 112 Ga. 645, 37 S. E. 862; *State v. Sallade*, 111 Ga. 700, 36 S. E. 922; *Wactor v. Marshall*, 102 Ga. 746, 29 S. E. 703; *Artope v. Barker*, 72 Ga. 186; *Clinch v. Ferril*, 48 Ga. 365; *Padgett v. Waters*, 4 Ga. App. 306, 61 S. E. 293.

[a] An affidavit is properly filed by a person owning the property levied upon, although the execution is issued against him as "A. W. S., Exec.," for the term "Exec." following his name is merely *descriptio personae* and the execution must be regarded as one against him personally. *Stephens v. Atlanta*, 119 Ga. 666, 46 S. E. 872.

As to description of person in writ in representative capacity, see 15 STANDARD PROC. 795.

[b] *Partners.*—If the execution is levied upon the individual property of a partner, he alone may contest the illegality of the proceeding. *Smith v. Bryan*, 60 Ga. 628, 630.

[c] Where a stockholder of a corporation is made individually liable upon an execution issuing against the corporation, he is entitled to the remedy of illegality. *Force Bros. & Co. v. Dahlonga Tan. & Leather Co.*, 22 Ga. 86.

[d] *Statutory claim, and not illegality*, is the remedy where property belonging to some person other than the defendant in *feri facias* has been levied on, or where property belonging to a person individually has been levied upon under a *feri facias* against that person in his representative capacity. *Padgett v. Waters*, 4 Ga. App. 306, 61 S. E. 293. But see *Horn v. Bird*, 45 Ga. 610. As to who may interpose affidavit or claim, see *supra*, II, B, 6, d, (V).

28. *City of Atlanta v. Seaboard Air-Line Ry.*, 137 Ga. 805, 74 S. E. 268; *Walker v. Equitable Mortgage Co.*, 112 Ga. 645, 37 S. E. 862; *State v. Sallade*, 111 Ga. 700, 36 S. E. 922; *Wactor v. Marshall*, 102 Ga. 746, 29 S. E. 703; *Van Dyke v. Besser*, 34 Ga. 268.

29. Fla. Comp. Laws, 1914, §1624; *Lewis v. Beck & Gregg Hdw. Co.*, 137 Ga. 515, 73 S. E. 739; *Cook v. Buchanan*, 86 Ga. 760, 13 S. E. 83; *Van Dyke v. Besser*, 34 Ga. 268.

As to form and sufficiency of an affidavit made by an attorney in fact, see *infra*, IV, B, 5, a.

30. Ga. Code, 1910, §5310.

31. *Ben Hill County v. Massachusetts Bond. & Ins. Co.*, 144 Ga. 325, 87 S. E. 15; *State v. Sallade*, 111 Ga. 700, 36 S. E. 922; *Wactor v. Marshall*, 102 Ga. 746, 29 S. E. 703. See also the cases cited *supra*, note 22.

attack by affidavit of illegality,<sup>32</sup> as is one signed by a person without authority.<sup>33</sup> This is also a proper method of attacking a levy made upon property other than that specified in an execution against specific property,<sup>34</sup> or in conflict with an agreement between the parties.<sup>35</sup> But the dismissal of a levy on the lands of the principal is no ground for an affidavit on the part of a surety.<sup>36</sup> Nor is such an affidavit a proper method of preventing an erroneous advertisement of a sale on which execution has been levied.<sup>37</sup>

b. *Going Behind Judgment.* — Where a defendant has had his day in court, he cannot, by affidavit of illegality, go behind the judgment.<sup>38</sup> an affidavit setting up such grounds is without merit.<sup>39</sup> Thus affidavits have been held insufficient as upon grounds going behind the judgment, where the judgment was attacked as not in conformity to the verdict,<sup>40</sup> or as rendered without sufficient evidence,<sup>41</sup> or as irregular,<sup>42</sup> or where the ground of the affidavit was that the verdict was not authorized by the pleadings,<sup>43</sup> or that service of process was not properly or timely made,<sup>44</sup> or errors of law taking place

32. *Lenoard v. Collier*, 53 Ga. 387.

33. *Williams v. McArthur*, 111 Ga. 28, 36 S. E. 301.

34. *James v. Cooledge & Bro.*, 129 Ga. 860, 60 S. E. 182.

[a] If the *facies* is found to be general as well as special, the illegality will be dismissed. *James v. Cooledge & Bro.*, 129 Ga. 860, 60 S. E. 182.

35. *Monroe v. Security Mutual L. Ins. Co.*, 127 Ga. 549, 56 S. E. 764.

36. *Steele v. Atlanta Land Imp. Co.*, 91 Ga. 64, 16 S. E. 257.

37. *Treadwell v. Beauchamp*, 82 Ga. 736, 9 S. E. 1040; *Jeffries v. Bartlett*, 75 Ga. 230; *Fitzgerald, etc. Co. v. Alpha, etc. Cement Co.*, 15 Ga. App. 174, 82 S. E. 774.

38. *Miller v. Watson & Co.*, 135 Ga. 408, 69 S. E. 555; *Monroe v. Security Mutual Life Ins. Co.*, 127 Ga. 549, 56 S. E. 764; *Brown v. Webb*, 121 Ga. 281, 48 S. E. 917; *Levadas v. Beach*, 119 Ga. 613, 46 S. E. 864; *Bard v. Burgsteiner*, 108 Ga. 654, 34 S. E. 183; *Ray v. Hixon*, 107 Ga. 768, 33 S. E. 692; *Cunnard v. Childs*, 10 Ga. App. 175, 73 S. E. 20; *Arnold-Forrest Horse & Mule Co. v. Fleeman*, 9 Ga. App. 483, 71 S. E. 766; *Taylor v. Futch*, 9 Ga. App. 292, 70 S. E. 1119; *Continental Fertilizer Co. v. Pass*, 7 Ga. App. 721, 67 S. E. 1052.

[a] **Fraud, Accident or Mistake.**—If a judgment is rendered, after due service of process, against a defendant by fraud, accident or mistake, or the act of the adverse party, unmixed with

negligence on his own part, his remedy is by motion to vacate the judgment, or bill in equity for relief, and not by affidavit of illegality. *Tumlin v. O'Bryan & Bros.*, 68 Ga. 65; *Fitzgerald G. Co. v. Alpha, etc. Cement Co.*, 15 Ga. App. 174, 82 S. E. 774; *Duvall v. Barron*, 14 Ga. App. 304, 80 S. E. 701. See 15 STANDARD PROC. 151, et seq.

[b] **Affidavit cannot be used as substitute for certiorari or other appellate procedure.** *Arnold-Forrest H. & M. Co. v. Fleeman*, 9 Ga. App. 483, 71 S. E. 766.

**Collateral attack on judgment, see generally the title "Judgments."**

39. *Bird v. Burgsteiner*, 108 Ga. 654, 34 S. E. 183; *Ray v. Hixon*, 107 Ga. 768, 33 S. E. 692; *Continental Fertilizer Co. v. Pass*, 7 Ga. App. 721, 67 S. E. 1052.

40. *Brewer v. Settle*, 144 Ga. 180, 86 S. E. 545; *Weaver v. Tuten*, 144 Ga. 8, 85 S. E. 1048; *Bird v. Burgsteiner*, 108 Ga. 654, 34 S. E. 183; *Saulsbury, Respass & Co. v. Blandys*, 65 Ga. 45; *Elliott v. Wilks*, 16 Ga. App. 466, 85 S. E. 679.

41. *Brown v. Webb*, 121 Ga. 281, 48 S. E. 917.

42. *Hill v. Mott*, 54 Ga. 494.

43. *Bird v. Burgsteiner*, 108 Ga. 654, 34 S. E. 183; *Elliott v. Wilks*, 16 Ga. App. 466, 85 S. E. 679.

44. *Reynolds v. Atlanta Nat. B. & L. Assn.*, 104 Ga. 703, 30 S. E. 942.

**Where defendant was not served and**

upon the trial,<sup>45</sup> or the disability of the judge to try the cause.<sup>46</sup> So also the defendant cannot set up as a ground of illegality, any matter of defense which should have been availed of on the trial of the case,<sup>47</sup> nor may he properly set up as a ground of illegality any matter which has become *res adjudicata* between the parties.<sup>48</sup>

Where a mortgage *feri facias* is levied on the mortgaged property, the defendant may file an affidavit of illegality, in which he may avail himself of any defense that he could have set up in an ordinary suit upon the demand secured by the mortgage, and show that he is not justly indebted to the plaintiff in the sum claimed in his affidavit of foreclosure.<sup>49</sup>

c. *Lack of Jurisdiction.*—The fact that the judgment upon which the execution was issued and levied was rendered by the court at a time and place not authorized by law renders it subject to attack upon affidavit of illegality.<sup>50</sup> So also where the judgment is void because the court was without jurisdiction over the person<sup>51</sup> of the de-

did not appear, see *infra*, following section.

45. *Arnold-Forrest H. & M. Co. v. Fleeman*, 9 Ga. App. 483, 71 S. E. 766.

46. *McMillan v. Nichols*, 62 Ga. 36.

47. *Ray v. Hixon*, 107 Ga. 768, 33 S. E. 692; *Crayton v. Fox*, 106 Ga. 853, 33 S. E. 42; *Harbig v. Freund & Co.*, 69 Ga. 180; *Chancy v. Carrigan*, 53 Ga. 84; *Murphrey v. Smith*, 16 Ga. App. 472, 85 S. E. 791.

[a] Such as (1) an attack on the genuineness of the note upon which judgment was rendered (*Continental Fertilizer Co. v. Pass*, 7 Ga. App. 721, 67 S. E. 1052), (2) or the discharge of a surety, who is affiant, from liability on his bond before the judgment (*Miller v. Watson & Co.*, 135 Ga. 408, 69 S. E. 555; *Cunnard v. Childs*, 10 Ga. App. 175, 73 S. E. 20), (3) or that the suit was prematurely brought (*Cooper v. Ricketson*, 14 Ga. App. 63, 80 S. E. 217), (4) or that no attachment would lie as against the property attached. *Craig v. Herring*, 80 Ga. 709, 6 S. E. 283.

48. *Dix v. Dix*, 132 Ga. 630, 64 S. E. 790; *Wells v. Hawkins*, 130 Ga. 524, 61 S. E. 121; *Brock v. Brock*, 104 Ga. 10, 20 S. E. 424; *Crusselle v. Reinhardt*, 68 Ga. 619; *Saulsbury, Respess & Co. v. Blandys*, 65 Ga. 45; *Scogin v. Beall*, 54 Ga. 499.

[a] *Adjudication of Claim.*—That a claim has been filed to personality levied on under a mortgage *feri facias*, and the property found subject, does not prevent the claimant's filing an affi-

davit of illegality to the execution, presenting issues other than those passed upon in the claim case, claimant being also defendant in *feri facias*. *Harper v. Grambling, Spalding & Co.*, 66 Ga. 236.

49. *Mathews v. Gelders*, 129 Ga. 103, 58 S. E. 649; *Arnold v. Carter*, 125 Ga. 319, 54 S. E. 177; *Berry v. Robinson*, 122 Ga. 575, 50 S. E. 378; *Stevens v. Stembridge*, 104 Ga. 619, 31 S. E. 413; *Garner v. Cohan*, 99 Ga. 78, 24 S. E. 851; *Mell v. Mooney*, 30 Ga. 413; *McCook v. Laughlin*, 9 Ga. App. 550, 71 S. E. 917.

[a] *Recoupment* (1) may be availed of by the mortgagor. *Arnold v. Carter*, 125 Ga. 319, 54 S. E. 177; *Mell v. Mooney*, 30 Ga. 413. (2) Matters of set-off, however, cannot be so pleaded. *Arnold v. Carter*, 125 Ga. 319, 54 S. E. 177; *Mell v. Mooney*, 30 Ga. 413. See generally the title, "*Set-off, Counterclaim and Recoupment.*"

50. *Williams v. Hinson*, 143 Ga. 740, 85 S. E. 868; *McDonald v. Farmers Supply Co.*, 143 Ga. 552, 85 S. E. 861; *Harrell v. Davis Wagon Co.*, 140 Ga. 127, 78 S. E. 713; *Lott v. Wood & Bro.*, 135 Ga. 821, 70 S. E. 661; *Hilson v. Kelley*, 111 Ga. 866, 36 S. E. 966.

51. *Orr v. Chattooga County Bank*, 145 Ga. 248, 88 S. E. 978; *Lott v. Wood & Bro.*, 135 Ga. 821, 70 S. E. 661; *Kuhnen v. Burt*, 108 Ga. 471, 34 S. E. 125; *Smith v. Brown*, 96 Ga. 274, 23 S. E. 849; *Rounsaville v. McGinnis*, 93 Ga. 579, 21 S. E. 123; *Planters' Bank v. Berry*, 91 Ga. 264, 18 S. E. 137;

pendant, or of the subject-matter,<sup>52</sup> the affidavit is the proper remedy to reach an execution issuing upon such judgment.

d. *Satisfaction or Discharge*.—So an affidavit of illegality is the proper method of attack where the execution is issued after a full payment or satisfaction,<sup>53</sup> or other discharge of the judgment.<sup>54</sup>

*Partial Payment*.—An affidavit of illegality may be made to an execution issuing upon a judgment which has been partially paid,<sup>55</sup> but in such case, the defendant at the time of making such affidavit, must pay the amount he admits to be due, or the sheriff shall proceed to raise that amount and accept the affidavit for the balance.<sup>56</sup>

e. *Dormancy and Prematureness*.—An execution issued after the judgment has become dormant,<sup>57</sup> or one issued prematurely,<sup>58</sup> is subject to attack by affidavit of illegality.

5. *Form and Sufficiency*.—a. *In General*.—The affidavit must

Meeks v. Johnson, 75 Ga. 629; Cobb v. Pitman, 49 Ga. 578; Parker v. Jennings, 26 Ga. 140; Fitzgerald Granitoid Co. v. Alpha, etc. Cement Co., 15 Ga. App. 174, 82 S. E. 774; Continental Fertilizer Co. v. Pass, 7 Ga. App. 721, 67 S. E. 1052.

[a] *Judgment Against Partnership*. Where a petition prays process against an individual and also against a partnership, but the individual alone is served, and there is no appearance or waiver by the partnership, an execution issuing upon a judgment by default against both the individual and the partnership and levied upon the property of the partnership is subject to an affidavit of illegality. Holland Gold Pen Co. v. Williams & Co., 7 Ga. App. 173, 66 S. E. 540.

52. Bates v. Bigby, 123 Ga. 727, 51 S. E. 717; Echols v. Almon, 77 Ga. 330, 1 S. E. 269; Morris v. Morris, 76 Ga. 733; Williams v. Sulter, 76 Ga. 355; Continental Fertilizer Co. v. Pass, 7 Ga. App. 721, 67 S. E. 1052.

53. Mathews v. Hillyer, 17 Fla. 498; Equitable Mortg. Co. v. Montfort, 121 Ga. 696, 49 S. E. 715; Conley v. Maher, 93 Ga. 781, 20 S. E. 647; Thompson v. Mitchell, 74 Ga. 797; Greene v. Oliphant, 64 Ga. 565; Lowry v. Richards, 62 Ga. 370; Flournoy v. Silman, 59 Ga. 195; Shorter v. Moore, Trimble & Co., 41 Ga. 691; Bryan v. Meaders Bros., 9 Ga. App. 326, 71 S. E. 491.

[a] *Allegations of affidavit insufficient to show delivery of personalty in satisfaction of judgment*. Leavel v. Frey, 133 Ga. 723, 66 S. E. 916.

54. Mathews v. Hillyer, 17 Fla. 498; Smith v. Murphey, 140 Ga. 80, 78 S.

E. 423 (discharge of judgment debtor in bankruptcy); Wimberly v. Adams, 51 Ga. 423; Murphey v. Smith, 16 Ga. App. 472, 85 S. E. 791, discharge of judgment debtor in bankruptcy.

[a] *Agreement Not To Enforce Against Surety*.—Where a surety dismissed his appeal from a judgment against his principal and himself upon the plaintiff's agreement that the judgment would be enforced only as against the principal, he could, upon a levy of an execution against his property upon the original judgment set up these facts as a ground that the execution was proceeding illegally. Wimberly v. Adams, 51 Ga. 423.

55. Ga. Code, 1910, §6287; Hardwick v. Dalton, 140 Ga. 633, 79 S. E. 553; Equitable Mortg. Co. v. Montfort, 121 Ga. 696, 49 S. E. 715; Levadas v. Beach, 119 Ga. 613, 46 S. E. 864; Roberson v. Banks, 17 Ga. 211.

56. See cases cited in preceding note.

[a] *An affidavit alleging that "the amount of the execution is excessive"* implies that some amount is due, and the failure of the defendant to pay the amount he admits to be due subjects the affidavit to a general demurrer. Hardwick v. Dalton, 140 Ga. 633, 79 S. E. 553.

57. Smith, Barry & Co. v. Bearden, 117 Ga. 822, 45 S. E. 59; Greene v. Oliphant, 64 Ga. 565; Vanderberg, Bonnett & Co. v. Threlkeld, 61 Ga. 16; Benton & Bros. v. Fish, 1 Ga. App. 656, 57 S. E. 1079.

58. Sheppard v. Roberson, 106 Ga. 757, 32 S. E. 665.

show that the execution was levied on or was proceeding against the defendant's property.<sup>59</sup> It must clearly state the ground of the illegality,<sup>60</sup> as well as all the existing reasons relied upon to show that it issued or is proceeding illegally.<sup>61</sup>

**Attorney in Fact.**—Where the affidavit is made by an attorney in fact of the person entitled to make the same, no writing showing his authority to so act need be exhibited or attached to the affidavit.<sup>62</sup>

**b. Verification.**—The affidavit must be positively verified on the oath of the person making it.<sup>63</sup>

59. *Wactor v. Marshall*, 102 Ga. 746, 29 S. E. 703.

[a] **Reference to Levy.**—Such fact may be shown by the endorsement of levy made on the writ of execution. *Wactor v. Marshall*, 102 Ga. 746, 29 S. E. 703.

60. *Mitchell v. Duncan*, 7 Fla. 13; *Rucker v. Tabor*, 126 Ga. 132, 54 S. E. 959; *Brinson v. Birge*, 102 Ga. 802, 30 S. E. 261; *Lewis v. Wall*, 70 Ga. 646; *Green v. Rogers*, 62 Ga. 166; *Sharp v. Kennedy*, 50 Ga. 208.

[a] **General statements** will be disregarded. *Lewis v. Wall*, 70 Ga. 646; *McGhee v. Way*, 46 Ga. 282.

[b] **Mere conclusions of the pleader** are insufficient. *Armistead v. Weaver*, 140 Ga. 740, 79 S. E. 783; *Baker v. Akerman*, 77 Ga. 89.

[c] **Merely alleging that the court had no jurisdiction** because the defendant does not reside in the county is insufficient. All grounds of jurisdictions and all methods of service or notice must be distinctly negated. *Warwick Gin & Cotton Co. v. Continental Gin Co.*, 143 Ga. 508, 85 S. E. 700; *Jordan v. Carter*, 66 Ga. 254; *Cobb v. Pitman*, 49 Ga. 578; *Georgia Northern Ry. Co. v. Home Mercantile Co.*, 17 Ga. App. 755, 88 S. E. 413.

[d] **By alleging that he has never had any notice of the pendency of the suit upon which the judgment was founded, until execution issued against him, the defendant negatives the fact of service, the acknowledgment of service, or of his appearance in court to defend the suit.** *Duke v. Randolph*, 52 Ga. 523.

[e] **Where it is alleged that the judgment was rendered at a place where the court had no jurisdiction to sit, the affidavit is good without alleging at what particular place the court should have held its sessions.** *Hilson v. Kelley*, 111 Ga. 866, 36 S. E. 966.

[f] **Payment** is not sufficiently alleged unless the affidavit distinctly and unequivocally avers that the execution has been fully paid off and satisfied. Merely setting forth that various specified sums have been paid on the execution is not sufficient unless it be further specifically alleged that they in amount are sufficient to fully satisfy the same. *Brinson v. Birge*, 102 Ga. 802, 30 S. E. 261.

[g] **An allegation that an execution has been fully paid off and satisfied since the rendition of the judgment, is good in substance and should not be stricken on general demurrer.** But the failure to state to whom the payment was made, subjects the affidavit to a special demurrer. *Griffin v. Frick*, 97 Ga. 219, 23 S. E. 833.

[h] **A copy or abstract of the record in a court of bankruptcy need not be attached or made a part of an affidavit of illegality based upon the ground that the judgment debt has been discharged by an adjudication of bankruptcy.** *Murphey v. Smith*, 16 Ga. App. 472, 85 S. E. 791.

[i] **A statement that affiant is advised and believes that the execution is proceeding illegally does not make defective an affidavit which otherwise shows sufficient grounds.** *Inman v. Miller*, 71 Ga. 293.

61. *Lamb v. Dart*, 108 Ga. 602, 34 S. E. 160; *Sigman v. Treadwell*, 102 Ga. 766, 29 S. E. 761; *Craig v. Fraser*, 73 Ga. 246; *Hambrick v. Crawford*, 55 Ga. 335; *Hurt v. Mason*, 2 Ga. 367.

62. *Lewis v. Beck & Gregg Hdw. Co.*, 137 Ga. 515, 73 S. E. 739; *Cook v. Buchanan*, 86 Ga. 760, 13 S. E. 83.

63. *Ga. Code*, 1910, §5305; *Howland v. Donehoo*, 141 Ga. 687, 82 S. E. 32; *Cook v. Buchanan*, 86 Ga. 760, 13 S. E. 83; *Sprinz v. Vannucci*, 80 Ga. 774, 6 S. E. 816; *Craig v. Fraser*, 73 Ga. 246; *Stancel v. Puryear*, 58 Ga. 445.

**6. Objections to Sufficiency.** — The affidavit of illegality may be demurred to if it is vague, indefinite or uncertain.<sup>64</sup> A motion to dismiss an affidavit of illegality will lie where no ground set forth therein presents a legal defense against the further progress of the writ.<sup>65</sup>

**7. Construction of Affidavit.** — Affidavits of illegality are strictly construed against the affiant.<sup>66</sup>

**8. Amendment and Second Affidavit.** — Affidavits of illegality are, upon motion and leave of court, amendable instantaneously by the insertion of new and independent grounds;<sup>67</sup> but the defendant must swear that he did not know of such grounds when the original affidavit was filed,<sup>68</sup> unless the amendment merely amplifies or alters a pre-existing ground already stated.<sup>69</sup> An amendment cannot contradict or qualify the original affidavit of illegality,<sup>70</sup> nor may it change the party defendant.<sup>71</sup>

A second affidavit cannot be maintained for causes which existed and were known, or in the exercise of reasonable diligence might have been known at the time of filing the first.<sup>72</sup> Where a second affidavit is made, the defendant should state fully and specifically the reasons

[a] An oath qualified by the words "to the best of deponent's knowledge and belief; and that this affidavit is based upon the testimony of reliable witnesses" is insufficient. *Sprinz v. Vannucki*, 80 Ga. 774, 6 S. E. 816; *Craig v. Fraser*, 73 Ga. 246.

Who may make affidavit, see *supra*, IV, B, 2.

64. *Rucker v. Tabor*, 126 Ga. 132, 54 S. E. 959; *McLaren v. Beall*, 50 Ga. 632.

[a] **Defect in Jurat.** — The jurat being no part of the affidavit, a general demurrer to the sufficiency of the affidavit will not reach a defect in the jurat, such as failure to add to the name of the person who administered the oath his official designation. *Smith v. Walker*, 93 Ga. 252, 18 S. E. 830.

65. *American Mortgage Co. v. Tennessee*, 87 Ga. 28, 33, 13 S. E. 158, 12 L. R. A. 529.

66. *Wactor v. Marshall*, 102 Ga. 746, 29 S. E. 703; *Mt. Airy Hotel Co. v. Mitchell Furn. Co.*, 73 Ga. 94.

67. *Inman v. Miller*, 71 Ga. 293; *Lee v. Walden*, 68 Ga. 664; *Ansley v. Wilson*, 47 Ga. 280; *Adams v. Fitzgerald*, 14 Ga. 36; *Higgs v. Huson*, 8 Ga. 317.

68. *Mosley v. Fryer & Son*, 102 Ga. 564, 27 S. E. 667 (amendment rightfully refused where defendant fails to so swear); *Miller v. Blitch*, 74 Ga. 360; *Lee v. Walden*, 68 Ga. 664; *Higgs v.*

*Huson*, 8 Ga. 317; *Georgia Northern Ry. Co. v. Cone*, 17 Ga. App. 786, 88 S. E. 701; *Georgia Northern Ry. Co. v. Home Mercantile Co.*, 17 Ga. App. 755, 88 S. E. 413.

69. *Inman v. Miller*, 71 Ga. 293; *Cooper Co. v. Lanier*, 17 Ga. App. 688, 87 S. E. 1092; *McCook v. Laughlin*, 9 Ga. App. 550, 71 S. E. 917.

70. *Higgs v. Huson*, 8 Ga. 317.

71. *Van Dyke v. Besser*, 34 Ga. 268.

72. *Cone Export & Com. Co. v. McCalla*, 113 Ga. 17, 38 S. E. 336; *Binder v. Ragsdale*, 100 Ga. 400, 28 S. E. 165; *Baker v. Smith*, 91 Ga. 142, 16 S. E. 967; *Burnett v. Fouché*, 77 Ga. 550; *Lenoard v. Collier*, 53 Ga. 387; *Field v. Price*, 50 Ga. 135; *Bell v. Atlanta Tel. & Tel. Co.*, 15 Ga. App. 680, 84 S. E. 175.

[a] **Negligence or ignorance of counsel** in not informing affiant of his legal rights is not sufficient to allow him to file a second affidavit upon grounds known to exist at the time of filing the first. *Baker v. Smith*, 91 Ga. 142, 16 S. E. 967; *Hambrick v. Crawford*, 55 Ga. 335.

[b] **The fact that the first affidavit was dismissed, without a trial of the issues raised by it, does not make an exception to the rule.** *Bell v. Atlanta Tel. & Tel. Co.*, 15 Ga. App. 680, 84 S. E. 175.

why the grounds contained in his second affidavit could not have been known to him at the time of filing the first.<sup>73</sup>

**9. Bond Accompanying Affidavit.**—A forthcoming bond, with sufficient sureties, must be given where the affiant wishes to take possession of the property.<sup>74</sup> The bond should be made payable to the execution plaintiff,<sup>75</sup> and be conditioned for the delivery of the property levied upon at the time and place of sale, in the event that such illegality is dismissed or withdrawn.<sup>76</sup>

**10. Filing and Subsequent Proceedings.**—a. *Generally.*—The affidavit and bond, if any, are delivered to the sheriff or other executing officer, who must accept them, if the allegations contained in the affidavit on their face show that the execution either issued or is proceeding illegally.<sup>77</sup> He must then return them with the writ of execution to the next term of the court from which the execution issued,<sup>78</sup> which court is the proper tribunal to determine the issues raised by the affidavit.<sup>79</sup>

**Mandamus** will lie to compel a sheriff to accept and return into court an affidavit, the allegations of which show on their face that the execution either issued or is proceeding illegally.<sup>80</sup>

73. *Binder v. Ragsdale*, 100 Ga. 400, 28 S. E. 165; *Burnett v. Fouche*, 77 Ga. 550 (properly dismissed on demurrer where affidavit fails to state reasons); *Hunter v. Davidson*, 59 Ga. 260.

74. *Mullis v. Kennedy*, 143 Ga. 618, 85 S. E. 845; *Crayton v. Fox*, 100 Ga. 781, 28 S. E. 510; *Tarver v. Tarver*, 53 Ga. 43. See Fla. Comp. Laws, 1914, §1624; *Griffin v. Lacourse*, 31 Fla. 125, 12 So. 665.

[a] Where levy made upon realty, no forthcoming bond is required. *Murphy v. Smith*, 16 Ga. App. 472, 85 S. E. 791.

75. Fla. Comp. Laws, 1914, §1624; *Kinney v. Avery & Co.*, 14 Ga. App. 180, 80 S. E. 663.

[a] A bond payable to sheriff is insufficient as a statutory bond. *Kinney v. Avery & Co.*, 14 Ga. App. 180, 80 S. E. 663.

76. *Brantley v. Baker*, 75 Ga. 676; *Kinney v. Avery & Co.*, 14 Ga. App. 180, 80 S. E. 663.

[a] Bond Must Be Conditioned Substantially as Required by Statute. *Brantley v. Baker*, 75 Ga. 676.

77. *Williams v. McArthur*, 111 Ga. 28, 36 S. E. 301; *McCandless v. McKibben*, 99 Ga. 129, 24 S. E. 872; *Moseley v. Sanders*, 76 Ga. 293; *Spring v. Morgan*, 73 Ga. 805. Compare, *Treadwell v. Beauchamp*, 82 Ga. 736, 9 S. E. 1040; *Tucker v. Respass*, 28 Ga. 613; *Sullivan v. Hearnden*, 11 Ga. 294.

[a] The sheriff is not to inquire into the truth of the allegations. *Williams v. McArthur*, 111 Ga. 28, 36 S. E. 301.

[b] Acceptance of unsworn affidavit, no protection to officer for failure to collect the writ. *Reeves v. Parish*, 80 Ga. 222, 4 S. E. 768.

78. *Houstoun v. Bradford*, 35 Fla. 490, 17 So. 664; *McGee v. Ancrum*, 32 Fla. 499, 15 So. 231; *Miller v. Perkerson*, 128 Ga. 465, 57 S. E. 787; *Berry v. Jordan*, 121 Ga. 537, 49 S. E. 607; *Williams v. McArthur*, 111 Ga. 28, 36 S. E. 301; *Beall v. Bailey*, 45 Ga. 300; *Padgett v. Waters*, 4 Ga. App. 306, 61 S. E. 293.

[a] It will be presumed that the officer acted in good faith in receiving and returning the affidavit into court. *Turner v. Winn*, 83 Ga. 761, 10 S. E. 368.

79. *Berry v. Jordan*, 121 Ga. 537, 49 S. E. 607; *Moore v. O'Barr*, 87 Ga. 205, 13 S. E. 464; *Manning v. Phillips*, 65 Ga. 548; *Padgett v. Waters*, 4 Ga. App. 306, 61 S. E. 293.

80. *Williams v. McArthur*, 111 Ga. 28, 36 S. E. 301.

[a] The plaintiff in execution is not a party to the proceedings by mandamus. *Williams v. McArthur*, 111 Ga. 28, 36 S. E. 301.

[b] No investigation into the truth of the recitals of fact contained in the affidavit can be made in the man-

**Effect of Filing.**—Upon the delivery of the affidavit of illegality and bond to the executing officer, all further proceedings on the execution must be suspended.<sup>81</sup> Other executions against the defendant are not stayed, however.<sup>82</sup>

**b Notice.**—The plaintiff in execution should be given notice that an affidavit has been filed.<sup>83</sup> But no notice of the time or place of the hearing upon the affidavit need be given the parties where such time or place is fixed by law.<sup>84</sup>

**c. Hearing and Determination.**—(I.) **Precedence of Motions.**—A motion by the plaintiff in execution to dismiss the illegality takes precedence of a motion by the defendant to quash the writ.<sup>85</sup>

(II.) **Pleadings, Issues and Trial.**—The execution with the entry of levy and the affidavit perform the functions of pleadings.<sup>86</sup> The plaintiff in execution or his attorney may controvert the facts contained in the affidavit,<sup>87</sup> in which event his written traverse becomes a

damus proceedings. *Williams v. McArthur*, 111 Ga. 28, 36 S. E. 301.

81. *Williams v. McArthur*, 111 Ga. 28, 36 S. E. 301; *Greene v. Oliphant*, 64 Ga. 565; *Green v. Rogers*, 62 Ga. 166.

[a] **Partial Payment.**—Where the affidavit is upon the ground that the execution has been partially paid, the execution is not stayed until the amount admitted to be due has been paid. *Equitable Mortg. Co. v. Montfort*, 121 Ga. 696, 49 S. E. 715.

[b] The giving of a bond is an essential prerequisite to the right to suspend the execution. *Griffin v. Lacourse*, 31 Fla. 125, 12 So. 665.

82. *Carr v. Morris*, 17 Ga. App. 45, 86 S. E. 94.

[a] **If the property be sold on other executions** enough of the proceeds should be set aside to satisfy the first execution, and the forthcoming bond given with the affidavit must be released. Ga. Code, 1910, §5309.

83. *Berry v. Jordan*, 121 Ga. 537, 49 S. E. 607. But see *Higgs v. Huson*, 8 Ga. 317, "no service or notice of illegality, is required."

84. *Berry v. Jordan*, 121 Ga. 537, 49 S. E. 607; *Beall v. Bailey*, 45 Ga. 300.

[a] **Irregular Terms.**—Where the court is one which does not hold its sessions at stated times or terms, the time and place of hearing should be fixed by the judge and ten days' notice given thereof to both parties. *Berry v. Jordan*, 121 Ga. 537, 49 S. E. 607.

85. *Sims v. Hatcher*, 77 Ga. 389, 3 S. E. 92.

86. *Thompson v. Fain*, 139 Ga. 310, 77 S. E. 166; *James v. Cooledge & Bro.*, 129 Ga. 860, 60 S. E. 182; *Miller v. Perkerson*, 128 Ga. 465, 57 S. E. 787.

[a] **Character of Writ.**—If, on the trial of the issue raised by these pleadings, the *feri facias* be introduced as evidence, it does not lose its character as pleading. *Miller v. Perkerson*, 128 Ga. 465, 57 S. E. 787.

87. *Thompson v. Fain*, 139 Ga. 310, 77 S. E. 166; *Miller v. Perkerson*, 128 Ga. 465, 57 S. E. 787.

[a] **Written Traverse of Defendant's Affidavit.**—(1) The traverse of the facts contained in defendant's affidavit must be in writing, and an oral statement, merely, of the execution plaintiff's counsel that he joins issue thereto is insufficient. And where counsel for the defendant raises the point that there has been no traverse of the grounds and no issues joined, and that the only question before the court for determination is as to the sufficiency of such grounds, it is error to compel him to proceed to a jury trial without any joinder of issue. *Thompson v. Fain*, 139 Ga. 310, 77 S. E. 166; *McLeod v. Bird*, 14 Ga. App. 77, 80 S. E. 207. (2) If, however, the affiant goes to trial before a jury without distinctly objecting on the ground that no such traverse or joinder of issue has been filed, he will be estopped from thereafter raising the objection. *McLeod v. Bird*, 14 Ga. App. 77, 80 S. E. 207.

[b] **The question of title to the property levied upon is not an issue involved in an illegality case and can-**

pleading.<sup>88</sup> Where the illegality alleged consists in the want of service, and there is a return of service made by the officer, the verity of such return must be traversed at the first term after notice of the return,<sup>89</sup> and the sheriff be made a party thereto.<sup>90</sup> The issues raised by a traverse of the affidavit are tried by a jury.<sup>91</sup> When there is no evidence other than the record itself,<sup>92</sup> or the affidavit is not controverted,<sup>93</sup> the court passes upon and determines the questions raised, from an inspection of the execution and affidavit of illegality. The fact of a levy cannot be denied by the defendant at the trial of his affidavit.<sup>94</sup>

(III.) **Affidavit Interposed for Delay.** — Where the affidavit of illegality is dismissed for insufficiency or informality,<sup>95</sup> or is withdrawn,<sup>96</sup> the plaintiff in execution may proceed with the case to have determined the question of whether the affidavit was interposed for delay, and the damages therefor.

(IV.) **Verdict and Judgment.** — Where the affiant fails to appear at the hearing, the affidavit is dismissed without adjudicating the merits.<sup>97</sup>

not be made so. *Harris v. Woodard*, 133 Ga. 104, 65 S. E. 250. See *Moore v. O'Barr*, 87 Ga. 205, 13 S. E. 464.

88. *Thompson v. Fain*, 139 Ga. 310, 77 S. E. 166.

89. *Orr v. Chattooga County Bank*, 145 Ga. 248, 88 S. E. 978; *O'Bryan & Bros. v. Calhoun*, 68 Ga. 215; *Dozier v. Lamb*, 59 Ga. 461; *Rawlings v. Brown*, 15 Ga. App. 162, 82 S. E. 803.

[a] "If it appears from the illegality that there is an entry of service by the proper officer, it must be duly attacked, or the affidavit of illegality will be dismissed." *Orr v. Chattooga County Bank*, 145 Ga. 248, 88 S. E. 978; *Field v. Queen City, etc. Co.*, 143 Ga. 129, 84 S. E. 553.

[b] **The traverse of the truth of the return may be included in the affidavit of illegality.** *Orr v. Chattooga County Bank*, 145 Ga. 248, 88 S. E. 978; *O'Bryan & Bros. v. Calhoun*, 68 Ga. 215.

[c] **A mere denial of service in the affidavit of illegality is not a traverse of the official return.** *Rawlings v. Brown*, 15 Ga. App. 162, 82 S. E. 803.

90. *Orr v. Chattooga County Bank*, 145 Ga. 248, 88 S. E. 978; *O'Bryan & Bros. v. Calhoun*, 68 Ga. 215; *Rawlings v. Brown*, 15 Ga. App. 162, 82 S. E. 803.

[a] **Deputy Sheriff.**—"If the return of service be made by a deputy sheriff, both he and the sheriff are necessary parties to the traverse." *Rawlings v.*

*Brown*, 15 Ga. App. 162, 82 S. E. 803.

91. *Thompson v. Fain*, 139 Ga. 310, 77 S. E. 166; *Miller v. Perkerson*, 128 Ga. 465, 57 S. E. 787.

[a] **Right To Close.**—The burden of proof resting with the plaintiff in execution, he is entitled to the right to conclude. *Bertody v. Ison*, 69 Ga. 317; *James v. Edward Thompson Co.*, 17 Ga. App. 578, 87 S. E. 842.

92. *Sprinz v. Frank*, 81 Ga. 162, 7 S. E. 177.

93. *Thompson v. Fain*, 139 Ga. 310, 77 S. E. 166; *Miller v. Perkerson*, 128 Ga. 465, 57 S. E. 787. See *Fla. Comp. Laws*, 1914, §1624; *Mathews v. Hillyer*, 17 Fla. 498.

94. *Smith v. Camp*, 84 Ga. 117, 10 S. E. 539.

95. *Burnett v. Fouché*, 77 Ga. 550; *Baker v. Akerman*, 77 Ga. 89; *Jordan v. Farmers & Merchants Bank*, 5 Ga. App. 244, 62 S. E. 1024.

[a] **Jury authorized to infer from such dismissal, that the affidavit was filed for delay only.** *Jordan v. Farmers' & Merchants Bank*, 5 Ga. App. 244, 62 S. E. 1024.

96. *Thomas & Co. v. Parker*, 69 Ga. 283.

97. *Morris v. Murphey & Co.*, 95 Ga. 307, 22 S. E. 635, 51 Am. St. Rep. 81; *Wade v. Wisenand*, 86 Ga. 482, 12 S. E. 645.

**As to the effect of the judgment,** see *infra*, this section.

**As to dismissal generally,** see the

A verdict may be directed by the court in accordance with the general rules elsewhere treated.<sup>98</sup> Where the grounds as stated in an affidavit, have been determined by the court to be insufficient, the judgment should be to set aside the affidavit and direct the issuance of an execution against the person making it.<sup>99</sup> A verdict cannot be rendered in favor of the defendant upon a second affidavit where it appeared that the grounds set up therein were known to him at the time of filing the first.<sup>1</sup> If the jury finds that an execution has been partially paid, its verdict shall be that the execution proceed for the balance shown to be really due thereon.<sup>2</sup> Where it is found by the jury that the affidavit was interposed for delay only, it may assess damages therefor.<sup>3</sup>

**Conclusiveness and Effect.**—A judgment of dismissal of an affidavit of illegality terminates the jurisdiction of the court over it,<sup>4</sup> and operates as a res adjudicata and bar, if based upon an inquiry into the merits,<sup>5</sup> but not if based on a failure to prosecute,<sup>6</sup> or upon the insufficiency of the allegations of the affidavit.<sup>7</sup>

**11. Review.**—The proceedings upon affidavit of illegality may be reviewed by writ of error.<sup>8</sup>

**C. RELIEF FROM INFORMAL OR INVALID LEVIES.—1. Remedies Generally.**<sup>9</sup>—In a proper case, relief from a defective, or informal

title "Dismissal, Discontinuance and Nonsuit."

98. See the title "Verdict."

[a] Where the sole ground set up is that the defendants were not served, (1) the court may, upon the uncontradicted evidence that one defendant was served and the other was not, direct a verdict that the writ proceed as against the defendant served and dismissed as to the other. *Crayton v. Fox*, 106 Ga. 853, 33 S. E. 42. (2) Where the defendant's evidence shows that no service was made upon him but fails to negative that he appeared and pleaded a verdict is properly directed against him. *Lemaster v. Orr*, 101 Ga. 762, 29 S. E. 32.

99. *Houstoun v. Bradford*, 35 Fla. 490, 17 So. 664.

1. *Cone Export & Com. Co. v. McCalla*, 113 Ga. 17, 38 S. E. 336.

2. *Equitable Mortg. Co. v. Montfort*, 121 Ga. 696, 49 S. E. 715.

3. Ga. Code, 1910, §5308.

4. *Howell v. Allen*, 106 Ga. 16, 31 S. E. 759.

As to effect of judgment of dismissal generally, see 7 STANDARD PROC. 683.

5. *Stevens v. Stembridge*, 104 Ga. 619, 31 S. E. 413; *Morris v. Murphey & Co.*, 95 Ga. 307, 22 S. E. 635, 51

Am. St. Rep. 81; *Bowden v. Taylor*, 81 Ga. 204, 6 S. E. 280, it is a judgment that the execution did not issue or proceed illegally.

[a] Is a bar to a further litigation upon the same grounds. *Craig v. Cosby*, 81 Ga. 650, 8 S. E. 185; *Field v. Sisson*, 40 Ga. 67.

Judgment as merger or bar, see the title "Judgments."

Judgment as res judicata, see the title "Res Judicata."

6. *Kinney v. Avery & Co.*, 14 Ga. App. 180, 80 S. E. 663.

[a] But a final judgment rendered in such case is not void, but merely irregular, and becomes binding, if not excepted to. *Morris v. Murphey & Co.*, 95 Ga. 307, 22 S. E. 635, 51 Am. St. Rep. 81.

7. *Peters v. Baker*, 54 Ga. 339.

8. *Hayes v. Frohock*, 56 Fla. 794, 47 So. 343; *Clinton v. Colelough*, 54 Fla. 520, 44 So. 878.

9. As to dismissal of a levy in a third party claim case, see *infra*, II, B, 6.

As to remedy by affidavit of illegality, see *supra*, IV, B.

Injunction against execution, see *infra*, IV, D.

Actions to set aside sales, see *supra*, II, B, 7.

levy may be had by *audita querela*,<sup>10</sup> by petition,<sup>11</sup> by statutory remedies,<sup>12</sup> or by motion to set aside, vacate or dismiss,<sup>13</sup> but not by bill in equity.<sup>14</sup>

**2. Remedy by Motion.**—a. *Generally.*—The remedy most generally adopted is that by motion to vacate, dismiss or set aside the levy,<sup>15</sup> accompanied by the proper affidavits and notice.<sup>16</sup> The remedy by motion is proper when it is not necessary to make third persons parties or to bring in extrinsic facts.<sup>17</sup>

b. *Grounds.*—(I.) **Unauthorized or Defective Writ.**—If the judgment is such that an execution cannot be lawfully issued thereon, a levy made by virtue of the unauthorized execution will be quashed.<sup>18</sup> So also it is ground for quashing a levy that the writ on its face is not sufficient to warrant the levy,<sup>19</sup> or that it is issued oppressively.<sup>20</sup>

10. *East Greenwich Inst. v. Allen*, 22 R. I. 337, 47 Atl. 885; *Hopkins v. Hayward*, 34 Vt. 474; *Hurlbut v. Mayo*, 1 D. Chipm. (Vt.) 387.

As to *audita querela* generally, see 3 STANDARD PROC. 875.

11. *Tudor v. Taylor*, 26 Vt. 444.

12. *Parker v. Parker*, 54 Vt. 341; *Phelps v. Laird*, 51 Vt. 285; *Hopkins v. Hayward*, 34 Vt. 474; *Hyde v. Taylor*, 19 Vt. 599; *Bell v. Roberts*, 13 Vt. 582; *Royce's Admr. v. Strong*, 11 Vt. 248.

[a] **In Vermont**, (1) the statute includes all matters of form (*Hopkins v. Hayward*, 34 Vt. 474; *Bell v. Roberts*, 13 Vt. 582), (2) but it does not apply to levies which are void. *Parker v. Parker*, 54 Vt. 341; *Hopkins v. Hayward*, 34 Vt. 474; *Bell v. Roberts*, 13 Vt. 582. (3) It is immaterial whether the defects rendering the title under the levy doubtful appear on the face of the levy or not. *Parker v. Parker*, 54 Vt. 341; *Briggs v. Green*, 33 Vt. 565; *Hyde v. Taylor*, 19 Vt. 599.

13. See *infra*, IV, C, 2.

14. *Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133. But see *Nelson v. Brown*, 23 Mo. 13, where relief is sought after the term.

15. **Ind.**—*Stockwell v. Walker*, 3 Ind. 384. **Mich.**—*Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133. **Mo.** *Blandon v. Martin*, 50 Mo. App. 114. **R. I.**—*East Greenwich Inst. v. Allen*, 22 R. I. 337, 47 Atl. 885. **Tex.**—*Cook v. Sparks*, 47 Tex. 28. **Vt.**—*Hopkins v. Hayward*, 34 Vt. 474; *Tudor v. Taylor*, 26 Vt. 444; *Hurlbut v. Mayo*, 1 D. Chip. 387.

[a] **Distinction Between Quashing Execution and Levy.**—A motion to

quash an execution and a motion to quash a levy are distinct motions having different purposes. *Fink v. Alderson*, 20 Mo. App. 364; *Scott v. Allen*, 1 Tex. 508. As to motion to quash execution, see *supra*, IV, A.

16. *De Witt v. Monroe*, 20 Tex. 289; *Tudor v. Taylor*, 26 Vt. 444.

[a] **An objection that no notice of motion was given** comes too late when made on the hearing. *Schiffer v. Fort*, 1 Posey Unrep. Cas. (Tex.) 198.

17. *Ritter v. Henshaw*, 7 Iowa 97.

18. *Osborne v. Rice*, 107 Ga. 281, 33 S. E. 54; *Scott v. Allen*, 1 Tex. 508.

As to the issuance of the writ, see 15 STANDARD PROC. 721.

As to quashing writ for unauthorized issuance, see *supra*, IV, A, 1, a and c.

19. *Scott v. Allen*, 1 Tex. 508, 513. See *Young v. Germania Sav. Bank*, 132 Ga. 490, 64 S. E. 552.

As to quashing the writ for defects in it, see *supra*, IV, A, 1, d.

[a] **That the writ is not subscribed** by the party issuing it or by his attorney authorizes setting aside the levy. *Bonesteel v. Orvis*, 23 Wis. 506, 99 Am. Dec. 201.

[b] **Where the writ is improperly made returnable on a particular day**, it is competent for the defendant to move, before sale, to set aside the levy. *Philadelphia Loan Co. v. Amies*, 2 Miles (Pa.) 292.

20. *Hower v. Ulrich*, 156 Pa. 410, 27 Atl. 37, where the *fieri facias* was issued while there was an outstanding attachment and the debtor was in no default.

(II.) Defective or Unauthorized Levy. — (A.) GENERALLY. — Defects and irregularities in the levy itself may be sufficient to justify quashing or vacating it,<sup>21</sup> as where it is improperly made on property which is in custody of the law,<sup>22</sup> or which is exempt,<sup>23</sup> or where the levy is excessive,<sup>24</sup> or is made in bad faith,<sup>25</sup> or where it is accomplished by fraudulent tricks and devices.<sup>26</sup> So also a levy may be set aside or dismissed on the ground of the disability of the officer to levy the execution,<sup>27</sup> or insufficiency of the description in the entry of levy,<sup>28</sup> or on the ground that the levy is made after return day,<sup>29</sup> or after the death of the defendant, in some states,<sup>30</sup> or on the ground that

21. **Ala.**—*McLemore v. Benbow*, 19 Ala. 76. **Ga.**—*State v. Jeter*, 60 Ga. 489; *Hill v. De Launay*, 34 Ga. 427. **Ill.**—*Hughes v. Streeter*, 24 Ill. 647, 76 Am. Dec. 777; *Warner v. Helm*, 6 Ill. 220. **Ia.**—*Ritter v. Henshaw*, 7 Iowa 97. **Ky.**—*Sanders v. Hamilton*, 3 Dana 550. **Mich.**—*Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133. **Minn.**—*Osborne & Co. v. Wilson*, 37 Minn. 8, 32 N. W. 786. **Mo.**—*Shacklett v. Scott*, 23 Mo. App. 322; *Fink v. Alderson*, 22 Mo. App. 364. **N. Y.**—*Adams v. Smith*, 5 Cow. 280; *Gouverneur v. Warner*, 2 Sandf. 624; *Jones v. McCarl*, 7 Abb. Pr. 418. **Ohio.**—*Bliss v. Enslow*, 3 Ohio 269. **Pa.**—*Robinson v. Atlantic & G. W. R. Co.*, 66 Pa. 160. **S. D.**—*Cable v. Magpie Gold Min. Co.*, 22 S. D. 566, 119 N. W. 174. **Tex.**—*Scott v. Allen*, 1 Tex. 508, 518; *Yett v. Iron City Nat. Bank* (Tex. Civ. App.), 45 S. W. 1033; *Schiffer v. Fort*, 1 Posey Unrep. Cas. 198, invalidity of levy. **Vt.**—*Tudor v. Taylor*, 26 Vt. 444.

[a] Where Defendant Deprived of Right of Designation.—An objection to a levy on the ground the defendant was not given an opportunity to point out property, can prevail only when it is shown that he had other property subject to levy which he desired first sold. *Yett v. Iron City Nat. Bank* (Tex. Civ. App.), 45 S. W. 1033.

[b] A levy upon property pointed out by the creditor when he had no right to do so, will be quashed. *Scott v. Allen*, 1 Tex. 508, 519; *Yett v. Iron City Nat. Bank* (Tex. Civ. App.), 45 S. W. 1033. When a plaintiff may point out property, see 15 STANDARD PROC. 925.

[c] Irregularity in levying upon special property of the defendant prematurely is ground for motion to quash

the levy. *Fink v. Alderson*, 20 Mo. App. 364.

[d] A levy in disregard of the right to select a homestead will be quashed. *Shacklett v. Scott*, 23 Mo. App. 322. As to selection of homestead, see 11 STANDARD PROC. 326.

22. *McLemore v. Benbow*, 19 Ala. 76; *Robinson v. Atlantic & G. W. R. Co.*, 66 Pa. 160. See also *Gouverneur v. Warner*, 2 Sandf. (N. Y.) 624.

23. *Bliss v. Enslow*, 3 Ohio 269.

24. *Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133; *Schiffer v. Fort*, 1 Posey Unrep. Cas. (Tex.) 198.

25. *Jones v. McCarl*, 7 Abb. Pr. (N. Y.) 418.

[a] Where Made Notwithstanding Stay Bond.—Where after an appeal has been perfected, and after a copy of the undertaking has been served upon the creditor, but before service thereof on the officer, the creditor directs a levy to be made, the levy is made in bad faith and will be set aside. *Jones v. McCarl*, 7 Abb. Pr. (N. Y.) 418.

26. *Williams v. Steenrod*, 11 Pa. Dist. 22.

27. *State v. Jeter*, 60 Ga. 489, where the sheriff was a co-defendant.

28. *Hughes v. Streeter*, 24 Ill. 647, 76 Am. Dec. 777.

[a] Where the defendant has given a forthcoming bond, the court may refuse to dismiss a levy on the ground the description in the entry of levy is insufficient. *Booker v. Bass*, 127 Ga. 133, 56 S. E. 283.

29. *Hill v. De Launay*, 34 Ga. 427.

As to levy after return day, see 15 STANDARD PROC. 918.

30. *Davis v. Oswalt*, 18 Ark. 414, 68 Am. Dec. 182.

As to levies after death of parties, see 15 STANDARD PROC. 920.

the levy is not made in accordance with the statutes.<sup>31</sup>

(B.) **LEVY UPON PROPERTY OF STRANGER.** — A stranger to the proceedings cannot move to set aside a levy on the ground that the property levied on belongs to him.<sup>32</sup> Nor can the defendant move to set aside the levy on this ground,<sup>33</sup> but a creditor who has been required to surrender the property on the ground it was owned by a stranger, may move to vacate the levy and sale and the record of satisfaction of the judgment.<sup>34</sup>

c. **Prerequisites.** — As a levy is a foundation for the proceeding for relief therefrom, it is an essential prerequisite that a levy shall have been made.<sup>35</sup>

d. **Effect of Existence of Other Remedies.** — The existence of cumulative statutory remedies does not preclude obtaining the dismissal of a levy by motion.<sup>36</sup>

e. **Venue and Jurisdiction.** — A motion to quash a levy of an execution must be made in the court issuing the writ.<sup>37</sup>

f. **Parties.** — The motion should be made by the judgment debtor,<sup>38</sup> and the sheriff is not a necessary party to the proceeding.<sup>39</sup>

g. **The Motion.** — A motion must be made in the ordinary way,<sup>40</sup>

31. *Osborne & Co. v. Hughey*, 14 Okla. 32, 76 Pac. 146.

[a] **A failure to levy in the order directed by statute** may be sufficient to authorize setting it aside. *Pearson v. Flanagan*, 52 Tex. 266, 280.

32. *Ala.*—*Cawthorne v. Knight*, 11 Ala. 268. *Ill.*—*Canty v. Kelley*, 154 Ill. App. 283. *N. Y.*—*Hewson v. Deygert*, 8 Johns. 333. *Pa.*—*Harrison v. Waln*, 9 Serg. & R. 318, leaving the party to his action of ejectment.

As to remedy of stranger whose property has been levied on, see *supra*, II, B, 6.

33. *Mitchell v. Skinner*, 17 Kan. 563; *Seitzinger v. Fisher*, 1 Watts & S. (Pa.) 293; *Insurance Co. v. Ketland*, 1 Binn. (Pa.) 499.

[a] But a levy by an execution plaintiff who filed a creditor's bill and obtained a receiver for the defendant's property will be set aside, on the application of the defendant, unless the plaintiff waives his receivership and dismisses his creditor's suit. *Gouverneur v. Warner*, 2 Sandf. (N. Y.) 624.

34. *Ill.*—*Warner v. Helm*, 6 Ill. 220. *Ia.*—*Ritter v. Henshaw*, 7 Iowa 97. *Ky.*—*Sanders v. Hamilton*, 3 Dana 550. *Minn.*—*Osborne & Co. v. Wilson*, 37 Minn. 8, 32 N. W. 786. *N. Y.*—*Adams v. Smith*, 5 Cow. 280. But see *Lansing v. Quackenbush*, 5 Cow. 38, hold-

ing remedy to be in equity. *Vt.* *Tudor v. Taylor*, 26 Vt. 444.

[a] **The remedy by motion to set aside a levy and sale applies** where the defendant never had title to the land, and also where his title has been wholly taken away, as under a prior mortgage. *Ritter v. Henshaw*, 7 Iowa 97.

**Obtaining new writ by scire facias** when levy is made on property of stranger, see *supra*, II, B, 9.

35. *Blandon v. Martin*, 50 Mo. App. 114.

36. *Hill v. De Launay*, 34 Ga. 427.

37. *Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133; *Mellier v. Bartlett*, 89 Mo. 134, 1 S. W. 220.

[a] **The fact that the land levied on is not situate in the county** in which the writ of execution issued does not change the rule of the text. *Mellier v. Bartlett*, 89 Mo. 134, 1 S. W. 220.

38. *Cable v. Magpie Gold Min. Co.*, 22 S. D. 566, 119 N. W. 174. See *supra*, II, B, 4, a.

39. *Demint v. Thompson*, 80 Ky. 255.

40. *Ralston v. Field*, 32 Ga. 453. See generally the title "Motions."

[a] **Improper Entitling of Motion.** Although the motion is designated a motion to quash the execution, it will be treated as a motion to quash the

setting forth the grounds upon which it is made.<sup>41</sup>

h. *When Made*.—A motion to set aside a levy should be made in apt time,<sup>42</sup> before the rights of third persons intervene.<sup>43</sup>

i. *Hearing*.—A motion to set aside a levy is addressed to the sound discretion of the trial court,<sup>44</sup> which may inquire into the execution and the circumstances under which it was issued,<sup>45</sup> the judgment on which it is based,<sup>46</sup> and the extraneous facts affecting their validity,<sup>47</sup> as well as the levy itself.<sup>48</sup> A payment of fees may be required as a condition to the granting of the motion.<sup>49</sup>

j. *Appeal*.—Appeals from judgments on motions to set aside levies are generally allowed,<sup>50</sup> but the appellate court will not control the discretion of the trial court in acting upon a motion to set aside a levy.<sup>51</sup>

k. *Effect of Quashing Levy*.—When a levy is quashed, all further proceedings thereunder are prevented,<sup>52</sup> and the parties stand in the same situation as if no levy had been made,<sup>53</sup> and ordinarily another levy may be made.<sup>54</sup> The special property acquired by the officer

levy and vacate the return, and relief thereon will be granted where the facts recited indicate this to be the true office of the motion. *Fink v. Alderson*, 20 Mo. App. 364.

41. *Young v. Germania Sav. Bank*, 132 Ga. 490, 64 S. E. 552.

42. *Gardner v. Eberhart*, 82 Ill. 316.

[a] *Before Sale*.—A motion to set aside an excessive levy should be made before sale. *Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133.

[b] *The motion should be made during the return term*, as after the term the power of the court is at an end. The proper course then is by a bill in the nature of a suit in equity wherein all parties interested are brought before the court. *Nelson v. Brown*, 23 Mo. 13.

[c] *Although a return has been made a levy may be quashed*. *Scott v. Allen*, 1 Tex. 508.

43. *Gardner v. Eberhart*, 82 Ill. 316.

44. *Bliss v. Enslow*, 3 Ohio 269.

45. *Cook v. Sparks*, 47 Tex. 28; *Scott v. Allen*, 1 Tex. 508.

46. *Cook v. Sparks*, 47 Tex. 28; *Scott v. Allen*, 1 Tex. 508.

47. *Cook v. Sparks*, 47 Tex. 28; *Scott v. Allen*, 1 Tex. 508.

48. See *supra*, IV, C, 2, b, (II).

49. *Wall St. Exch. Bldg. Assn. v. New York & W. Consol. Oil Co.*, 107 N. Y. Supp. 884.

[a] *Where notice of appeal and un-*

*dertaking were not filed until the time had expired within which an execution might issue without leave*, payment of the sheriff's and keeper's fees will be required before granting motion. *Wall St. Exch. Bldg. Assn. v. New York & W. Consol. Oil Co.*, 107 N. Y. Supp. 884.

50. *Cook v. Sparks*, 47 Tex. 28.

[a] *As a sheriff has no direct interest in the result of a motion to quash his levy*, he cannot appeal from a judgment sustaining the motion. *Demint v. Thompson*, 80 Ky. 255.

[b] *A senior judgment creditor, who made no application to intervene in proceedings by motion of the judgment debtor to quash a levy under an execution issued under a junior judgment, and who was not authorized by order of the court to intervene, and who merely attempted to unite with the judgment debtor in a renewal of the application to quash, designating himself as intervenor, was not a party to the proceedings, but was a stranger to the record, and could not appeal from the order refusing to quash*. *Cable v. Magpie Gold Min. Co.*, 22 S. D. 566, 119 N. W. 174.

51. *Bliss v. Enslow*, 3 Ohio 269.

52. *Demint v. Thompson*, 80 Ky. 255.

53. *Patton v. Sheriff*, 2 Ohio 395.

54. *Collins v. Hudson*, 69 Ga. 684; *Schiffer v. Fort*, 1 Posey Unrep. Cas. (Tex.) 198.

ceases.<sup>55</sup> and property taken from the defendant must be restored to him.<sup>56</sup>

**D. SETTING ASIDE SALE.**—This subject is fully treated elsewhere in this article.<sup>9</sup>

**E. BY INJUNCTION AGAINST EXECUTION.<sup>10</sup>—1. Nature of Suit.** A suit in equity to enjoin an execution is an original action, and it is not entitled as in the action at law from which the execution sought to be enjoined was issued.<sup>11</sup> Sometimes the suit is brought as ancillary to a proceeding at law to suspend proceedings until the questions can be determined at law.<sup>12</sup> And though frequently brought to enjoin sales that would create a cloud on title if made, it is quite different from the statutory action to quiet title and must not be confounded with it.<sup>13</sup>

**2. Effect of Existence of Remedy at Law.**—As a general rule where the complainant has a full, complete and adequate remedy at law, equity will not enjoin the execution of a judgment.<sup>14</sup> If a party

55. *Walpole v. Smith*, 4 Blackf. (Ind.) 304.

As to title acquired by levy, see 15 STANDARD PROC. 995.

56. *Patton v. Sheriff*, 2 Ohio 395.

9. See *supra*, II, B, 7, k.

10. As to relief from writs of assistance, see 3 STANDARD PROC. 157.

As to enjoining the enforcement of judgments, see the title "Judgments."

As to right to enjoin sale of exempt property, see 11 STANDARD PROC. 540.

As to right of assignee for benefit of creditors to enjoin the prosecution of a levy, see 3 STANDARD PROC. 73.

As to injunctions to protect landlord's liens, see the title "Landlord and Tenant."

As to injunction to protect mechanic's liens, see the title "Mechanics' Liens."

As to injunction against sale of attached property under execution, see 3 STANDARD PROC. 746.

11. *Foard v. Alexander*, 64 N. C. 69.

[a] **Treating Bill as a Motion.**—Because the suit is a new action, the bill, when improperly filed in the original cause in a case where a motion is a proper remedy, cannot be treated as a motion in the cause. *Foard v. Alexander*, 64 N. C. 69.

12. *Schiffer v. Fort*, 1 Posey Unrep. Cas. (Ind.) 198.

13. *Bell v. Murray*, 13 Colo. App. 217, 57 Pac. 488.

14. **U. S.**—*La Mothe v. Fink*, 8 Biss. 493, 14 Fed. Cas. No. 8,032;

*Featherman v. Louisiana State Seminary*, 2 Woods 71, 8 Fed. Cas. No. 4,713. **Ala.**—*Henderson v. Holman*, 193 Ala. 262, 69 So. 424; *Troy Fertilizer Co. v. Prestwood*, 116 Ala. 119, 22 So. 262; *Triest & Co. v. Enslen*, 106 Ala. 180, 17 So. 356; *Marriott v. Givens*, 8 Ala. 694; *Fryer v. Austill*, 2 Stew. 119. **Ark.**—*Haycock v. Tarver*, 107 Ark. 458, 155 S. W. 918; *Arkadelphia Lumb. Co. v. Asman*, 79 Ark. 284, 95 S. W. 134; *Johnson v. Gillenwater*, 75 Ark. 114, 87 S. W. 439; *Driggs & Co.'s Bank v. Norwood*, 49 Ark. 136, 4 S. W. 448, 4 Am. St. Rep. 30; *Jacks & Co. v. Bigham*, 36 Ark. 481; *King v. Clay*, 34 Ark. 291; *Anthony & Brodie v. Shannon*, 8 Ark. 52. **Cal.**—*Moulton v. Knapp*, 85 Cal. 385, 24 Pac. 803; *Roman Catholic Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. 343; *Richards v. Kirkpatrick*, 53 Cal. 433; *Mayo v. Bryte*, 47 Cal. 626; *Ketchum v. Crippen*, 37 Cal. 223; *Tevis v. Ellis*, 25 Cal. 515. **Colo.**—*Irwin v. Beggs*, 24 Colo. App. 158, 132 Pac. 385. **Conn.**—*Johnson v. Connecticut Bank*, 21 Conn. 148. **Fla.**—*McCall v. Matheson*, 66 Fla. 157, 63 So. 701; *Garcia v. Pardo*, 63 Fla. 429, 57 So. 974; *Florida Packing & Ice Co. v. Carney*, 49 Fla. 293, 38 So. 602; *Davidson v. Seegar*, 15 Fla. 671; *Robinson v. Yon*, 8 Fla. 350. **Ga.**—*Smith v. Murphey*, 140 Ga. 80, 78 S. E. 423; *Williams v. Kennedy*, 134 Ga. 339, 67 S. E. 821; *Parker-Hensel Engineering Co. v. Schuler*, 133 Ga. 696, 66 S. E. 800; *Hitchcock v. Culver*, 107 Ga. 184, 33 S. E. 35; *Thomasville v.*

neglects to avail himself of his legal remedies, equity will refuse him

McGinnis, 93 Ga. 579, 21 S. E. 123; Jones v. Crawley, 68 Ga. 175. **Ill.** Hernandez v. Drake, 81 Ill. 35; Hay v. Baugh, 77 Ill. 500; McDaniel v. Fox, 77 Ill. 343; Chittenden v. Rogers, 42 Ill. 95; Farrell v. McKee, 36 Ill. 225; Coughron v. Swift, 18 Ill. 414; Grossman v. Davis, 117 Ill. App. 354. **Ind.**—Boone v. Van Gorder, 164 Ind. 499, 74 N. E. 4, 108 Am. St. Rep. 314; Allen v. Winsteadly, 135 Ind. 105, 34 N. E. 699; Warnick v. Connelly, 8 Blackf. 75; Henderson v. Bates, 3 Blackf. 460. **Ia.**—Henderson v. Rainbow, 76 Iowa 320, 41 N. W. 29. **Kan.** Cameron v. Griesa, 74 Kan. 560, 87 Pac. 679 (by objection to confirmation of sale); Supreme Lodge v. Carey, 57 Kan. 655, 47 Pac. 621 (by mandamus); Mitchell v. Skinner, 17 Kan. 563; Treat v. Wilson, 4 Kan. App. 586, 46 Pac. 322. **Ky.**—Simrall v. Grant, 79 Ky. 435, 3 Ky. L. Rep. 208; Young's Exr. v. Young, 9 B. Mon. 66; Poston v. Southern, 7 B. Mon. 289; Boyce v. Waller, 9 Dana 478; Hall v. Davis, 5 J. J. Marsh. 290; Kendrick v. Arnold, 4 Bibb 235. **La.**—City of New Orleans v. Bilgery, 108 La. 191, 32 So. 429. **Md.**—McCormick v. McCormick, 104 Md. 325, 65 Atl. 54; Welde v. Scotten, 59 Md. 72; Frazier v. White, 49 Md. 1; Wilson v. Miller, 30 Md. 82, 96 Am. Dec. 568. **Mass.**—Boston & M. R. R. v. D'Almeida, 221 Mass. 380, 108 N. E. 1065. **Mich.**—City Bank & Trust Co. v. Hurd, 179 Mich. 454, 146 N. W. 299. **Miss.**—Ricks v. Richardson, 70 Miss. 424, 11 So. 935; Ammons v. Whitehead, 31 Miss. 99; Thomas v. Tappan, Freem. Ch. 472. **Mo.** Cantwell v. Johnson, 236 Mo. 575, 139 S. W. 365; Donham v. Hoover, 135 Mo. 210, 36 S. W. 627; Stockton v. Ransom, 60 Mo. 535; Ostmann v. Frey, 148 Mo. App. 284, 128 S. W. 257; Stroeh v. Doggett Dry Goods Co., 65 Mo. App. 103; Good v. Merkowitz Bros., 35 Mo. App. 658. **Mont.**—Eisenhauer v. Quinn, 36 Mont. 368, 93 Pac. 38, 122 Am. St. Rep. 370, 14 L. R. A. (N. S.) 435; Donovan v. McDevitt, 36 Mont. 61, 92 Pac. 49; Beck v. Franscham, 21 Mont. 117, 53 Pac. 96. **Neb.** Rickards v. Coon, 13 Neb. 420, 14 N. W. 163. **N. J.**—Murphy v. Borden, 49 N. J. L. 527, 13 Atl. 42; Margate & Co. v. Hand (N. J. Eq.), 98 Atl. 313, Palladino v. Hilpert, 72 N. J. Eq. 270, 65 Atl. 721; White v. Smith (N. J. Eq.), 58 Atl. 817; Swayze v. Hackettstown Nat. Bank, 44 N. J. Eq. 9, 13 Atl. 670, 45 N. J. Eq. 368, 19 Atl. 621; Freeman v. Elmendorf, 7 N. J. Eq. 475. **N. Y.**—Lansing v. Eddy, 1 Johns. Ch. 49; Chittenden v. Davidson, 20 Jones & S. 421; Newcombe v. Irving Nat. Bank, 51 Hun 220, 4 N. Y. Supp. 37, affirmed, 51 Hun 639, 4 N. Y. Supp. 39. But see Buffum v. Forster, 77 Hun 27, 28 N. Y. Supp. 285, 59 N. Y. St. 833, holding although the party has a remedy by motion to set aside the levy and enjoin the creditor from proceeding against exempt property he may resort to an action in equity. **N. C.**—Bostie v. Young, 116 N. C. 766, 21 S. E. 552; Browning v. Lavender, 104 N. C. 69, 10 S. E. 77; Bristol v. Hallyburton, 93 N. C. 384; Fox v. Kline, 85 N. C. 173; Walker v. Gurley, 83 N. C. 429; Perkins v. Bullinger, 2 N. C. 367. **Okla.**—Harris v. Smiley, 36 Okla. 89, 128 Pac. 276; Crist v. Cosby, 11 Okla. 635, 69 Pac. 885. **Ore.**—Marks v. Stephens, 38 Ore. 65, 63 Pac. 824, 84 Am. St. Rep. 750; Parsons v. Hartman, 25 Ore. 547, 37 Pac. 61, 42 Am. St. Rep. 803, 30 L. R. A. 98. **Pa.**—Buckley v. Kilker, 218 Pa. 176, 67 Atl. 55; Nelson v. Guffey, 131 Pa. 273, 18 Atl. 1073; Mantz v. Kistler, 34 Pa. Co. Ct. 367; Erie Canal Co. v. Lowrie, 5 Clark 464; Eckfelt v. Starr, 5 Phila. 497. **R. I.**—McCudden v. Wheeler & Wilson Mfg. Co., 23 R. I. 528, 51 Atl. 48. **S. C.**—McTeer v. Moorer, Bailey Eq. 62. **Tenn.**—Hammond v. St. John, 4 Yerg. 107; Loftin v. Espy, 4 Yerg. 84. **Tex.**—Mann v. Wallis, 75 Tex. 611, 12 S. W. 1123; Purinton v. Davis, 66 Tex. 455, 1 S. W. 343; Latham Co. v. Shelton, 57 Tex. Civ. App. 122, 122 S. W. 941; Hahn v. Willis & Bro., 31 Tex. Civ. App. 643, 73 S. W. 1084; Wingfield v. Hockney, 30 Tex. Civ. App. 39, 69 S. W. 446; Modisett v. National Bank, 23 Tex. Civ. App. 589, 56 S. W. 1007; Demmitt v. Garnier, 2 Posev Unrep. Cas. 333. **Va.**—Beckley v. Palmer, 11 Gratt. (52 Va.) 625; Shackelford v. Apperson, 6 Gratt. (47 Va.) 451; Randolph v. Randolph, 6 Rand. (27 Va.) 194; Bowyer v. Creigh, 3 Rand. (24 Va.) 26. **W. Va.**—Howell v. Thomson,

relief.<sup>15</sup> The rule seems to have been relaxed somewhat in those jurisdictions where law and equity is administered by the same court,<sup>16</sup> and by virtue of special statutes.<sup>17</sup>

Equity will generally deny the plaintiff relief where he has a remedy by motion,<sup>18</sup> as by motion to stay,<sup>19</sup> to quash,<sup>20</sup> vacate or set

34 W. Va. 794, 12 S. E. 1088; *Rollins v. Hess*, 27 W. Va. 570; *Hall & Patton v. Taylor*, 18 W. Va. 544; *Kuhn v. Mack*, 4 W. Va. 186. **Wyo.**—*Ward v. Rees*, 11 Wyo. 459, 72 Pac. 581. **Eng.**—*Garstin v. Asplin*, 1 Madd. 150, 56 Eng. Reprint 57.

See generally the title "Legal Remedy."

[a] "Plain and adequate remedy at law does not mean an ability to resort to every remedy which the forms of legal procedure give." If any form of action at law will give a complete and adequate remedy, the plaintiff is within the rule and cannot obtain relief in equity. *La Mothe v. Fink*, 8 Biss. (U. S.) 493, 14 Fed. Cas. No. 8,032.

15. **Cal.**—*Moulton v. Knapp*, 85 Cal. 385, 24 Pac. 803; *Ketchum v. Crippen*, 37 Cal. 223. **Ill.**—*Commercial Nat. Bank v. Stoddard*, 70 Ill. App. 79. **Tenn.**—*Lafferty v. Conn*, 3 Sneed 221. **Wyo.**—*Ward v. Rees*, 11 Wyo. 459, 72 Pac. 581.

[a] But where an execution is levied on a school house, the sale will be enjoined although the party may have a remedy at law, for the property is not vendible under the execution and equity will interfere to prevent a cloud being cast on the title by a void sale and to prevent a multiplicity of suits. *State v. Tiedemann*, 69 Mo. 306, 33 Am. Rep. 498.

[b] The defendant may waive the rule by failing to avail himself of it in apt time. **U. S.**—*Amis v. Myers*, 16 How. 492, 14 L. ed. 1029. **Ohio.**—*Miller v. Longacre*, 26 Ohio St. 291. **Tex.**—*Rogers v. Driscoll* (Tex. Civ. App.), 125 S. W. 599.

16. **Colo.**—*Bell v. Murray*, 13 Colo. App. 217, 57 Pac. 488. **Ind.**—*First Nat. Bank v. Savin*, 47 Ind. App. 266, 94 N. E. 347. *Compare*, *Allen v. Winsteadly*, 135 Ind. 105, 34 N. E. 699. **Tex.**—*Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994.

17. See generally the statutes.

[a] Under a statute providing that an injunction may issue where it ap-

pears that the applicant is entitled to the relief demanded and such relief requires the restraint of some act prejudicial to the defendant, an injunction may issue although the petitioner has an adequate remedy at law. *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994; *Chamberlain v. Baker*, 28 Tex. Civ. App. 499, 67 S. W. 532.

18. **Ark.**—*Anthony v. Shannon*, 9 Ark. 52, motion to have execution superseded. **Cal.**—*Mayo v. Bryte*, 47 Cal. 626. **N. C.**—*Walker v. Gurley*, 83 N. C. 429; *Faison v. McIlwaine*, 72 N. C. 312. **Wis.**—*Pleshek v. McDonnell*, 130 Wis. 445, 110 N. W. 269.

But see *Buffum v. Forster*, 77 Hun 27, 28 N. Y. Supp. 285, 59 N. Y. St. 833.

[a] Motion by Owner Inadequate. But the privilege of one whose real property is levied upon under an execution against another, to make a motion in the case in which the execution was issued to release the property from such levy, does not afford him such an adequate remedy at law as to cut off any right he would otherwise have to maintain injunction against the sale of the property. *Gale Mfg. Co. v. Sleeper*, 70 Kan. 806, 79 Pac. 648.

19. **Ark.**—*Driggs' Bank v. Norwood*, 49 Ark. 136, 4 S. W. 448, 4 Am. St. Rep. 30. **Colo.**—*Irwin v. Beggs*, 24 Colo. App. 158, 132 Pac. 385. **Fla.**—*Barnett v. Hickson*, 52 Fla. 457, 41 So. 606. **Ill.**—*Fahs v. Roberts*, 54 Ill. 192; *Farrell v. McKee*, 36 Ill. 225. **Kan.**—*Treat v. Wilson*, 4 Kan. App. 586, 46 Pac. 322.

20. **Ala.**—*Henderson v. Holman*, 193 Ala. 262, 69 So. 424. **Ark.**—*Jacks & Co. v. Bigham*, 36 Ark. 481; *King v. Clay*, 34 Ark. 291. **Cal.**—*Moulton v. Knapp*, 88 Cal. 446, 26 Pac. 210, 85 Cal. 385, 24 Pac. 803. **Colo.**—*Irwin v. Beggs*, 24 Colo. App. 158, 132 Pac. 385. **Fla.**—*Barnett v. Hickson*, 52 Fla. 457, 41 So. 606. **Ill.**—*Palmer v. Gardiner*, 77 Ill. 143. **Ind.**—*Cline v. Lowe*, 3 Ind. 527; *Lasselle v. Moore*, 1 Blackf. 226. **Kan.**—*Shelden v. Motter* (Kan.

aside the execution, or motion for an order of distribution,<sup>21</sup> or to set aside the sale,<sup>22</sup> or where he has a remedy by affidavit of illegality,<sup>23</sup> by interpleader,<sup>24</sup> by audita querela,<sup>25</sup> by writ of error,<sup>26</sup> appeal,<sup>27</sup> supersedeas,<sup>28</sup> by a trial of the right of property,<sup>29</sup> by an action<sup>30</sup> at

App.), 53 Pac. 89. **Ky.**—Poston v. Southern, 7 B. Mon. 289. **Mass.**—Boston & M. R. R. v. D'Almeida, 221 Mass. 380, 108 N. E. 1065. **Miss.**—Ammons v. Whitehead, 31 Miss. 99. **Mo.**—Stockton v. Ransom, 60 Mo. 535. **Ohio.**—Sample v. Ross' Admr., 16 Ohio 419; Wittstein v. Huntsman, 20 Ohio Cir. Ct. (N. S.) 404. **Ore.**—Marks v. Stephens, 38 Ore. 65, 68 Pac. 824, 84 Am. St. Rep. 750. **Pa.**—Nelson v. Guffey, 131 Pa. 273, 18 Atl. 1073.

**Remedy by Motion To Quash.**—See *supra*, IV, A.

21. Chittenden v. Rogers, 42 Ill. 95.

22. Wilson v. Miller, 30 Md. 82, 96 Am. Dec. 568.

Setting aside sale, see *infra*, IV, D.

23. Wadley v. Oertel, 140 Ga. 326, 78 S. E. 912; Smith v. Murphey, 140 Ga. 80, 78 S. E. 423; Williams v. Kennedy, 134 Ga. 339, 67 S. E. 821; Mathews v. Gelders, 129 Ga. 103, 58 S. E. 649; Roney v. McCall, 128 Ga. 249, 57 S. E. 503; Park v. Callaway, 128 Ga. 119, 57 S. E. 229; Hitchcock v. Culver, 107 Ga. 184, 33 S. E. 35; Rounsaville v. McGinnis, 93 Ga. 579, 21 S. E. 123; Morris v. Morris, 76 Ga. 733; Mitchell v. Cooper, 73 Ga. 796; Lockridge v. Lyon, 68 Ga. 137; Gunn v. Woolfolk, 66 Ga. 682; Flournoy v. Silman, 59 Ga. 195; Hambrick v. Crawford, 55 Ga. 335.

As to affidavit of illegality generally, see *supra*, IV, B.

24. Eckfelt v. Starr, 5 Phila. (Pa.) 497. See generally the title "Interpleader."

25. Parker v. Jones, 58 N. C. 276, 75 Am. Dec. 441; McRae v. Davis, 58 N. C. 140. See generally the title "Audita Querela."

26. Ammons v. Whitehead, 31 Miss. 99 (by writ of error coram nobis with supersedeas); Perkins v. Bullinger, 2 N. C. 367.

27. Beck v. Fransham, 21 Mont. 117, 53 Pac. 96. See generally the title "Appeals."

28. Ricks v. Richardson, 70 Miss. 424, 11 So. 935; Ammons v. Whitehead, 31 Miss. 99; Forbes, Brooks & Co. v. Hill, Dall. Dig. (Tex.) 486.

29. **La.**—Gleises v. McHatton, 14 La. Ann. 560; Wallis v. Bourg, 14 La. Ann. 104. **N. C.**—Baxter v. Baxter, 7 N. C. 118. **Tex.**—Ferguson v. Herring, 49 Tex. 126; Williams v. Farmers Nat. Bank, 22 Tex. Civ. App. 581, 56 S. W. 261; George v. Dyer, 1 White & W. Civ. Cas., §780.

As to third party claims, see *supra*, II, B, 6.

[a] The withdrawal of a claim interposed by the plaintiff to the property does not affect his right to file a bill for an injunction. Cox v. Mayor, 17 Ga. 249.

30. **Ark.**—Jacks & Co. v. Bigham, 36 Ark. 481. **Fla.**—Davidson v. Floyd, 15 Fla. 667. **N. Y.**—Newcombe v. Irving Nat. Bank, 51 Hun 220, 4 N. Y. Supp. 37, affirmed in 51 Hun 639, 4 N. Y. Supp. 39.

[a] Action of Trespass.—**U. S.**—La Mothe v. Fink, 8 Biss. 493, 502, 14 Fed. Cas. No. 8,032. **Conn.**—Johnson v. Connecticut Bank, 21 Conn. 148. **Fla.**—Davidson v. Floyd, 15 Fla. 667. **Ky.**—Kendrick v. Arnold, 4 Bibb 235.

[b] Action of Trespass To Try Title.—Hahn v. Willis, 31 Tex. Civ. App. 643, 73 S. W. 1084.

[c] Action of Trover or Conversion. **U. S.**—La Mothe v. Fink, 8 Biss. 493, 14 Fed. Cas. No. 8,032. **Ark.**—Jacks & Co. v. Bigham, 36 Ark. 481. **Conn.**—Johnson v. Connecticut Bank, 21 Conn. 148. **Fla.**—Davidson v. Floyd, 15 Fla. 667. **Ky.**—Boyce v. Waller, 9 Dana 478; Kendrick v. Arnold, 4 Bibb 235; Nesmith v. Bowler, 3 Bibb 487.

[d] Action of Replevin.—**Ark.**—Johnson v. Gillenwater, 75 Ark. 114, 87 S. W. 439; Jacks & Co. v. Bigham, 36 Ark. 481. **Ind.**—Allen v. Winsteadly, 135 Ind. 105, 34 N. E. 699. **Ia.**—Key City Gaslight Co. v. Munsell, 19 Iowa 305. **Ky.**—Young's Exr. v. Young, 9 B. Mon. 66. **Mo.**—Ostmann v. Frey, 148 Mo. App. 284, 128 S. W. 257.

[e] Action of Claim and Delivery. Richards v. Kirkpatrick, 53 Cal. 433.

[f] Action of Detinue.—Bissell & Carville v. Lindsay, 9 Ala. 162; Kendrick v. Arnold, 4 Bibb (Ky.) 235; Nesmith v. Bowler, 3 Bibb (Ky.) 487.

[g] Action for Damages.—**Ark.**

law, or by statutory proceedings which furnish an adequate remedy.<sup>31</sup>

**Where Remedy at Law Is Inadequate.**—If the plaintiff has no legal remedy, or if the remedy is not as adequate and efficient as the equitable,<sup>32</sup> or if it is embarrassed,<sup>33</sup> equity will entertain jurisdiction. If the plaintiff has already exhausted his legal remedy,<sup>34</sup> or if the sheriff refuses to accept a proper affidavit of illegality,<sup>35</sup> equity may entertain the bill.

**3. Relief Where Property Taken Is Personalty.**—It is a well established general principle as to personal property that a bill in equity will not ordinarily lie to prevent a wrongful sale thereof under execution, since by a suit at law, a full compensation in damages may be obtained.<sup>36</sup> Where, however, the character of the chattels is such

Sanders v. Sanders, 20 Ark. 610. **Ind.** Allen v. Winsteadly, 135 Ind. 105, 34 N. E. 699. **N. J.**—Freeman v. Freeman, 17 N. J. Eq. 44.

31. Smith v. Murphey, 140 Ga. 80, 78 S. E. 423.

32. **U. S.**—Watson v. Sutherland, 5 Wall. 74, 18 L. ed. 580. **Ala.**—Huntington v. Bell, 2 Port. 51; Fryer v. Austill, 2 Stew. 119. **Ark.**—Haycock v. Tarver, 107 Ark. 458, 155 S. W. 918. **Fla.**—Guerra v. Nistal, 66 Fla. 579, 64 So. 236; Davidson v. Floyd, 15 Fla. 667. **Ga.**—Ben Hill County v. Massachusetts Bond. & Ins. Co., 144 Ga. 325, 87 S. E. 15; Sanders v. Foster, 66 Ga. 292; Hall v. Lyon, 37 Ga. 636. **Idaho.**—Kester v. Schuldt, 11 Idaho 663, 85 Pac. 974. **Ill.**—Wende v. Zimmer, 189 Ill. App. 490; Jenney v. Jackson, 6 Ill. App. 32. **Ind.**—First Nat. Bank v. Savin, 47 Ind. App. 266, 94 N. E. 347. **Ky.**—Simrall v. Grant, 79 Ky. 435, 3 Ky. L. Rep. 208. **Md.** McCreery v. Sutherland, 23 Md. 471, 481, 87 Am. Dec. 578. **Miss.**—Cooper v. Newell, 36 Miss. 316, 319. **Mo.** Anderson v. Biddle, 10 Mo. 23. **N. J.** Margate Co. v. Hand (N. J. Eq.), 98 Atl. 313. **N. Y.**—Chittenden v. Davidson, 20 Jones & S. 421; Newcomb v. Irving Nat. Bank, 51 Hun 220, 4 N. Y. Supp. 37, affirmed in 51 Hun 639, 4 N. Y. Supp. 39. **Va.**—Snively v. Harkrader, 30 Gratt. (71 Va.) 487; Bowyer v. Creigh, 3 Rand. (24 Va.) 25; Wilson v. Butler, 3 Munf. (17 Va.) 559. **Wash.**—Cline Piano Co. v. Sherwood, 57 Wash. 239, 106 Pac. 742; Phelan v. Smith, 22 Wash. 397, 61 Pac. 31. **W. Va.**—Williamson v. Russell, 18 W. Va. 612; Walker v. Hunt, 2 W. Va. 491, 98 Am. Dec. 779.

33. Irwin v. Beggs, 24 Colo. App. 158, 132 Pac. 385.

34. Eppinger v. Scott, 130 Cal. 275, 62 Pac. 460.

[a] **Where no independent equity is shown,** a court of equity will not enjoin a sale under an execution that has been adjudged to be valid in a proceeding at law taken for that purpose. Hayes v. Frohock, 56 Fla. 794, 47 So. 343; Hollinshead v. Woodard, 128 Ga. 7, 57 S. E. 79.

[b] **After Claim.**—Equity will not enjoin a sale of the plaintiff's property, where he interposed a claim and the land was found subject. Welchel v. Gordon, 63 Ga. 610.

35. Webb v. Newsom, 138 Ga. 342, 75 S. E. 106 (where the judge denied a writ of mandamus compelling the sheriff to accept the affidavit); Williams v. Kennedy, 134 Ga. 339, 67 S. E. 821; McCandless v. McKibben, 99 Ga. 129, 24 S. E. 872 (where the affidavit was insufficient); Newton Mfg. Co. v. White, 47 Ga. 400. See Miller v. Baxter, 108 Ga. 600, 34 S. E. 169.

[a] **Where Sheriff Violates Agreement To Postpone Sale.**—Where the affidavit is insufficient and the sheriff refuses to accept it but agrees with counsel to postpone the sale until a legal affidavit can be tendered and then violates such agreement, an injunction against delivering a deed is proper. Manning v. Lacey, 97 Ga. 384, 23 S. E. 845.

[b] **Equity will not dissolve the injunction** because the sheriff later accepts the affidavit. Newton Mfg. Co. v. White, 47 Ga. 400.

36. **Ark.**—Haycock v. Tarver, 107 Ark. 458, 155 S. W. 918; Driggs' Bank v. Norwood, 49 Ark. 136, 4 S. W. 448, 4 Am. St. Rep. 30; Jacks & Co. v. Big- ham, 36 Ark. 481; Stillwell v. Oliver,

that in the case of a sale, removal, destruction, or damage, an injury would result to the owner for which the remedy at law would not be full, complete and adequate, equity will grant relief in a proper case.<sup>37</sup> And notwithstanding the property may not possess this special value, equity will grant relief where both the plaintiff and sheriff are insolvent.<sup>38</sup>

**4. Grounds of Relief.**—a. *Defects and Irregularities.*<sup>39</sup>—(I.) In the Writ of Execution.—A court of equity will not enjoin an execution because of mere defects or irregularities in the writ, as the party has an adequate remedy at law.<sup>40</sup> And generally equity will not enjoin a sale under a void execution, since the party has an adequate remedy at law, and since the sale under an execution void on its face, will not create a cloud on the title,<sup>41</sup> though there is authority to the con-

35 Ark. 184. **Fla.**—Guerra v. Nistal, 66 Fla. 579, 64 So. 236. **Ky.**—Simrall v. Grant, 79 Ky. 435, 3 Ky. L. Rep. 208. **Mich.**—City Bank v. Hurd, 179 Mich. 454, 146 N. W. 299, 301. **Okla.**—Payne v. Ramsey, 30 Okla. 356, 120 Pac. 595. **Tenn.**—Hammond v. St. John, 4 Yerg. 107.

Where stranger's personalty is levied on, see *infra*, IV, E, 4, a, (III), (B), (2).

37. **Ark.**—Driggs' Bank v. Norwood, 49 Ark. 136, 4 S. W. 448, 4 Am. St. Rep. 30; Stillwell v. Oliver, 35 Ark. 184. **Fla.**—Davidson v. Floyd, 15 Fla. 667. **Tenn.**—Hammond v. St. John, 4 Yerg. 107.

38. **Bristol v. Hallyburton**, 93 N. C. 384.

39. Defects in the judgment or proceedings leading up thereto as a ground for injunction against enforcement of the judgment, see 15 STANDARD PROC. 298, et seq.

40. **Ala.**—Henderson v. Holman, 193 Ala. 262, 69 So. 424; Triest & Co. v. Enslen, 106 Ala. 180, 17 So. 356. **Del.**—Hastings v. Cropper, 3 Del. Ch. 165. **Fla.**—Wordehoff v. Evers, 18 Fla. 339; Robinson v. Yon, 8 Fla. 350. **Ga.**—Wadley v. Oertel, 140 Ga. 326, 78 S. E. 912. **Ill.**—Robinson v. Chesseldine, 5 Ill. 332; Beaird v. Foreman, 1 Ill. 385, 12 Am. Dec. 197. **Kan.**—Kansas Farmers' Mut. F. Ins. Co. v. Amick, 45 Kan. 74, 25 Pac. 211. **La.**—Rooks v. Williams, 13 La. Ann. 374, where writ issued in name of deceased creditor. **Minn.**—La Crosse & Minn. Packet Co. v. Reynolds, 12 Minn. 213. **Miss.**—Ammons v. Whitehead, 31 Miss. 99, where the writ issued in the name of the administrator without revival by

seire facias. **N. C.**—Foard v. Alexander, 64 N. C. 69. **Ohio.**—Dunn & Co. v. Springmeier, 7 Ohio Dec. (Reprint) 339, 2 W. L. Bul. 127. **Okla.**—Harris v. Smiley, 36 Okla. 89, 128 Pac. 276. **Ore.**—Marks v. Stephens, 38 Ore. 65, 63 Pac. 824, 84 Am. St. Rep. 750. **Tenn.**—Williams v. Wright, 9 Humph. 493, 502. **Tex.**—Dunson v. Spradley (Tex. Civ. App.), 40 S. W. 327.

[a] But see Elson v. O'Dowd, 40 Ind. 300, where the court says by way of dictum that the fact that the execution is not directed against all the judgment debtors constitutes a valid reason for enjoining a levy upon the property of the replevin bail.

[b] The absence of internal revenue stamps from the assignment of a judgment does not affect the validity of execution issued on the judgment, and affords no ground for restraining their enforcement. *Campbell v. Johnston*, 3 Del. Ch. 94.

41. **Ala.**—Henderson v. Holman, 193 Ala. 262, 69 So. 424; Martin v. Atkinson, 108 Ala. 314, 18 So. 888. **Cal.**—Gates v. Lane, 49 Cal. 266; Sanchez v. Carriaga, 31 Cal. 170. **Fla.**—Wordehoff v. Evers, 18 Fla. 339; Davidson v. Seegar, 15 Fla. 671. **Ill.**—Beaird v. Foreman, 1 Ill. 385, 12 Am. Dec. 197. **Minn.**—Hanson v. Johnson, 20 Minn. 194; La Crosse & Minn. Packet Co. v. Reynolds, 12 Minn. 213. **Mo.**—St. Louis, etc. R. Co. v. Lowder, 138 Mo. 533, 39 S. W. 799; St. Louis, etc. R. Co. v. Lowder, 38 S. W. 550; Russell v. Inter-State Lumb. Co., 112 Mo. 40, 20 S. W. 26; Howlett v. Turner, 93 Mo. App. 20. **Okla.**—Harris v. Smiley, 36 Okla. 89, 128 Pac. 276. **Ore.**—Farris v. Hayes, 9 Ore. 81. **S. C.**—Attor-

trary.<sup>42</sup> It has been held that an injunction will not be granted on the ground that execution does not conform to the judgment,<sup>43</sup> that it misdescribes the judgment,<sup>44</sup> or that it issues for an amount exceeding the amount of the judgment or for more than is due.<sup>45</sup>

(II.) In the Issuance of the Writ. — (A.) IN GENERAL. — Generally equity will not enjoin an execution that has been irregularly or improvidently issued as the party has a remedy at law.<sup>46</sup> Accordingly

ney General *v. Baker*, 9 Rich. Eq. 521. Tenn.—*Williams v. Wright*, 9 Humph. 493, 502.

[a] An execution apparently regular on its face will not be adjudged void, at least until an effort for relief has been made in the tribunal from which it issued. *Beaird v. Foreman*, 1 Ill. 385, 12 Am. Dec. 197.

[b] Adequate Legal Remedy.—An irregular or void execution, or an execution issued on a void judgment, is always open to direct attack by the judgment debtor upon affidavit of illegality or motion to discharge the property seized thereunder, or to quash or set aside, and hence injunction will not lie. *Harris v. Smiley*, 36 Okla. 89, 128 Pac. 276.

42. Ind.—*Vincennes Nat. Bank v. Hargrove*, 80 Ind. 364; *Vincennes Nat. Bank v. Cockrum*, 80 Ind. 355, holding an execution upon an invalid recognition is void and will be enjoined. Ia.—*McConkie v. Landt*, 126 Iowa 317, 101 N. W. 1121 (holding injunction is proper remedy where the court makes an order in vacation without notice directing the clerk to issue execution); *Meek v. Bunker*, 33 Iowa 169, where execution issued in name of dead plaintiff. Kan.—*Kansas Farmers' Mut. F. Ins. Co. v. Amick*, 45 Kan. 74, 25 Pac. 211. Tex.—*Dailey v. Wynn*, 33 Tex. 614 (where creditor died before writ issued); *Trammell v. Watson*, 25 Tex. Supp. 210.

43. Ind.—*Martin v. Pifer*, 96 Ind. 245. Ohio.—*Dunn & Co. v. Springmeier*, 7 Ohio Dec. (Reprint) 339, 2 W. L. Bul. 127. Tex.—*Dunson v. Spradley* (Tex. Civ. App.), 40 S. W. 327.

44. *Dunson v. Spradley* (Tex. Civ. App.), 40 S. W. 327.

45. *Henderson v. Holman*, 193 Ala. 262, 69 So. 424; *Triest & Co. v. Enslen*, 106 Ala. 180, 17 So. 356 (where execution exceeded the penalty of a forfeited claim bond); *Sample v. Ross' Admar*, 16 Ohio 419, where an exe-

cution was issued against a successor of the attorney's rights at the instance of a divorcee, for a certain proportion of the alimony which under contract was to be paid to the attorney for his fee. *Contra*, *Guillory v. Latour*, 138 La. 142, 70 So. 66; *Harper v. Terry*, 16 La. Ann. 216. But the issuance of a fieri facias for too large a sum due to an error in the calculation of interest on a judgment is not ground for an injunction. *Walker v. Villavaso*, 26 La. Ann. 42.

[a] Where credits (1) are not entered on a fieri facias no relief by injunction will be granted generally. Ga.—*Brown v. Wilson*, 56 Ga. 534. Ind. *Cline v. Lowe*, 3 Ind. 527. Md.—*Gorsuch v. Thomas*, 57 Md. 334. Tex. *Compare*, *Williams v. Bradbury*, 9 Tex. 487, holding petition sufficient. (2) But a subsequent execution creditor may obtain an injunction until the payments are ascertained and the creditor gives credit for them. *Peshine v. Binns*, 11 N. J. Eq. 101. (3) And where a sheriff levied an execution against the principal and falsely returned "no money made," the surety may enjoin an alias to the extent of the amount made on the first writ. *Fryer v. Austill*, 2 Stew. (Ala.) 119. Payment of judgment as a ground of relief, see the title "Judgments."

46. Ark.—*Anthony & Brodie v. Shannon*, 8 Ark. 52. Colo.—*Irwin v. Beggs*, 24 Colo. App. 158, 132 Pac. 385. Del.—*Hastings v. Cropper*, 3 Del. Ch. 165. Ill.—*Greenup v. Brown*, 1 Ill. 252. Ind.—*Berry v. Nichols*, 96 Ind. 287 (absence of praecipe); *Cline v. Lowe*, 3 Ind. 527, where after recovering judgment on a delivery bond and collecting but not crediting a part thereof, another execution issued on the original judgment. Miss.—*Thomas v. Tappan*, Freem. 472. Mo.—*Ostmann v. Frey*, 148 Mo. App. 284, 128 S. W. 257. Ore.—*Marks v. Stephens*, 38 Ore. 65, 63 Pac. 824, 84 Am. St. Rep. 750. Pa.—*Nelson v. Guffey*, 131 Pa. 273, 291,

an injunction will not lie on the ground of a premature issuance of the writ,<sup>47</sup> an improper issuance of a second execution,<sup>48</sup> or the issuance and levy in violation of an agreement to stay execution.<sup>49</sup> But where the legal remedy is inadequate,<sup>50</sup> where complicated questions of law or fact are involved which can be properly presented only upon appropriate pleadings,<sup>51</sup> or where, it has been held, an execution issued in violation of a statute prohibiting it<sup>52</sup> equitable relief by injunction may be had.

(B.) WHERE WRIT ISSUED WITHOUT A JUDGMENT. — Some courts of equity will not enjoin an execution issued without a judgment or bond,<sup>53</sup>

18 Atl. 1073. **Eng.**—Garstin v. Asplin, 1 Madd. 150, 56 Eng. Reprint 57.

[a] But see Jacobs v. Jacobs, 23 Ky. L. Rep. 186, 62 S. W. 263, in which an injunction was granted where the judgment was too indefinite to authorize the clerk to issue execution.

[b] **Issuance at Instance of Stranger.**—Where the person seeking to have execution issued is not the owner of the judgment, an injunction against issuing execution will be awarded. Kruegel v. Jones (Tex. Civ. App.), 143 S. W. 989; Kruegel v. Murphy (Tex. Civ. App.), 126 S. W. 680; Kruegel v. Rawlins (Tex. Civ. App.), 121 S. W. 216.

47. Williams v. Douglass, 47 La. Ann. 1277, 17 So. 805; Isler v. Willis, 1 Pat. & H. (Va.) 43. But see Greene v. Johnson, 21 La. Ann. 464; Girard v. Hirsch, 6 La. Ann. 651, holding an injunction to be a proper remedy where execution issued before the expiration of a stay thereof.

[a] **Since Creditor Can Immediately Take Out Another Execution.**—Dayton v. Commercial Bank, 6 Rob. (La.) 17.

[b] A defendant who fails to appeal cannot enjoin an execution on the ground it issued before the judgment of the appellate court affirming the judgment was filed, as the plaintiff could abandon his appeal at any time. Savoie v. Thibodaux, 29 La. Ann. 51.

48. Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639. But see Lasselle v. Moore, 1 Blackf. (Ind.) 226; Wagner v. Pegues, 10 S. C. 259.

[a] But if two executions issue simultaneously on the same judgment, and one of them be acted on, the other may be enjoined if attempted to be enforced also. Hudson v. Dangerfield, 2 La. 63, 20 Am. Dec. 297.

[b] Where the creditor maintains two executions on a judgment at the

same time, but in different states, equity will enjoin one until it is shown that the judgment is satisfied or the creditor has exhausted his remedy on the other execution. Newell v. Morton, 3 Rob. (La.) 102.

49. **Ark.**—Fowler v. Williams, 20 Ark. 641. **Cal.**—Moulton v. Knapp, 85 Cal. 385, 24 Pac. 803. **Ia.**—Anamosa v. Wurzbacher, 37 Iowa 25, holding plaintiff had no standing in court as he had made no offer of performance.

But see Thomas' Trustees v. Brash-ear, 4 Mon. (Ky.) 65; Crook v. Lipscomb, 30 Tex. Civ. App. 567, 70 S. W. 993, where a levy was made in violation of an agreement not to levy. And compare Thurman v. Burt, 53 Ill. 129, specifically enforcing an agreement as to a stay of execution.

**Violation of agreement as to order of levy as ground for injunction, see infra, IV, E, 4, c.**

50. Snavely v. Harkrader, 30 Gratt. (71 Va.) 487 (where the remedy by motion to quash is not speedy enough); Shackelford v. Apperson, 6 Gratt. (47 Va.) 451 (where relief is sought in vacation); Grant v. Cole, 23 Wash. 542, 63 Pac. 263.

51. Irwin v. Beggs, 24 Colo. App. 158, 132 Pac. 385.

52. New Orleans v. Ruleff, 23 La. Ann. 708; Bramel v. Ratliff, 54 Wash. 581, 103 Pac. 817, where an execution issued from a county other than that in which the judgment was rendered.

[a] A *feri facias* issued against a municipality in violation of a statute prohibiting it and providing other methods of satisfying judgments, will be enjoined. New Orleans v. Ruleff, 23 La. Ann. 708.

53. **Ark.**—Scanlan v. Mixer, 34 Ark. 354, issuance after the taking of an appeal. **Fla.**—Davidson v. Seegar, 15 Fla. 671; Davidson v. Floyd, 15 Fla.

placed by law on the footing of a judgment, but others hold to the contrary.<sup>54</sup>

(C.) WHERE JUDGMENT IS DORMANT.—According to some authorities a suit in equity will not lie to enjoin an execution upon a dormant judgment for the reason that the party has an adequate remedy at law, or that the sale under such an execution would not cast a cloud on the plaintiff's land.<sup>55</sup> But others hold that a suit in equity will lie,<sup>56</sup> notwithstanding the remedy in the original action.<sup>57</sup>

(III.) In the Levy.—(A.) IN GENERAL.—Irregularities in the levy are not ground for injunctive relief.<sup>58</sup> But an injunction will lie where

667. **Ky.**—Ewell *v.* Jackson, 33 Ky. L. Rep. 673, 110 S. W. 860, where judgment is unsigned. But see *Schneider v. Artsman*, 16 Ky. L. Rep. 350, holding proceeding not barred by an order overruling a motion to quash. **Mo.**—Farris *v.* Smithpeter, 180 Mo. App. 466, 166 S. W. 655; *Ostmann v. Frey*, 148 Mo. App. 284, 128 S. W. 257, where judgment was superseded by an appeal.

54. **Ga.**—Hall *v.* Lyon, 37 Ga. 636. **Ind.**—Sare *v.* Butcher, 141 Ind. 146, 40 N. E. 749. Compare *Lasselle v. Moore*, 1 Blackf. 226. **Kan.**—Olson *v.* Nunnally, 47 Kan. 391, 28 Pac. 149, 27 Am. St. Rep. 296. **Tex.**—Alsup & Co. *v.* Allen, 43 Tex. 598; *Trammell v. Watson*, 25 Tex. Supp. 210; *Hubbart v. Willis State Bank* (Tex. Civ. App.), 152 S. W. 458; *Western Union Tel. Co. v. McKee Bros.* (Tex. Civ. App.), 135 S. W. 658.

[a] Where an appeal is properly perfected so that there will be a trial de novo, the judgment is vacated. A dismissal of the appeal does not reinstate the judgment and an execution issued thereon is unauthorized and will be enjoined. *Western Union Tel. Co. v. McKee Bros.* (Tex. Civ. App.), 135 S. W. 658.

[b] Where the record of the judgment has been destroyed and had not been substituted when execution is issued, an injunction is properly issued. *Cyrus v. Hicks*, 20 Tex. 483.

[c] Where the defendant fails to raise the defense of the existence of a remedy at law, equity will relieve from an execution issued on a judgment on the first trial which was vacated by a second trial. *Miller v. Longacre*, 26 Ohio St. 291.

55. **Cal.**—Mayo *v.* Bryte, 47 Cal. 626. But see *Stout v. Macey*, 22 Cal. 647. **Minn.**—Hanson *v.* Johnson, 20

**Minn.** 194. **N. C.**—Foard *v.* Alexander, 64 N. C. 69; *Perkins v. Bullinger*, 2 N. C. 367. **Ohio.**—Wittstein *v.* Huntsman, 20 Ohio Cir. Ct. (N. S.) 404, *distinguishing* *Krinke v. Parish*, 6 Ohio Cir. Dec. 30, 9 Ohio Cir. Ct. 141, on the ground that the relief there was sought three days before the sale was to take place and the remedy by motion was inadequate.

[a] In Texas if it appears that the judgment has not been paid, the injunction will be denied. *Seymour v. Hill*, 67 Tex. 385, 3 S. W. 313 (*distinguishing* *North v. Swing*, 24 Tex. 193, and *Watson v. Newsham*, 17 Tex. 437, in which injunctions were granted restraining executions upon dormant judgments, on the ground that in neither was any inquiry made whether the judgments were unpaid and that no relief based on them was asked); *Spiller v. Hollinger* (Tex. Civ. App.), 148 S. W. 338. See also *Buie v. Crouch*, 37 Tex. 53. Compare *Snow v. Nash*, 50 Tex. 216, granting an injunction.

56. **Ind.**—See *Shanklin v. Sims*, 110 Ind. 143, 11 N. E. 32. **Kan.**—*Sparks v. Martin*, 96 Kan. 282, 150 Pac. 532; *Updegraff v. Lucas*, 76 Kan. 456, 93 Pac. 630, 13 Ann. Cas. 860. **Neb.**—*Predohl v. O'Sullivan*, 59 Neb. 311, 80 N. W. 903. See *Richards v. Coon*, 13 Neb. 419, 14 N. W. 162.

[a] But one who enjoins a judgment until its lien is barred by lapse of time cannot obtain a perpetual injunction against the enforcement of the judgment on this ground. *Work v. Harper*, 31 Miss. 107, 66 Am. Dec. 549. See also *Sugg v. Thrasher*, 30 Miss. 135. But see *Kilpatrick v. Byrne*, 25 Miss. 571.

57. *Updegraff v. Lucas*, 76 Kan. 456, 93 Pac. 630, 94 Pac. 121, 13 Ann. Cas. 860, note.

58. **Ga.**—*Bogges v. Lowrey*, 78 Ga.

the legal remedy is not speedy and adequate.<sup>59</sup> And where a levy is made in violation of an express statute,<sup>60</sup> or where because of some omission, subsequent proceedings will be void;<sup>61</sup> or where the judgment has been wholly or partially satisfied,<sup>62</sup> an injunction is sometimes allowed.

Generally equity will not enjoin an execution on the ground that the sheriff levied on property not subject to the execution,<sup>63</sup> that he

539, 3 S. E. 771, 6 Am. St. Rep. 279. **La.**—Gusman *v.* De Poret, 33 La. Ann. 333; Deville *v.* Hayes, 23 La. Ann. 550; Dabbs *v.* Hemken, 3 Rob. 123, omission in notice of seizure to mention one of the three executions in the sheriff's hands. **Ore.**—Marks *v.* Stephens, 38 Ore. 65, 63 Pac. 824, 84 Am. St. Rep. 750. **Tenn.**—Lafferty *v.* Conn, 3 Sneed 221. **Tex.**—Forbes, Brooks & Co. *v.* Hill, Dall. Dig. 486. But see Wills Point Bank *v.* Bates, 76 Tex. 329, 13 S. W. 309, holding an injunction to be an appropriate remedy against errors occurring subsequent to judgment with regard to the levy and the collection of the final process.

[a] **A levy under a dormant execution** will not be enjoined in the absence of a showing of insolvency of the defendants. Green *v.* Bank of Georgetown, 10 Rich. Eq. (S. C.) 27.

Where execution issues on a dormant judgment, see *supra*, IV, E, 4, a, (II), (C).

59. Grant *v.* Cole, 23 Wash. 542, 63 Pac. 263.

60. Titus *v.* Ginheimer, 27 Ill. 462, holding that where a constable levies on real property, he acts in excess of his authority and may be enjoined. See Appeal of Boyd, 2 Monag. (Pa.) 399, 15 Atl. 736.

[a] **Under a statute expressly forbidding a levy upon the separate property of a wife for the debts of the husband.** But if the creditor alleges the property to belong to the husband an injunction will not be granted. Hunter's Appeal, 40 Pa. 194; Dyer *v.* People's Bank, 9 Phila. (Pa.) 159, 31 Leg. Int. 28. And see *infra* IV, E, 4, a, (III), (B), and 11 STANDARD PROC. 810.

[b] **An execution against a quasi-public corporation**, such as a fire insurance patrol, cannot be levied on property necessary to its existence apart from its franchises, and a levy thus made will be enjoined. Appeal of Boyd, 2 Monag. (Pa.) 399, 15 Atl. 736.

[c] **Levy by Seizure Instead of by**

**Notice.**—Where the sheriff levying an execution against a partner seized and removed part of the stock of goods of the partnership in possession of a trustee instead of levying by notice as required by statute, the trustee upon a showing that by the seizure the remainder of the stock was greatly depreciated and the trust estate damaged may by injunction compel the restoration of the goods. Sumner *v.* Crawford, 91 Tex. 129, 41 S. W. 994.

61. Lopene *v.* McCan, 28 La. Ann. 749; Galbraith *v.* Snyder, 2 La. Ann. 492, where copies of notes were seized.

62. See 15 STANDARD PROC. 341.

63. Hitchcock *v.* Culver, 107 Ga. 184, 33 S. E. 35. But see Lanier *v.* Adams, Thorne & Co., 72 Ga. 145, granting a temporary injunction pending the hearing and determination of the question whether goods were subject to levy.

[a] **Property of Legislator.**—A member of the assembly cannot obtain an injunction against an execution at law against his property on the ground of his privilege. Botts *v.* Tabb, 10 Leigh (37 Va.) 616.

[b] **But a mortgagee or trustee in a deed of trust** may obtain an injunction against a sale of land under a judgment and execution to which it is not subject. Whitfield *v.* Clark, 48 Ala. 555.

[c] **The sale of property necessary to the enjoyment of a franchise** which is of little value apart from the franchise will be enjoined as it would be unjust to other creditors of the corporation to take this property and thereby destroy the value of the property owned by the company. Gue *v.* Tide Water Canal Co., 24 How. (U. S.) 257, 16 L. ed. 635.

[d] **Property of a public corporation mortgaged to the state for money loaned by the state and necessary to the operation of the corporation** is not subject to execution and a seizure thereof by a general creditor will be

did not make the requisite seizure,<sup>64</sup> that he is incompetent to act,<sup>65</sup> or that the levy is excessive.<sup>66</sup> Injunction is not a proper remedy to restrain oppressive or illegal acts of the officer making a levy.<sup>67</sup> But injunction has been held proper to restrain proceedings on execution where the property levied on is in custodia legis,<sup>68</sup> or where no notice of seizure was given,<sup>69</sup> or where the officer is attempting to execute the writ beyond his jurisdiction.<sup>70</sup>

(B.) LEVY ON PROPERTY OF STRANGERS.<sup>71</sup>—(1.) *Where Levy Is Threatened.* It has been held that one who is not a party to the proceedings in which a judgment is rendered may enjoin a threatened levy of an execution upon his property.<sup>72</sup>

enjoined. *Brown v. State*, 114 U. S. 598, 5 Sup. Ct. 1065, 29 L. ed. 233; *Brady v. Johnson*, 75 Md. 445, 26 Atl. 49, 27 L. R. A. 737. See also *Brady v. State*, 26 Md. 290; *Boyd v. Chesapeake & Ohio Canal Co.*, 17 Md. 195, 79 Am. Dec. 546.

64. *Calderwood v. Prevost*, 9 Rob. (La.) 182, the plaintiff will not sustain injury and he can cure the irregularity by delivering the personalty to the officer.

65. *Turner v. Hill*, 21 La. Ann. 543.

66. Ga.—See *Miller v. Baxter*, 108 Ga. 600, 34 S. E. 169 (levy held not excessive); *Saffold v. Foster*, 75 Ga. 233, holding levy not excessive. Ill. *Palmer v. Gardener*, 77 Ill. 143. La. *Lambeth v. Sentell*, 38 La. Ann. 691; *Gusman v. De Poret*, 33 La. Ann. 333; *Hefner v. Hesse*, 29 La. Ann. 149; *Dabbs v. Hemken*, 3 Rob. 123. Mo. *Cantwell v. Johnson*, 236 Mo. 575, 139 S. W. 365, 376.

[a] An excessive levy on realty is not ground for an injunction, especially where it is not shown that the defendant offered and is ready to place personal property in the hands of the officer sufficient to satisfy the execution. *Cook v. De la Garza*, 13 Tex. 431.

67. *Beaird v. Foreman*, 1 Ill. 385, 12 Am. Dec. 197. See *Miller v. Baxter*, 108 Ga. 600, 34 S. E. 169.

68. Ind.—*Stout v. La Follette*, 64 Ind. 365. Kan.—*Ryan v. Parris*, 48 Kan. 765, 30 Pac. 172. Mont.—*Gardiner v. Caldwell*, 41 Cent. L. J. 133, where property is in the hands of a receiver. Pa.—*Thompson v. McCleary*, 159 Pa. 189, 28 Atl. 254, where suit was brought by receiver.

*Contra*, *Endres v. Lloyd*, 56 Ga. 547; *Boyce v. Waller*, 9 Dana (Ky.) 478.

[a] Where goods levied on are seized on another execution, a sale under the latter will not be enjoined as

the party has a complete remedy at law. *Endres v. Lloyd*, 56 Ga. 547; *Boyce v. Waller*, 9 Dana (Ky.) 478.

[b] Goods retained by a sheriff on giving bond in a replevin suit are in custodia legis and a sale thereof by the sheriff on a subsequent execution will be enjoined. *Ryan v. Parris*, 48 Kan. 765, 30 Pac. 172.

[c] *Levy on Property in Hands of Federal Officer.*—Where property levied on under a federal execution is subsequently levied on by the sheriff under a state execution, the levy of the sheriff will be enjoined. *Hall v. Boyd*, 52 Ga. 456.

[d] *Where Land Is in Sister State.* But a court of equity which has appointed a receiver of lands in a foreign state cannot enjoin a citizen of that state who is not a party to the suit in which the receiver was appointed from causing a levy to be made on the property. *Schindelholz v. Culum*, 55 Fed. 885, 5 C. C. A. 293, 12 U. S. App. 242.

69. *Lapene v. McCan*, 28 La. Ann. 749; *O'Hara v. Folwell*, 26 La. Ann. 370.

70. *Needles v. Frost*, 2 Okla. 19, 35 Pac. 574.

[a] *Execution Beyond Jurisdiction.* Wherever an attempt is made to execute a writ without reference to the place where the judgment was rendered or where the plaintiff resides, an injunction may be sued out. *Todd v. Richmond*, Man. Unrep. Cas. (La.) 268.

71. *Injunction against levy upon partnership property* for individual debt, and vice versa, see the title "Partnership."

Where property of wife or of the husband and wife is levied on under an execution against the husband, see 11 STANDARD PROC. 812.

72. *Tierney v. Evans*, 92 Neb. 330,

(2.) *Where Property Is Personal.*—Although it has apparently been held to the contrary,<sup>73</sup> as a general rule an owner of personal property, not shown to be of such character that its loss cannot be fully compensated in damages, cannot enjoin a levy and sale of it under an execution against another person<sup>74</sup> as he is deemed to have an ade-

138 N. W. 140. See *Elson v. O'Dowd*, 40 Ind. 300.

73. **Colo.**—*Weber v. Bullock*, 19 Colo. 214, 35 Pac. 183, granting relief to the owner of shares of stock which were not transferred on the books of the company because of the fault of the officers and which are levied on as the property of the assignor, although he has a remedy by action against the company to recover the statutory penalty and damages. **La.**—*Poincy v. Burke*, 28 La. Ann. 673; *Gay & Co. v. Nicol*, 28 La. Ann. 227; *Barron v. Solibellos*, 26 La. Ann. 289; *Deville v. Hayes*, 23 La. Ann. 550; *Lewis v. Daniels*, 23 La. Ann. 170; *Gogreve v. Windhorst*, 21 La. Ann. 296; *Twitty v. Clarke*, 14 La. Ann. 503. **Tenn.**—*Grant v. Chester*, 58 S. W. 485. But see *Loftin v. Espy*, 4 Yerg. 84.

See *Van Norden v. Morton*, 99 U. S. 378, 25 L. ed. 453, holding the code of Louisiana authorizing an injunction when the sheriff has seized property not belonging to the defendant obviously refers to the control of the court over its own officer. The remedy needs no formal chancery proceedings but a petition or motion with notice to the sheriff only.

74. **U. S.**—*Van Norden v. Morton*, 99 U. S. 378, 25 L. ed. 453; *Chaffee v. Coggs*, 6 Leg. Gaz. 342, 5 Fed. Cas. No. 2,571a. **Ala.**—*Baldrige v. Eason*, 99 Ala. 516, 13 So. 74; *Bissell v. Lindsay*, 9 Ala. 162; *Marriott v. Givens*, 8 Ala. 694; *Gunn v. Harrison*, 7 Ala. 585. **Ark.**—*Sanders v. Sanders*, 20 Ark. 610. **Conn.**—*Johnson v. Connecticut Bank*, 21 Conn. 148. Compare *Worthington v. Broom*, 1 Root 279. **Ill.**—*Greenberg v. Holmes*, 100 Ill. App. 186. **Ind.**—*Boone v. Van Gorder*, 164 Ind. 499, 74 N. E. 4, 108 Am. St. Rep. 314 (corporate stock); *Allen v. Winstandly*, 135 Ind. 105, 34 N. E. 699; *Henderson v. Bates*, 3 Blackf. 460. **Ky.**—*Young's Exr. v. Young*, 9 B. Mon. 66; *Boyce v. Waller*, 9 Dana 478; *Hall v. Davis*, 5 J. J. Marsh. 290; *Payne v. Owings*, 4 Mon. 80 (slave property); *Watkins v. Logan*, 3 Mon. 20; *Kendrick v. Arnold*, 4 Bibb

235; *Nesmieth v. Bowler*, 3 Bibb 487. Compare *Brummel v. Hurt*, 3 J. J. Marsh. 709. **Md.**—*Frazier v. White*, 49 Md. 1; *Chappell v. Cox*, 18 Md. 513; *Freeland v. Reynolds*, 16 Md. 416; *Lewis v. Levy*, 16 Md. 85. See *Wenzel v. Milbury*, 93 Md. 427, 49 Atl. 618, denying an injunction as plaintiff's bill does not allege that his title is prior to the judgment. **Mich.** *Hinkle v. Baldwin*, 93 Mich. 422, 53 N. W. 534, denying relief on the ground that the claimant did not notify the officer of his claim to the property. **Miss.**—*Beatty v. Smith*, 2 Smed. & M. 567; *Sevier v. Ross & Co.*, *Freem. Ch.* 519. **Nev.**—*Marshon v. Toohey*, 38 Nev. 248, 148 Pac. 357. **N. J.**—*Freeman v. Freeman*, 17 N. J. Eq. 44. **N. Y.** *Chittenden v. Davidson*, 20 Jones & S. 421. **N. C.**—*Baxter v. Baxter*, 7 N. C. 118. **Okla.**—*Payne v. Ramsey*, 30 Okla. 356, 120 Pac. 595. **Ore.**—*Marks v. Stephens*, 38 Ore. 65, 63 Pac. 824, 84 Am. St. Rep. 750. **Tex.**—*Perrin v. Stevens* (Tex. Civ. App.), 29 S. W. 927; *George v. Dyer*, 1 White & W. Civ. Cas. §780. Under statute, see *infra* this section. **Va.**—*Allen v. Freeland*, 3 Rand. (24 Va.) 170; *Bowyer v. Creigh*, 3 Rand. (24 Va.) 25. **W. Va.**—*Zanhizer v. Hefner*, 47 W. Va. 418, 35 S. E. 4; *Dunn v. Baxter*, 30 W. Va. 672, 5 S. E. 214; *Rollins v. Hess*, 27 W. Va. 570; *Baker v. Rinehard, Mayer & Co.*, 11 W. Va. 238; *Walker v. Hunt*, 2 W. Va. 491, 98 Am. Dec. 779.

Relief where property seized is personality generally, see *supra*, IV, E, 3.

[a] That the claimant is a trustee does not alter the case, for in contests with strangers, trustees have the right to the same legal remedies as other plaintiffs. *Watkins v. Logan*, 3 Mon. (Ky.) 20.

[b] A trustee of a mortgage cannot enjoin a levy on the property on the ground the property belongs to him, as he has a remedy by interpleader. *Eckfelt v. Starr*, 5 Phila. (Pa.) 497, 21 Leg. Int. 389.

[c] Crops.—But where the mortgagor remains in possession and plants

quate remedy at law,<sup>75</sup> by an action of trespass,<sup>76</sup> trover,<sup>77</sup> replevin,<sup>78</sup> detainee,<sup>79</sup> claim and delivery,<sup>80</sup> or for damages,<sup>81</sup> or by statutory proceedings for the trial of the right to property.<sup>82</sup> This is so even where the plaintiff claims title from the judgment debtor.<sup>83</sup>

If the plaintiff has no adequate legal remedy,<sup>84</sup> as where the prop-

crops after a decree directing the marshal to sell the premises if the debt is not paid in six months, the vendee at the sale is entitled to the crops and may enjoin creditors of the mortgagor from taking and selling them. *Crews v. Mountcastle*, 1 Leigh (28 Va.) 297.

[d] Where statute provides that personal property loaned for a certain period shall be liable to satisfy the creditors of the borrower, the owner cannot enjoin a sale by the creditors of the borrower of property so loaned though he resumes possession after the expiration of the statutory period. *Beale v. Digges*, 6 Gratt. (47 Va.) 582.

75. *Ind.*—*Henderson v. Bates*, 3 Blackf. 460. *Ky.*—*Hall v. Davis*, 5 J. J. Marsh. 290; *Bouldin v. Alexander*, 7 Mon. 424; *Nesmieth v. Bowler*, 3 Bibb 487, by trying right of property by jury before sale. *Md.*—*Freeland v. Reynolds*, 16 Md. 416. *Miss.*—*Beatty v. Smith*, 2 Smed. & M. 567; *Sevier v. Ross & Co.*, *Freem. Ch.* 519. *Okla.*—*Payne v. Ramsey*, 30 Okla. 356, 120 Pac. 595. *W. Va.*—*Zanhizer v. Hefner*, 47 W. Va. 418, 35 S. E. 4.

As to effect of remedy at law, see *supra*, IV, E, 2.

76. *Ala.*—*Marriott v. Givens*, 8 Ala. 674; *Gunn v. Harrison*, 7 Ala. 585. *Conn.*—*Johnson v. Connecticut Bank*, 21 Conn. 148. *Ill.*—*Greenberg v. Holmes*, 100 Ill. App. 186. *Ky.*—*Kendrick v. Arnold*, 4 Bibb 235. *W. Va.*—*Zanhizer v. Hefner*, 47 W. Va. 418, 35 S. E. 4.

77. *Johnson v. Connecticut Bank*, 21 Conn. 148; *Boyce v. Waller*, 9 Dana (Ky.) 478; *Kendrick v. Arnold*, 4 Bibb (Ky.) 235; *Nesmieth v. Bowler*, 3 Bibb (Ky.) 487.

78. *Ill.*—*Greenberg v. Holmes*, 100 Ill. App. 186. *Ind.*—*Allen v. Winstandly*, 135 Ind. 105, 34 N. E. 699. *Ia.*—*Key City Gaslight Co. v. Munsell*, 19 Iowa 305. *Ky.*—*Young's Exr. v. Young*, 9 B. Mon. 66; *Bouldin v. Alexander*, 7 Mon. 424. *Md.*—*Frazier v. White*, 49 Md. 1. *Miss.*—*Beatty v. Smith*, 2 Smed. & M. 567.

79. *Ala.*—*Bissell v. Lindsay*, 9 Ala.

162. *Ky.*—*Kendrick v. Arnold*, 4 Bibb 235; *Nesmieth v. Bowler*, 3 Bibb 487. *W. Va.*—*Zanhizer v. Hefner*, 47 W. Va. 418, 35 S. E. 4.

80. *Chittenden v. Davidson*, 20 Jones & S. (N. Y.) 421.

81. *Ark.*—*Sanders v. Sanders*, 20 Ark. 610. *Ind.*—*Allen v. Winstandly*, 135 Ind. 105, 34 N. E. 699; *Henderson v. Bates*, 3 Blackf. 460. *Md.*—*Frazier v. White*, 49 Md. 1; *Lewis v. Levy*, 16 Md. 85. *Nev.*—*Marshon v. Toohey*, 38 Nev. 248, 148 Pac. 357. *N. Y.*—*Chittenden v. Davidson*, 20 Jones & S. 421.

82. *Marriott v. Givens*, 8 Ala. 694; *Gunn v. Harrison*, 7 Ala. 585; *George v. Dyer*, 1 White & W. Civ. Cas. (Tex.) §781. But see *Wende v. Zimmer*, 189 Ill. App. 490, holding the statutory proceeding for the trial of the right of property does not oust equity of jurisdiction.

[a] Where a number of executions with various indemnitors has been levied on the property of a debtor, an assignee for benefit of creditors may maintain an action to enjoin a judgment creditor of his assignor from enforcing the execution against the assigned estate as his remedy at law is inadequate he having no means of ascertaining for what property each indemnitor is liable in an action of trespass. *Newcombe v. Irvin Nat. Bank*, 51 Hun 220, 4 N. Y. Supp. 37, *affirmed* in 51 Hun 639, 4 N. Y. Supp. 39.

83. *Moore v. Ord*, 15 Cal. 204 (where plaintiff did not show irreparable injury); *Freeland v. Reynolds*, 16 Md. 416; *Lewis v. Levy*, 16 Md. 85.

84. *Conn.*—*Worthington v. Broom*, 1 Root 279, where a recovery by an action at law is doubtful. *Ga.*—*Sims v. Goodwyn*, 31 Ga. 267. *Idaho.*—*Kester v. Schuldt*, 11 Idaho 663, 85 Pac. 974. *Ind.*—*Allen v. Winstandly*, 135 Ind. 105, 34 N. E. 699; *Henderson v. Bates*, 3 Blackf. 460. *Ky.*—*Bouldin v. Alexander*, 7 Mon. 424; *Kendrick v. Arnold*, 4 Bibb 235. *Md.*—*Martin v. Jewell*, 37 Md. 530, where a landlord who is entitled to one-half a crop of wheat by way of rent and who has a mortgage

erty has a peculiar value to the owner,<sup>85</sup> or where the creditor and sheriff are insolvent,<sup>86</sup> equity will grant relief. And the same is true where the plaintiff's property consists of stock in trade and merchandise, since a seizure and sale would utterly destroy the trade, credit and business of the plaintiff as a merchant.<sup>87</sup> If the owner

on the other half enjoined a sale of the wheat on *feri facias*. **N. Y.**—*Funk v. Brooklyn Glass & M. Co.*, 25 Misc. 91, 53 N. Y. Supp. 1086; *Sickels v. Combs*, 10 Misc. 551, 32 N. Y. Supp. 181. **S. D.**—*Halley v. Ingersol*, 14 S. D. 7, 84 N. W. 201. **Tex.**—*Southwestern Tel. & Tel. Co. v. Howard*, 3 Tex. Civ. App. 335, 22 S. W. 524. **W. Va.**—*Walker v. Hunt*, 2 W. Va. 491, 98 Am. Dec. 779.

[a] Where pending a third party claim, other executions are levied, equity may restrain the latter. *Huntington v. Bell*, 2 Port. (Ala.) 51.

[b] Where Property Seized Is Telephone Apparatus.—Where on an execution against one telephone company, some property of the plaintiff company consisting of poles, wires and electrical apparatus is seized and sold, and where the purchaser threatens to take forcible possession of such property and prevent plaintiff from using and operating his line, an injunction will be granted. *Southwestern Tel. & Tel. Co. v. Howard*, 3 Tex. Civ. App. 335, 22 S. W. 524.

[c] Where Tools Seized Are in Use. If a party is actually engaged in boring an oil well and the tools in use are levied on as another's, and great consequential damages would result from sale, equity will undoubtedly grant relief. *Zanhizer v. Hefner*, 47 W. Va. 418, 35 S. E. 4.

[d] Fraud.—Where the judgment, levy and sale are fraudulent, equity will entertain jurisdiction. *Hardy v. Broadus*, 35 Tex. 668, 681; *McFarland v. Dilly*, 5 W. Va. 135.

[e] To Avoid Multiplicity of Suits. (1) Where on an execution against a mortgagor of chattels, the sheriff seizes and proposes to sell not only the equity of redemption but the interest of the mortgagee as well, the latter may enjoin the sale as the sale would involve him in litigation with every purchaser of the goods. *Stratton v. Packer* (N. J. Eq.), 14 Atl. 587. (2) But the fact that the levy was made at the instance of four individual creditors does not justify taking jurisdiction on the

ground of prevention of multiplicity of suits. *Zanhizer v. Hefner*, 47 W. Va. 418, 35 S. E. 4.

85. **U. S.**—*Amis v. Myers*, 16 How. 492, 14 L. ed. 1029. **Ark.**—*Bell v. Greenwood*, 21 Ark. 249; *Sanders v. Sanders*, 20 Ark. 610 (slave property); *overruling Lovette v. Longmire*, 14 Ark. 339. **Conn.**—*Johnson v. Connecticut Bank*, 21 Conn. 148. **Ind.**—*Boone v. Van Gorder*, 164 Ind. 499, 74 N. E. 4, 108 Am. St. Rep. 314; *Allen v. Winstandly*, 135 Ind. 105, 34 N. E. 699. **Md.**—*Lewis v. Levy*, 16 Md. 85. **Miss.**—*Cooper v. Newell*, 36 Miss. 316 (slave property); *Beatty v. Smith*, 2 Smed. & M. 567; *Sevier v. Ross & Co.*, Freem. Ch. 519, slave property. **Tenn.**—*Williams v. Wright*, 9 Humph. 493, 502; *Caperton v. Huddleston*, 7 Humph. 452; *Henderson v. Vault*, 10 Yerg. 30 (slave property); *Prewet v. Loony*, 8 Yerg. 63; *Loflin v. Espy*, 4 Yerg. 84, slave. **Va.**—*Beale v. Digges*, 6 Gratt. (47 Va.) 582 (slave); *Kelly v. Scott*, 5 Gratt. (46 Va.) 479; *Whitton's Admr. v. Terry*, 6 Leigh (33 Va.) 189 (slave); *Sims v. Harrison*, 4 Leigh (31 Va.) 346 (slave); *Randolph v. Randolph*, 6 Rand. (27 Va.) 194; *Allen v. Freeland*, 3 Rand. (24 Va.) 170; *Bowyer v. Creigh*, 3 Rand. (24 Va.) 25; *Wilson v. Butler*, 3 Munf. (17 Va.) 559; *Randolph v. Randolph*, 3 Munf. (17 Va.) 99. **W. Va.**—*Zanhizer v. Hefner*, 47 W. Va. 418, 35 S. E. 4; *Dunn v. Baxter*, 30 W. Va. 672, 5 S. E. 214; *Rollins v. Ifess*, 27 W. Va. 570; *Baker v. Rinehard*, *Mayer & Co.*, 11 W. Va. 238; *Walker v. Hunt*, 2 W. Va. 491, 98 Am. Dec. 779.

[a] Copyrighted Reference Books. Equity will enjoin a threatened levy on the property of the plaintiff where such property consists of copyrighted reference books confidential in character and where the sheriff was threatening to disclose the contents to persons paying a small sum therefor. *Sinsabaugh v. Dun*, 214 Ill. 70, 73 N. E. 390.

86. *Bristol v. Hallyburton*, 93 N. C. 384, dictum.

87. **U. S.**—*Watson v. Sutherland*, 5

is not entitled to immediate possession,<sup>88</sup> or if his interest or title in the property is equitable only,<sup>89</sup> his legal remedies are not adequate, and equity will entertain his bill. Statutes sometimes allow the owner to obtain injunctive relief, even though he has a legal remedy.<sup>90</sup>

But where the plaintiff's rights in the property originated in fraud, equity will not relieve him.<sup>91</sup>

(3.) *Where Property Is Real.*—There is a conflict in the authorities as to whether equity will enjoin a judgment about to be enforced against the land of an owner in possession not a party to the execution. In some jurisdictions, equity will at the suit of the owner of land enjoin its sale on an execution as the property of another.<sup>92</sup>

Wall. 74, 18 L. ed. 580, *followed* in *North v. Peters*, 138 U. S. 271, 11 Sup. Ct. 346, 34 L. ed. 936, and quoted in *La Mothe v. Fink*, 8 Biss. 493, 14 Fed. Cas. No. 8,032; *Daly v. Sheriff*, 1 Woods C. C. 175, 6 Fed. Cas. No. 3,553, holding an action on an indemnity bond not an adequate remedy. **Ala.**—See *Daniel v. Owens & Co.*, 70 Ala. 297, query. **Ark.**—*Haycock v. Tarver*, 107 Ark. 458, 155 S. W. 918, goods of wife about to be seized on execution against husband. **Ill.**—*Wende v. Zimmer*, 189 Ill. App. 490. **Md.**—*McCreery v. Sutherland*, 23 Md. 471, 481, 87 Am. Dec. 578, on the authority of *Hyde v. Ellery*, 18 Md. 496. **Nev.**—*Marshon v. Toohey*, 38 Nev. 248, 148 Pac. 357. **N. Y.** *Funk v. Brooklyn Glass & M. Co.*, 25 Misc. 91, 53 N. Y. Supp. 1086; *Sickels v. Combs*, 10 Misc. 551, 32 N. Y. Supp. 181. **W. Va.**—*Walker v. Hunt*, 2 W. Va. 491, 98 Am. Dec. 779.

88. *Ford v. Rigby*, 10 Cal. 449.

89. **Ind.**—*Hollingsworth v. Trueblood*, 59 Ind. 542, 48 Ind. 537, action brought by purchaser of cestui's interest in leasehold. **Ky.**—*Orr v. Pickett*, 3 J. J. Marsh. 269. **Mo.**—*Anderson v. Biddle*, 10 Mo. 23. **N. C.**—*Smith v. Bank of Wadesborough*, 57 N. C. 303. See *Beam v. Blanton*, 38 N. C. 59, where the defendant in execution purchased the property levied on in his own name as agent of the plaintiff.

[a] Where personal property of a cestui que trust is levied on as the property of the trustee, equity will entertain jurisdiction of a petition by the cestui to enjoin a sale of the property. *Simrall v. Grant*, 79 Ky. 435, 3 Ky. L. Rep. 208; *Anderson v. Biddle*, 10 Mo. 23.

90. See the statutes.

[a] Under a statute providing that an injunction shall issue where it ap-

pears that the applicant is entitled to the relief demanded and such relief requires the restraint of some act prejudicial to him, the owner of personalty seized on an execution against another may enjoin the sale and the objection that he has a remedy by resort to statutory proceeding does not prevent relief. *Allen v. Carpenter* (Tex. Civ. App.), 182 S. W. 432.

91. **La.**—*Mora v. Avery*, 22 La. Ann. 417. **Nev.**—*Marshon v. Toohey*, 38 Nev. 248, 148 Pac. 357. **Tenn.**—*Taylor v. Harwell*, 5 Humph. 331; *Bryan v. Earthman*, 6 Yerg. 24. **Va.**—*Snoddy v. Haskins*, 12 Gratt. (53 Va.) 363. See *Whitton's Admr. v. Terry*, 6 Leigh (33 Va.) 189.

92. **U. S.**—*Walker v. Colby Wringer Co.*, 14 Fed. 517. See *Hill v. Gordon*, 45 Fed. 276, holding plaintiff has not established title to the property. **Colo.** *Bell v. Murray*, 13 Colo. App. 217, 57 Pac. 488. **Ind.**—*Royal v. Aultman & Taylor Co.*, 116 Ind. 424, 19 N. E. 202, 2 L. R. A. 526; *Scobey v. Walker*, 114 Ind. 254, 15 N. E. 674; *Shanklin v. Sims*, 110 Ind. 143, 11 N. E. 32; *Petry v. Ambroscher*, 100 Ind. 510; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731; *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *First Nat. Bank v. Savin*, 47 Ind. App. 266, 94 N. E. 347. **Ia.**—*Bahnsen v. Qualley*, 142 Iowa 282, 120 N. W. 625; *Hickey v. Davidson*, 129 Iowa 384, 105 N. W. 678; *Eherke v. Hecht*, 96 Iowa 96, 64 N. W. 652; *Knudson v. Litchfield*, 87 Iowa 111, 54 N. W. 199; *Weed v. Bowman*, 82 Iowa 762, 48 N. W. 808; *Austin v. Bowman*, 81 Iowa 277, 46 N. W. 1111. **Kan.**—*Leslie v. Harrison Nat. Bank*, 97 Kan. 22, 154 Pac. 209; *Yount v. Hoover*, 95 Kan. 752, 149 Pac. 408, L. R. A. 1915F, 1120; *Gale Mfg. Co. v. Sleeper*, 70 Kan. 806, 79 Pac. 648; *Dean v. McAdams*, 22 Kan.

The fact that the owner's title is in dispute does not preclude him from obtaining relief in equity.<sup>93</sup> In other jurisdictions, equity will deny the landowner an injunction, in the absence of other circumstances entitling him to equitable relief,<sup>94</sup> for as to him the judgment

544. **Ky.**—*Robinson v. Carlton*, 29 Ky. L. Rep. 876, 96 S. W. 549; *Brummel v. Hurt*, 3 J. J. Marsh. 709. But see *Hall v. Davis*, 5 J. J. Marsh. 290. **La.** *Hurst v. Thompson & Co.*, 118 La. 57. 42 So. 645, where realty of debtor's wife and children was seized; *Dauchite Lumb. Co. v. Lane & Bodley Co.*, 52 La. Ann. 1937, 28 So. 232; *Hoy v. Peterman*, 28 La. Ann. 289; *McEnery v. Letchford*, 23 La. Ann. 617; *Lyons v. Cenas*, 22 La. Ann. 113; *Estate of Mailou v. Lynch & Co.*, 15 La. Ann. 547; *Eagan v. Bell*, 13 La. Ann. 508. **Neb.** *Predohl v. O'Sullivan*, 59 Neb. 311, 80 N. W. 903 (where plaintiff purchased the property after the lien of the judgment had lapsed and satisfaction entered, and where subsequently the entry of satisfaction was set aside and the judgment was about to be enforced against plaintiff's land); *Dierks v. Martin*, 16 Neb. 120, 19 N. W. 598. **Ohio.** *Scheferling v. Huffman*, 4 Ohio St. 241, 62 Am. Dec. 281, bill of wife. **Ore.** *Lieblin v. Breyman Leather Co.*, 160 Pac. 1167. **R. I.**—*Linnell v. Battey*, 17 R. I. 241, 21 Atl. 606; *Kenyon v. Clarke*, 2 R. I. 67. **S. D.**—*Riley v. Jorgenson*, 35 S. D. 91, 150 N. W. 771, where plaintiff is a married woman.

[a] A sale of plaintiff's realty confusedly with another's will be enjoined. *Mullins v. Hanneman*, 123 La. 643, 49 So. 271.

[b] A purchaser of property on a subsequent execution cannot enjoin a sale under a former execution. *Henry v. Tricou*, 36 La. Ann. 519.

**Levy on Wife's Property as That of Husband.**—See generally 11 STANDARD PROC. 810.

93. *First Nat. Bank v. Savin*, 47 Ind. App. 266, 94 N. E. 347.

[a] In **Pennsylvania**, (1) where it clearly appears that the execution defendant has no interest in the property, injunction will be granted (*Barrell v. Adams*, 26 Pa. Super. 635), (2) but where the creditor alleges that the debtor has an interest in the property levied on, an injunction will not be granted. *Mantz v. Kistler*, 221 Pa. 142, 70 Atl. 545; *Kreamer v. Fleming*, 200 Pa. 414, 50 Atl. 233; *Natalie An-*

*thracite Coal Co. v. Ryon*, 188 Pa. 138, 41 Atl. 462, 43 W. N. C. 265; *Small's Appeal*, 9 Atl. 337; *Walker's Appeal*, 112 Pa. 579, 4 Atl. 13; *Taylor's Appeal*, 93 Pa. 21; *Reeser v. Johnson*, 76 Pa. 313; *Winch's Appeal*, 61 Pa. 424.

94. **Ala.**—*Troy Fertilizer Co. v. Prestwood*, 116 Ala. 119, 22 So. 262. **Cal.**—*Brum v. Ivins*, 154 Cal. 17, 96 Pac. 876, 129 Am. St. Rep. 137; *Roman Catholic Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. 343; *Tevis v. Ellis*, 25 Cal. 515. **Fla.**—*Barnes v. Mayo*, 19 Fla. 542; *Shalley v. Spillman*, 19 Fla. 500. But see *Budd v. Long*, 13 Fla. 288. **Ga.** *Racine Iron Co. v. McCommons*, 111 Ga. 536, 36 S. E. 866, 51 L. R. A. 134; *Stone v. Franklin*, 89 Ga. 195, 15 S. E. 47. **Minn.**—*Pelican River Milling Co. v. Maurin*, 67 Minn. 418, 69 N. W. 1149.

**Mo.**—*Wilcox v. Walker*, 94 Mo. 88, 7 S. W. 115; *Kuhn v. McNeil*, 47 Mo. 389; *Drake v. Jones*, 27 Mo. 428; *Taylor v. Swearingen*, 161 Mo. App. 467, 144 S. W. 160; *Witthaus v. Washington Sav. Bank*, 18 Mo. App. 181. **Mont.** *McCormick v. Ri'dle*, 10 Mont. 467, 26 Pac. 202. But see *McQueeney v. Toomey*, 36 Mont. 282, 92 Pac. 561, 122 Am. St. Rep. 358, 13 Ann. Cas. 316, where a transferee of the interest remaining in a judgment debtor after execution sale redeemed the property and enjoined an execution against the property for the deficiency remaining after the sale. **N. J.**—*Smith v. Collins*, 81 N. J. Eq. 348, 86 Atl. 957; *Alpern v. Behrenburg*, 76 N. J. Eq. 373, 77 Atl. 803, quoting *West Jersey & S. R. Co. v. Smith*, 69 N. J. Eq. 429, 60 Atl. 757; *White v. Smith* (N. J. Eq.), 58 Atl. 817; *Swayze v. Hackettstown Nat. Bank*, 44 N. J. Eq. 9, 13 Atl. 670; *American Dock & Imp. Co. v. Trustees of Public Schools*, 35 N. J. Eq. 181; *Dawes v. Taylor*, 35 N. J. Eq. 40; *Freeman v. Freeman*, 17 N. J. Eq. 44. **N. C.** *Bostie v. Young*, 116 N. C. 766, 21 S. E. 552, distinguishing *British & Am. Mortgage Co. v. Long*, 113 N. C. 123, 18 S. E. 165; *Gatewood v. Burns*, 99 N. C. 357, 6 S. E. 635; *Bristol v. Hallyburton*, 93 N. C. 384. **Tex.**—*Mann v. Wallis, Landes & Co.*, 75 Tex. 611, 12 S. W. 1123; *Purinton v. Davis*, 66 Tex.

and all proceedings under it are void and cannot change his rights in the land or create a cloud upon his title,<sup>95</sup> and in such case he has an adequate remedy at law,<sup>96</sup> and furthermore the granting of

455, 1 S. W. 343; *Spencer v. Rosenthal*, 58 Tex. 4; *Whitman v. Willis*, 51 Tex. 429; *Carlin v. Hudson*, 12 Tex. 202, 62 Am. Dec. 521; *Henderson v. Morrill*, 12 Tex. 1; *Latham Co. v. Shelton*, 57 Tex. Civ. App. 122, 122 S. W. 941; *Brown v. Ikard*, 33 Tex. Civ. App. 661, 77 S. W. 967; *Chamberlain v. Baker*, 28 Tex. Civ. App. 499, 67 S. W. 532; *Cook v. Texas & Pac. R. Co.*, 3 Tex. Civ. App. 145, 22 S. W. 58.

[a] The mere fact of ownership of property to be sold on execution against another is insufficient. Plaintiff must show that his right will be injuriously affected or that some irreparable injury will follow if the sale is made. He must show that he has not a clear and adequate remedy at law. *Mann v. Wallis, Landes & Co.*, 75 Tex. 611, 12 S. W. 1123.

[b] The apprehension of a multiplicity of suits will not authorize relief. *Purinton v. Davis*, 66 Tex. 455, 1 S. W. 343; *Cook v. Texas & Pac. R. Co.*, 3 Tex. Civ. App. 145, 22 S. W. 58.

[c] As Depending on Notice of Plaintiff's Title.—(1) Where plaintiff is the legal and equitable owner by a conveyance of which the defendant has full notice by record or otherwise, an injunction will not lie to restrain the enforcement against plaintiff's property of an execution issued against another person in an action to which the plaintiff is not a party. *Latham Co. v. Shelton*, 57 Tex. Civ. App. 122, 122 S. W. 941; *Magoffin v. San Antonio Brew. Assn.* (Tex. Civ. App.), 84 S. W. 843. (2) But where the title or right of the petitioner rested in part in parol or was not of record at the time of the levy of the execution against a third party, an injunction will be upheld. *Mann v. Wallis, Landes & Co.*, 75 Tex. 611, 12 S. W. 1123; *Latham Co. v. Shelton*, 57 Tex. Civ. App. 122, 122 S. W. 941; *Texas Brew. Co. v. Bisso*, 50 Tex. Civ. App. 119, 109 S. W. 270; *Brown v. Ikard*, 33 Tex. Civ. App. 661, 77 S. W. 967 (an injunction will be granted only where the threatened sale will cast a cloud on a title but for parol proof); *Rodriguez v. Buckley* (Tex. Civ. App.), 30 S. W. 1123. Where levy

will create a cloud, see *infra*, IV, E, 4, b.

[d] Although the plaintiff may have the same name as the defendant, he cannot enjoin a sale of his land on the execution. This is a question to be determined by a jury in ejectment by the purchaser. *Mantz v. Kistler*, 221 Pa. 142, 70 Atl. 545.

[e] The fact that insurance has been canceled because of a levy and other insurance will be speedily canceled unless the relief is granted, is not ground for an injunction against a sale on an execution against a third person of premises owned by the plaintiff, on which is a mortgage providing that if the premises are not kept insured the mortgagees may foreclose at once. *Pelican River Milling Co. v. Maurin*, 67 Minn. 418, 69 N. W. 1149.

[f] A lessee of real estate cannot enjoin a sale of the property on executory process as he can set up his claim when possession is demanded. *Carroll v. Chaffee*, 35 La. Ann. 83.

95. Cal.—*Brum v. Ivins*, 154 Cal. 17, 96 Pac. 876, 129 Am. St. Rep. 137; *Roman Catholic Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. 343. Fla.—*Barnes v. Mayo*, 19 Fla. 542; *Shalley v. Spillman*, 19 Fla. 500. Mo.—*Carrel v. Meek*, 155 Mo. App. 337, 137 S. W. 19. N. J. *American Dock & Imp. Co. v. Trustees of Public Schools*, 35 N. J. Eq. 181. N. C.—*Bristol v. Hallyburton*, 93 N. C. 384. Tex.—*Purinton v. Davis*, 66 Tex. 455, 1 S. W. 343; *Spencer v. Rosenthal*, 58 Tex. 4; *Carlin v. Hudson*, 12 Tex. 202, 62 Am. Dec. 521; *Latham Co. v. Shelton*, 57 Tex. Civ. App. 122, 122 S. W. 941; *Cook v. Texas & P. R. Co.*, 3 Tex. Civ. App. 145, 22 S. W. 58.

96. Mo.—*Wilcox v. Walker*, 94 Mo. 88, 7 S. W. 115. N. J.—*Dawes v. Taylor*, 35 N. J. Eq. 40; *Freeman v. Freeman*, 17 N. J. Eq. 44. Tex.—*Spencer v. Rosenthal*, 58 Tex. 4; *Carlin v. Hudson*, 12 Tex. 202, 62 Am. Dec. 521; *Latham Co. v. Shelton*, 57 Tex. Civ. App. 122, 122 S. W. 941.

[a] "If as a result of the sale sought to be enjoined, any attempt should be made under the proceedings to dispossess the plaintiff, the law affords ample and complete remedies for

relief would involve the determination of the legal question of the title to real estate.<sup>97</sup>

If, however, the petitioner shows that he is in danger of suffering injury for which the ordinary legal remedies are not adequate,<sup>98</sup> as where he will be deprived of the use and enjoyment of the property,<sup>99</sup> or where the levy and sale would cloud his title,<sup>1</sup> equity will enjoin the enforcement of the judgment. And where some equitable ground such as fraud, gross injustice or irremediable injury appears, equity will entertain jurisdiction.<sup>2</sup>

**Where Plaintiff's Title Is Equitable.**—If the title of the plaintiff be equitable only and an injunction is necessary to protect his title,

prevention or redress in the court that issued the process for the enforcement of the decree, by refusing a writ of *habere facias possessionem*, or superseding it if it should be issued (*Tevis v. Ellis*, 25 Cal. 515; *Long v. Neville*, 36 Cal. 455), or by an original action in that or any other court of equity to enjoin its execution for matters subsequent to judgment (*Goodnough v. Sheppard*, 28 Ill. 191), or to have determined any adverse claim to the land predicated upon the sheriff's deed (Code Civ. Proc., sec. 738).'' *Roman Catholic Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. 343. *Compare* *Gale Mfg. Co. v. Sleeper*, 70 Kan. 806, 79 Pac. 648, holding the remedy by motion to release the property from the levy is not such an adequate remedy as precludes resort to equity.

97. *Bostic v. Young*, 116 N. C. 766, 21 S. E. 552.

98. *Paddock v. Jackson*, 16 Tex. Civ. App. 653, 41 S. W. 700.

99. **Cal.**—*Moulton v. McDermott*, 93 Cal. 660, 29 Pac. 259; *Roman Catholic Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. 343. But see *Tevis v. Ellis*, 25 Cal. 515. **Ill.**—*Goodnough v. Sheppard*, 22 Ill. 81; *New Music Hall Co. v. Orpheon Music Hall Co.*, 100 Ill. App. 278; *Greenberg v. Holmes*, 100 Ill. App. 186. **N. C.**—*Banks v. Parker*, 80 N. C. 157. **Tenn.**—See *Moore v. Hallum*, 1 Lea 511. **Tex.**—*Wofford v. Booker*, 10 Tex. Civ. App. 171, 30 S. W. 67; *Texas Land & M. Co. v. Worsham*, 5 Tex. Civ. App. 245, 23 S. W. 938. **W. Va.** *Bushong v. Rector*, 32 W. Va. 311, 9 S. E. 225, 25 Am. St. Rep. 817; *Williamson v. Russell*, 18 W. Va. 612.

[a] An order of sale under a judgment of foreclosure, under statute, has the force of a writ of possession, and

where it is attempted to enforce such an order against the property of the petitioner, who was not a party to the suit, an injunction will lie. *Wofford v. Booker*, 10 Tex. Civ. App. 171, 30 S. W. 67.

[b] The remedies by ejectment and damages are not adequate. *Williamson v. Russell*, 18 W. Va. 612.

1. See *infra*, IV, E, 4, b.

2. **Cal.**—*Roman Catholic Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. 343. **N. J.**—*American Dock & Imp. Co. v. Trustees of Public Schools*, 35 N. J. Eq. 181; *Dawes v. Taylor*, 35 N. J. Eq. 40. **Tex.**—*Hardy v. Broaddus*, 35 Tex. 668.

[a] "In the absence of fraud, gross injustice, irremedial injury or other ground of equitable jurisdiction, a court of chancery will not restrain a threatened sale under execution against one person of property claimed by another person." *Smith v. Collins*, 81 N. J. Eq. 348, 86 Atl. 957; *Alpern v. Behrenburg*, 77 N. J. Eq. 373, 77 Atl. 803, quoting *West Jersey & S. R. Co. v. Smith*, 69 N. J. Eq. 429, 60 Atl. 757. This principle applies with equal force to those cases where it is sought to restrain an execution against a former owner as judgment debtor and those in which the complainant is the judgment debtor, and the ground of the relief sought is that complainant's sole estate in the property sold is an estate which cannot be reached by process of law. *Smith v. Collins*, 81 N. J. Eq. 348, 86 Atl. 957. *Compare infra*, IV, E, 4, b.

[b] That the creditor stood by and saw money being expended on the property without executing his judgment is not a fraud warranting relief. *West Jersey & S. R. Co. v. Smith*, 69 N. J. Eq. 429, 60 Atl. 757.

equity will grant relief.<sup>3</sup> Thus equity will enjoin a sale of trust property upon an execution against the trustee.<sup>4</sup>

**Injunction at Instance of Judgment Defendant.**—A judgment defendant cannot champion the rights of a stranger to the action and enjoin an execution on the ground that the property seized does not belong to himself.<sup>5</sup> Nor can a vendor who has sold property under a warranty, enjoin the sale of the property under an execution against himself or a third person, on the ground that he may thereby be made liable on his warranty.<sup>6</sup>

3. **U. S.**—Lane *v.* Ludlow, 2 Paine 591, 14 Fed. Cas. No. 8,052. **Ky.**—Phillips *v.* Winslow, 18 B. Mon. 431, 68 Am. Dec. 729. **Me.**—See Knight *v.* Mayberry, 48 Me. 158. **Md.**—Hampson *v.* Edelen, 2 Har. & J. 64, 3 Am. Dec. 530. **Mo.**—Parks *v.* People's Bank, 97 Mo. 130, 11 S. W. 41, 10 Am. St. Rep. 295, 31 Mo. App. 12; Pawley *v.* Vogel, 42 Mo. 291, 303. **Tex.**—Brown *v.* Ikard, 33 Tex. Civ. App. 661, 77 S. W. 967; Hawkins *v.* Willard (Tex. Civ. App.), 38 S. W. 365; Rodriguez *v.* Buckley (Tex. Civ. App.), 30 S. W. 1123.

[a] **Purchaser Who Has Not Paid Purchase Price.**—A purchaser of realty may enjoin enforcement against the property of a judgment recovered after the sale before delivery of the deed and payment of the purchase money. McSorley *v.* Ludlow, 2 Paine 600, 16 Fed. Cas. No. 8,927; Lane *v.* Ludlow, 2 Paine 591, 14 Fed. Cas. No. 8,052; Hampson *v.* Edelen, 2 Har. & J. (Md.) 64, 3 Am. Dec. 530.

[b] **But where the decision of the case involves the determination of the legal question that the plaintiff has no legal estate, relief will be denied.** Smith *v.* Collins, 81 N. J. Eq. 348, 86 Atl. 957.

[c] **An assignee for benefit of creditors may enjoin the enforcement against the assigned property of a judgment obtained by a non-resident creditor against the assignor subsequent to the assignment.** Howard *v.* Cannon, 11 Rich. Eq. (S. C.) 23, 75 Am. Dec. 736.

4. **Ga.**—Simms *v.* Phillips, 51 Ga. 423; Clinch *v.* Ferril, 48 Ga. 365. **Ind.**—Anderson *v.* Crist, 113 Ind. 65, 15 N. E. 9. **Mo.**—South Presbyterian Church *v.* Hintze, 72 Mo. 363. **Tex.**—Hawkins *v.* Willard (Tex. Civ. App.), 38 S. W. 365.

[a] **But in Brown *v.* Ikard, 33 Tex.**

Civ. App. 661, 77 S. W. 967, the legal and paper title to the property in question was in M. I. who held it in trust for the plaintiffs, and the property was in possession of W. I. their father, who is the execution defendant. Injunctive relief was denied as it was not necessary to protect the equitable title, they being in no worse position as to the threatened execution sale than if their title were legal.

5. **Ga.**—Tompkins *v.* Tumlin, 49 Ga. 460. **La.**—Gusman *v.* De Poret, 33 La. Ann. 333; Howard *v.* Walsh, 28 La. Ann. 847; Mitchell *v.* Lay, 3 La. Ann. 593; Dubreuil *v.* Soulie, 4 Mart. (N. S.) 91, 16 Am. Dec. 165. **Tex.**—Corder *v.* Steiner (Tex. Civ. App.), 54 S. W. 277; Davis *v.* Beall, 21 Tex. Civ. App. 183, 50 S. W. 1086.

[a] **An insolvent corporation cannot enjoin a threatened levy upon property it has already conveyed.** Miller *v.* Waldborough Packing Co., 88 Me. 605, 34 Atl. 527.

[b] **Where defendant holds the property as agent, he may, as agent, have instituted proceedings in the name of his principal for the latter's protection.** Mitchell *v.* Lay, 3 La. Ann. 593, dictum.

6. **Small *v.* Somerville, 58 Iowa 362, 12 N. W. 315; Kelly *v.* Wiseman, 14 La. Ann. 661, as his liability on his warranty exists as to causes anterior to the sale only.**

*Contra*, Bach *v.* Goodrich, 9 Rob. (La.) 391; San Bernardo Townsite Co. *v.* Hocker (Tex. Civ. App.), 176 S. W. 644 (holding one who sells land with covenants of warranty may enjoin a sale thereof on execution under a void judgment when such sale will create a cloud on his vendee's title); McCall Co. *v.* Page (Tex. Civ. App.), 155 S. W. 655, where the vendor with warranty claimed the land sold by him and seized by the sheriff was his homestead property,

(C.) **LEVY ON EXEMPT AND HOMESTEAD PROPERTY.** — The right to enjoin an execution on the ground that the property levied on is homestead or exempt property is treated elsewhere.<sup>7</sup>

(IV.) **In the Sale.**<sup>8</sup> — It is no ground for an injunction that a sale is about to be made in an irregular manner,<sup>9</sup> or that there were irregularities in the conduct of the sale.<sup>10</sup> An injunction will not issue because of a mere defect in,<sup>11</sup> or, it has been held, a want of,<sup>12</sup> notice of the sale. Nor is it a ground of relief, that the officer is about to sell the property levied on without first having it appraised.<sup>13</sup> Although improper conduct of a judgment creditor at a sale tending to prejudice the defendant may be ground for an injunction,<sup>14</sup>

**7. Injunction where property taken is exempt,** see 11 STANDARD PROC. 540. **As to protection of homestead property by injunction,** see 11 STANDARD PROC. 410.

**8. As to opening and vacating an execution sale by bill in equity,** see *supra*, II, B, 7; K, 3.

**9. Robinson v. Yon,** 8 Fla. 350 (sale on an unauthorized day); *Thomassen v. De Goey*, 133 Iowa 278, 110 N. W. 581, 119 Am. St. Rep. 605.

[a] **A mortgagee** cannot enjoin a sale on the ground the officer is proceeding irregularly. *James v. Breaux*, 26 La. Ann. 245.

[b] **An assumption that the sheriff and district court will subsequently misinterpret the law** applicable to the sale or violate its provisions will not warrant enjoining a sale under a judgment of foreclosure. *Gorden v. Bodwell*, 55 Kan. 131, 39 Pac. 1044.

[c] **Where in violation of a replevin bond given by a sheriff on restoration of property taken from him by writ of replevin, the sheriff proceeds to sell the property under an execution in his hands, the sale will be enjoined as such sale would tend to render a judgment in the replevin suit in favor of the plaintiff therein ineffectual.** *Uphaus v. Roof*, 68 Ohio St. 401, 67 N. E. 717.

**10. La.**—*Dubreuil v. Soulie*, 4 Mart. N. S. 93, that the deed is not in the statutory form. **Md.**—*Wilson v. Miller*, 30 Md. 82, 96 Am. Dec. 568. **N. J.** *Skillman v. Holcomb*, 12 N. J. Eq. 131.

[a] **That the sheriff refused to adjourn the sale is not ground for an injunction.** *Skillman v. Holcomb*, 12 N. J. Eq. 131.

[b] **Sale in Bulk.**—But where a levy on realty is excessive and the sale is made in bulk for a grossly inadequate sum, an injunction will lie. *Forbes v.*

*Hall*, 102 Ga. 47, 28 S. E. 915, 66 Am. St. Rep. 152, recommending to the legislature a statute requiring confirmation of sales.

**11. Ark.**—*Walker v. Files*, 94 Ark. 453, 127 S. W. 739. **Ia.**—*Thomassen v. De Goey*, 133 Iowa 278, 110 N. W. 581, 119 Am. St. Rep. 605. **Kan.**—*Camaron v. Griesa*, 74 Kan. 560, 87 Pac. 679, defective description. **La.**—*Henderson v. Hoy*, 26 La. Ann. 156, insufficient description; *Dabbs v. Hemken*, 3 Rob. 129, slight variance between description in advertisement and in notice of seizure. **N. J.**—*Margate Co. v. Hand* (N. J. Eq.), 98 Atl. 313, defective description.

But see *Johnson v. Hanye*, 103 Ga. 542, 29 S. E. 914.

[a] **A discrepancy of twenty cents between the amount of the execution itself and the amount as stated in the advertisement of sale is not ground for an injunction.** *Lee v. Broocks*, 54 Tex. Civ. App. 220, 118 S. W. 164.

[b] **Omission of Interest.**—The failure of the advertisement of sale to state that the execution provided for the collection of interest, is not ground for an injunction. *Lee v. Broocks*, 54 Tex. Civ. App. 220, 118 S. W. 164.

**12. Lafferty v. Conn**, 3 Sneed (Tenn.) 221.

[a] **But where the notice of sale is published in a Sunday paper in violation of statute, the notice is void, and equity by injunction will prevent the sale upon the execution.** *Shaw v. Williams*, 87 Ind. 158, 44 Am. Rep. 756.

**13. Robinson v. Chesseldine**, 5 Ill. 232; *Martin v. Pifer*, 96 Ind. 245. *Contra*, *Drouet v. Lacroix*, 28 La. Ann. 126; *Robertson v. Travis*, 4 La. Ann. 151; *Robinson v. Perry*, 4 Tex. 273.

**14. Brady v. Carteret Realty Co.**, 67 N. J. Eq. 641, 60 Atl. 938, 110 Am.

a strong case of fraud, mistake, surprise or accident is required to induce a court of equity to interfere with the completion of a sale upon an execution at law.<sup>15</sup>

b. *To Prevent a Cloud on Title.*—Consonant with the jurisdiction of a court of equity to remove a cloud upon the title of an owner of land,<sup>16</sup> a court of equity will enjoin proceedings upon an execution where they will cast a cloud on the title of an owner of land who is not a party to the judgment, although no title would pass thereby. The objection that the party has an adequate remedy at law is not tenable.<sup>17</sup> Accordingly equity will enjoin a sale of land under an

St. Rep. 502, 3 Ann. Cas. 421, 66 N. J. Eq. 243, 54 Atl. 814.

[a] Where a judgment creditor collecting his debt starts a question of title at the sale to cheapen the property to be sold, equity will enjoin the sale until the question of title is settled. *Brady v. Carteret Realty Co.*, 67 N. J. Eq. 641, 60 Atl. 938, 110 Am. St. Rep. 502, 3 Ann. Cas. 421, 66 N. J. Eq. 243, 54 Atl. 814.

15. *Skillman v. Holcomb*, 12 N. J. Eq. 131.

[a] Equity may grant an injunction restraining the sheriff from delivering a deed to a third person who bid it off for about one per cent. of its value, where there was evidence of confusion in the sale relative to the rights of the execution plaintiff and that the sale was not fairly conducted. *Curran v. Georgia Loan & Tr. Co.*, 104 Ga. 682, 30 S. E. 886.

16. See the title "Quieting Title."

17. **U. S.**—*Allen v. Hanks*, 136 U. S. 300, 10 Sup. Ct. 961, 34 L. ed. 414. **Ala.**—*Eufaula Nat. Bank v. Pruett*, 128 Ala. 470, 30 So. 731; *Robinson v. Joplin*, 54 Ala. 70; *Alabama L. Ins. & Tr. Co. v. Pettway*, 24 Ala. 544; *Burt v. Cassety*, 12 Ala. 734. **Ark.**—*Talieferro v. Barnett*, 37 Ark. 511; *King v. Clay*, 34 Ark. 291, 299. **Cal.**—*Einstein v. Bank of California*, 137 Cal. 47, 69 Pac. 616; *Wilhoit v. Cunningham*, 87 Cal. 453, 25 Pac. 675; *Roth v. Insley*, 86 Cal. 134, 24 Pac. 853; *Roman Catholic Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. 343; *Porter v. Pico*, 55 Cal. 165; *Marriner v. Smith*, 27 Cal. 649; *Englund v. Lewis*, 25 Cal. 337; *Pixley v. Huggins*, 15 Cal. 127; *Shattuck v. Carson*, 2 Cal. 588. **Colo.**—*Union Iron Wks. v. Bassick Mfg. Co.*, 10 Colo. 24, 43, 14 Pac. 54; *Bell v. Murray*, 13 Colo. App. 217, 57 Pac. 488; *Crawford v. Lamar*, 9 Colo.

App. 83, 47 Pac. 665. **Del.**—*Sharpe v. Tatnall*, 5 Del. Ch. 302. **Fla.**—*Benner v. Kendall*, 21 Fla. 584; *Barnes v. Mayo*, 19 Fla. 542; *Shalley v. Spillman*, 19 Fla. 500; *Davidson v. Seegar*, 15 Fla. 671; *Budd v. Long*, 13 Fla. 288, 309. See *Wilson v. Matheson*, 17 Fla. 630. **Ga.**—*Sanders v. Foster*, 66 Ga. 292. **Ida.**—*Young v. First Nat. Bank*, 4 Idaho 323, 39 Pac. 557. **Ill.**—*Groves v. Webber*, 72 Ill. 606; *Groves v. Maghee*, 64 Ill. 180; *Bennett v. McFadden*, 61 Ill. 334; *Christie v. Hale*, 46 Ill. 117; *Fitts v. Davis*, 42 Ill. 391. **Ind.**—*Zimmerman v. Makepeace*, 152 Ind. 199, 52 N. E. 992; *Thomas v. Simmons*, 103 Ind. 538, 2 N. E. 203, 3 N. E. 381; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731; *First Nat. Bank v. Deitch*, 83 Ind. 131; *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *First Nat. Bank v. Savin*, 47 Ind. App. 266, 94 N. E. 347. **Ia.**—*Wildner v. Thompson*, 66 Iowa 283, 23 N. W. 670; *Key City Gas Light Co. v. Munsell*, 19 Iowa 305. **Ky.**—*Bean v. Everett*, 21 Ky. L. Rep. 1790, 56 S. W. 403. **Mass.**—*Stevens v. Mulligan*, 167 Mass. 84, 44 N. E. 1086. **Minn.**—*Hamilton v. Wood*, 55 Minn. 482, 57 N. W. 208; *Conkey v. Dike*, 17 Minn. 457. **Mo.**—*Rev. St.*, 1909, §2534; *Parks v. People's Bank*, 97 Mo. 130, 11 S. W. 41, 10 Am. St. Rep. 295; *South Presbyterian Church v. Hintze*, 72 Mo. 363; *State v. Tiedemann*, 69 Mo. 306, 33 Am. Rep. 498; *Vogler v. Montgomery*, 54 Mo. 577; *Taylor v. Swearingen*, 161 Mo. App. 467, 144 S. W. 160; *Neeley v. Bank of Independence*, 114 Mo. App. 467, 89 S. W. 907. **Neb.**—*Uhl v. May*, 5 Neb. 157. **N. H.**—*Tucker v. Kenniston*, 47 N. H. 267, 93 Am. Dec. 425. **N. Y.**—*Lehman v. Roberts*, 86 N. Y. 232; *Buffum v. Forster*, 77 Hun 27, 28 N. Y. Supp. 285, 59 N. Y. St. 833; *Pettit v. Shepherd*, 5 Paige 493, 28 Am. Dec. 437; *Shaw v. Dwight*, 16

execution upon a money judgment recovered against the person from

Barb. 536. **N. C.**—Harris v. Carolina Dist. Co., 89 S. E. 789. **Ohio.**—Norton v. Beaver, 5 Ohio 178; Bank of United States v. Schultz, 2 Ohio 471, 495. **Ore.**—Townsend v. Chamberlain, 158 Pac. 664; Wilhelm v. Woodecock, 11 Ore. 518, 5 Pac. 202; Coolidge v. Forward, 11 Ore. 118, 2 Pac. 292; Cox v. Smith, 10 Ore. 418. **Pa.**—Natalie Anthracite Coal Co. v. Ryan, 188 Pa. 318, 41 Atl. 462; Gay v. Chambers, 37 Pa. Super. 41; Barrell v. Adams, 26 Pa. Super. 635. **Tex.**—Vern. Sayles' Tex. Civ. St., 1914, art. 4643; Ward v. Caples (Tex. Civ. App.), 170 S. W. 816; S. K. McCall Co. v. Page (Tex. Civ. App.), 155 S. W. 655; Texas Brew. Co. v. Bisso, 50 Tex. Civ. App. 119, 109 S. W. 270; Brown v. Ikard, 33 Tex. Civ. App. 661, 77 S. W. 967; Rodriguez v. Buckley (Tex. Civ. App.), 30 S. W. 1123; Texas Land & M. Co. v. Worsham, 5 Tex. Civ. App. 245, 23 S. W. 938. **Wis.** Moore v. Cord, 14 Wis. 213.

[a] "To constitute a cloud upon title such as warrants the interference of a court of equity, it is necessary to show, by proof of extrinsic facts, the invalidity of proceedings apparently valid on their face. (Scribner v. Allen, 12 Minn. 148.) Thus, if in an action of ejectment founded upon a judgment, execution sale, and sheriff's deed, it would devolve upon the owner in possession of the land sought to be recovered to prove the invalidity of the proceedings resulting in the deed, or to show a superior title in himself from the same source of title, the proceedings would be held to cast a cloud upon the title. But it is only where such proof is necessary that a cloud would exist. Where such proof is unnecessary no shade would be cast by the proceedings (Pixley v. Huggins, 15 Cal. 127; Hickman v. O'Neal, 10 Cal. 293; Cohen v. Sharp, 44 Cal. 29); and a court of equity will not interfere to enjoin them. (City and County of San Francisco v. Beideman, 17 Cal. 444; Hollister v. Sherman, 63 Cal. 38; Taylor v. Underhill, 40 Cal. 471; Schuyler v. Broughton, 65 Cal. 252.)" Roman Catholic Archbishop v. Shipman, 69 Cal. 586, 11 Pac. 343. To same effect, see the following cases: **Ark.**—Talieferro v. Barnett, 37 Ark. 511. **Cal.**—Roth v. Insley, 86 Cal. 134,

24 Pac. 853; Tibbetts v. Fore, 70 Cal. 242, 11 Pac. 648; Fulton v. Hanlow, 20 Cal. 450, 484. **Fla.**—Benner v. Kendall, 21 Fla. 584; Barnes v. Mayo, 19 Fla. 542; Shalley v. Spillman, 19 Fla. 500; Davidson v. Seegar, 15 Fla. 671. **Mo.**—Taylor v. Swearingen, 161 Mo. App. 467, 144 S. W. 160. **N. Y.**—Lehman v. Roberts, 86 N. Y. 232; Schroeder v. Gurney, 73 N. Y. 430; Fonda v. Sage, 48 N. Y. 173. **Tex.**—Brown v. Ikard, 33 Tex. Civ. App. 661, 77 S. W. 967; Rodriguez v. Buckley (Tex. Civ. App.), 30 S. W. 1123; Texas Land & Mort. Co. v. Worsham, 5 Tex. Civ. App. 245, 23 S. W. 938; Ryburn v. Getzen-daner, 1 Posey Unrep. Cas. 349. **Wis.** Moore v. Cord, 14 Wis. 213.

[b] A sale under an execution against A of land belonging to B will not be enjoined unless B at some time had a title, for otherwise the sale would not create any cloud on B's title. Barnes v. Mayo, 19 Fla. 542; Shalley v. Spillman, 19 Fla. 500.

As to cloud cast by a sale on an execution void on its face, see *supra*, IV, E, 4, a, (I).

Sale under execution against stranger as creating a cloud, see *supra*, IV, E, 4, a, (III), (B), (3).

[c] Where there is no question as to the plaintiff's title, an injunction may be granted to restrain a sale under execution which would operate to cast a cloud upon that title, but where there are serious doubts as to such title an injunction should be denied. Crawford v. Lamar, 9 Colo. App. 83, 47 Pac. 665.

[d] An administrator who sets up no title in himself, save, at most, a right in the administration to sell the lands for purposes of administration, or for distribution cannot enjoin an execution sale of an heir's interest on the ground it would create a cloud on the title. Robinson v. Joplin, 54 Ala. 70.

[e] The real estate of a pensioner purchased with pension money is exempt from execution, and the owner may enjoin the enforcement of an execution against the property as the ground of exemption can be established only by extrinsic evidence and the levy and sale will constitute an apparent cloud on his title. Buffum v. Forster,

whom the present owner derived title before the recovery of the judgment.<sup>18</sup> The rule has been extended in some jurisdictions and execution sales have been enjoined where they would cast doubt on the title and

77 Hun 27, 28 N. Y. Supp. 285, 59 N. Y. St. 833.

[f] **Where Judgment Is Not a Lien.** "Where an execution is levied upon real property upon which the judgment is not a lien, the court will enjoin the sale to prevent a cloud from being cast upon the title. It is no hardship upon the execution creditor in such case, because he is not entitled to sell the property at all. *Key City Gas Light Co. v. Munsell*, 19 Iowa 305." *Wiedner v. Thompson*, 66 Iowa 283, 23 N. W. 670.

[g] A purchaser at a foreclosure sale may enjoin a sale of the premises on a judgment for a prior mechanic's lien where by statute a sale of execution discharges the property from prior liens, as the sale would cloud plaintiff's title. *Sharpe v. Tatnall*, 5 Del. Ch. 302.

18. **Ala.**—*Martin v. Hewitt*, 44 Ala. 418, 436; *Downing v. Mann*, 43 Ala. 266; *Burt v. Cassety*, 12 Ala. 734. **Cal.** *Einstein v. Bank of California*, 137 Cal. 47, 69 Pac. 616; *Porter v. Jennings*, 89 Cal. 440, 26 Pac. 965; *Roman Catholic Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. 343; *Englund v. Lewis*, 25 Cal. 337; *Pixley v. Huggins*, 15 Cal. 127; *Shattuck v. Carson*, 2 Cal. 588; *Austin v. Union Pav. & Con. Co.*, 4 Cal. App. 610, 88 Pac. 731. See *Fitzgibbon v. Laumeister*, 119 Cal. xvii, 51 Pac. 1078. **Fla.**—*Barnes v. Mayo*, 19 Fla. 542; *Budd v. Long*, 13 Fla. 288, 309. **Ga.**—*Cox v. Mayor*, 17 Ga. 249, action by city to prevent levy on land dedicated to city by debtor company. See *Kendall v. Dow*, 46 Ga. 607, 614, where the property claimed was released from the lien of the execution by contract. **Ill.**—*Groves v. Webber*, 72 Ill. 606. **Ia.**—*Key City Gaslight Co. v. Munsell*, 19 Iowa 305; *Jones v. Jones*, 13 Iowa 276. **Kan.**—*Yount v. Hoover*, 95 Kan. 752, 149 Pac. 408, L. R. A. 1915F, 1120. **Ky.**—*Bean v. Everett*, 21 Ky. L. Rep. 1790, 56 S. W. 403. **La.** *Thompson & Co. v. Herring*, 45 La. Ann. 291, 13 So. 393; *Theurer v. McGibbon*, 28 La. Ann. 29; *Doherty v. Leake*, 24 La. Ann. 224. **Md.**—*Hollida v. Shoop*, 4 Md. 465, 59 Am. Dec. 88. **Mich.** *Corey v. Smalley*, 106 Mich. 257, 64 N.

W. 13, 58 Am. St. Rep. 474. **Miss.** *Niles v. Davis*, 60 Miss. 750, enjoining a sale on execution against plaintiff's vendor, plaintiff having obtained the land by adverse possession against the creditor with a parol contract of sale as color of title. **Mo.**—*Carrel v. Meek*, 155 Mo. App. 337, 137 S. W. 19. **Ohio.** *Olin v. Hungerford*, 10 Ohio 268. **Ore.** *Wilhelm v. Woodcock*, 11 Ore. 518, 525, 5 Pac. 202; *Coolidge v. Forward*, 11 Ore. 118, 2 Pac. 292. **Pa.**—*Barrell v. Adams*, 26 Pa. Super. 635. **Tenn.** *Merriman v. Polk*, 5 Heisk. 717. **Wis.** *Goodell v. Blumer*, 41 Wis. 436.

**Contra. Minn.**—*Pelican River Milling Co. v. Maurin*, 67 Minn. 418, 69 N. W. 1149, denying relief as the plaintiff's title appeared of record. **N. J.**—*Sheldon v. Stokes*, 34 N. J. Eq. 87. **N. C.** *Southerland v. Harper*, 83 N. C. 200. **Tex.**—*Paddock v. Jackson*, 16 Tex. Civ. App. 655, 41 S. W. 700, holding, however, that equity would entertain the bill where the property in question consisted of 330 different parcels and was levied on as the property of the plaintiff's grantor, and the petition for an injunction showed that the property was held for sale, and that the levy injured the plaintiff in that it hindered and obstructed the sale, and that the sale would cast a cloud on his title, deter persons from buying the same, and cause the market value to be greatly depreciated.

[a] **Specific Performance of Contract To Convey and Injunction.**—A plaintiff may obtain a decree directing specific performance of an oral contract to convey certain realty and an injunction against the levying of an execution against the promisor by his creditors. *Brown v. Prescott*, 63 N. H. 61.

[b] **Where the plaintiff's deed is found to be a mortgage**, his bill will be dismissed as his rights after the sale will be on the same footing as they were before. *Purdy v. Irwin*, 18 Cal. 350.

[c] **Where Plaintiff Has Possessory Right Only.**—But a plaintiff who purchases land and takes a bond for title when the purchase money shall be paid cannot enjoin a threatened sale of the

hinder the full power of disposal, even though they would not, strictly speaking, cloud the owner's title.<sup>19</sup> A bona fide purchaser of real property may enjoin the enforcement upon the property of a judgment against the vendor where the judgment is not a lien upon the property,<sup>20</sup> but it is otherwise where the lien has attached.<sup>21</sup> It has been held that a purchaser at an execution sale who has not complied with the terms of his bid cannot enjoin a sale of the property.<sup>22</sup> A sale and deed of a wife's separate property under an execution against the husband is generally held to constitute a cloud upon the wife's property which equity will prevent by injunction.<sup>23</sup>

**Where Conveyance Is Fraudulent.**—If the creditor in good faith believes the conveyance of the debtor to the plaintiff to be fraudulent and seeks to obtain satisfaction for his debt out of the property conveyed, equity will not grant relief;<sup>24</sup> but it is otherwise if the charge of fraud is colorable and groundless, and not made in good faith.<sup>25</sup>

*c. Compelling Exhaustion of Certain Property First.*—Although generally a judgment creditor will not by the use of an injunction be required to proceed against one piece of property in preference to another,<sup>26</sup> he may be required to do so where third persons acquire rights

property on an execution against the vendor; he has a possessory right at most and the sale will not disturb his possession. *Moore v. Hallum*, 1 Lea (Tenn.) 511. *Contra*, *Money v. Dorsey*, 7 Smed. & M. (Miss.) 15.

19. Injunction of sale of plaintiff's lands on execution against another, see *supra* IV, E, 4, a, (III), (B), (3).

Enjoining sale on void execution, see *supra*, IV, E, 4, a, (I).

20. *Riggin v. Mulligan*, 9 Ill. 50. See *Scott v. Bennett*, 6 Ill. 646.

[a] **Estoppel.**—Where judgment creditors assent to a deed of trust made by their debtors and induce third parties to purchase the estate and by their conduct cause the purchasers to believe they will look to the trustees and not their liens for their claim, the purchasers may enjoin an enforcement of the judgment against the property. *Doub v. Barnes*, 4 Gill (Md.) 1, 19.

21. *Taylor v. Morgan*, 86 Ind. 295; *Hollida v. Shoop*, 4 Md. 465, 59 Am. Dec. 88.

22. *Losee v. Sauton*, 24 La. Ann. 370.

23. Where wife's separate property is levied on for a debt of her husband, see 11 STANDARD PROC. 810.

24. Md.—*Welde v. Scotten*, 59 Md. 72. N. H.—*Tucker v. Kensington*, 47 N. H. 267, 93 Am. Dec. 425. N. J. *Freeman v. Elmendorf*, 7 N. J. Eq. 475. N. C.—*Southerland v. Harper*, 83 N. C. 200. Ore.—*Coolidge v. Forward*, 11 Ore.

118, 2 Pac. 292. Pa.—*Winch's Appeal*, 61 Pa. 424. Tex.—See *Paddock v. Jackson*, 16 Tex. Civ. App. 655, 41 S. W. 700.

[a] **Where Purchaser Alleges That Creditor Charges Fraud.**—A purchaser of land pending an action against the vendor cannot enjoin a levy and sale under an execution against the vendor on the ground that the creditor charges his purchase with fraud and that this will be a cloud on his title. *Welde v. Scotten*, 59 Md. 72.

[b] **In Louisiana**, a judgment creditor cannot disregard an actual though fraudulent sale and seize property held under such title. He can do so only where the deeds are purely fictitious having only a semblance of title. And a creditor will be enjoined from selling the property on execution against the vendor although the sale is alleged to be fraudulent. *Ford v. Douglas*, 5 How. (U. S.) 143, 167, 12 L. ed. 891; *Theurer v. McGibbon*, 28 La. Ann. 29; *Lewis v. Dinkgrave*, 24 La. Ann. 489; *Dewey v. Bird*, 22 La. Ann. 168; *Hobgood v. Brown*, 2 La. Ann. 323.

25. *Tucker v. Kensington*, 47 N. H. 267, 93 Am. Dec. 425.

26. *Frey v. McGaw*, 127 Md. 23, 95 Atl. 960.

[a] That sheriff did not levy on property he was required to exhaust first is not ground for an injunction. *Farrell v. McKee*, 36 Ill. 225; *Beaird*

in the property, since the rules as to marshaling of assets are applicable,<sup>27</sup> unless the rights of the creditor would be thereby prejudiced.<sup>28</sup> Under this rule a purchaser of some of the property of the debtor may enjoin the sheriff from selling it before exhausting property remaining in the hands of the debtor,<sup>29</sup> or subsequently sold

*v. Foreman*, 1 Ill. 385, 12 Am. Dec. 197. But see *McClellan v. Marshall*, 19 Iowa 561, 87 Am. Dec. 454; *Anderson v. Oldham*, 82 Tex. 228, 18 S. W. 557; *Denson v. Taylor* (Tex. Civ. App.), 132 S. W. 811.

[b] But the wife of the debtor may enjoin a levy upon the homestead before levying on the debtor's personal property, notwithstanding the debtor's designation of the homestead for levy, as he could not direct a levy on his realty before his personalty when it would prejudice the rights of other persons. *Bartholomew v. Hook*, 23 Cal. 277.

[c] Where the debtor has lawfully selected the property to be levied on, he may enjoin an execution in disregard of his choice. See *Pierson v. Connellee* (Tex. Civ. App.), 145 S. W. 1039, and 15 STANDARD PROC. 929, note. 12.

27. **U. S.**—*Findlay's Exrs. v. Bank of the United States*, 2 McLean 44, 9 Fed. Cas. No. 4,791. **Ga.**—*Compton & Sons v. Pitman*, 49 Ga. 612. **Miss.** *Baine v. Williams*, 10 Smed. & M. 113. **N. J.**—*Peshine v. Binns*, 11 N. J. Eq. 101, suit by subsequent execution creditor. **N. Y.**—*Ingalls v. Morgan*, 10 N. Y. 178, 186; *Welch v. James*, 22 How. Pr. 474. **S. C.**—*Bollman v. Wamer*, 38 S. C. 464, 17 S. E. 223. **Tenn.**—*Hunt v. Ewing*, 12 Lea 519.

See generally the title "Marshaling Assets."

[a] If the creditor with knowledge of the facts voluntarily incapacitates himself from resorting to the fund to which he alone has access, he may be enjoined thereafter from resorting to the common fund. *Ingalls v. Morgan*, 10 N. Y. 178.

28. **N. Y.**—*Evertson v. Booth*, 19 Johns. 486. **N. C.**—*Francis v. Herren*, 101 N. C. 497, 508, 8 S. E. 353; *Jackson v. Sloan*, 76 N. C. 306. **Ohio.** *Bank of United States v. Schultz*, 3 Ohio 61.

[a] A purchaser of property cannot compel a creditor to resort to other property which has been so disposed

of that it cannot be subjected to the judgment. *Bank of United States v. Schultz*, 3 Ohio 61.

29. **Ill.**—*Hurd v. Eaton*, 28 Ill. 122, **Ind.**—*Boos v. Morgan*, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237; *Sidener v. White*, 46 Ind. 588; *Dyer v. Armstrong*, 5 Ind. 437; *Russell v. Houston*, 5 Ind. 180, where a purchaser of the property under a junior judgment enjoined the sale of the land on an execution issued on a prior judgment until other property of the debtor which has been levied on has been exhausted. **Miss.**—*Rollins v. Thompson*, 13 Smed. & M. 522; *Baine v. Williams*, 10 Smed. & M. 113; *Agricultural Bank v. Pallen*, 8 Smed. & M. 357, 47 Am. Dec. 92; *Pallen v. Agricultural Bank*, *Freem. Ch.* 419. **N. Y.**—*Ingalls v. Morgan*, 10 N. Y. 178, 186; *James v. Hubbard*, 1 Paige 228; *Clowes v. Dickenson*, 5 Johns. Ch. 235, 9 Cow. 403; *Evertson v. Booth*, 19 Johns. 486; *Welch v. James*, 22 How. Pr. 474. **N. C.** *Francis v. Herren*, 101 N. C. 497, 507, 8 S. E. 353; *Jackson v. Sloan*, 76 N. C. 306. **Tenn.**—*Jones v. Maney*, 7 Lea 341. *Contra*, *Jones v. McCrady*, 48 S. C. 533, 26 S. E. 802; *Latimer v. Ballew*, 41 S. C. 517, 19 S. E. 792, 44 Am. St. Rep. 748; *Wagner v. Pegues*, 10 S. C. 259; *McAhey v. Barber*, 4 S. C. 45; *Moore v. Wright*, 14 Rich. Eq. 132.

[a] Where the judgment creditor expressly waives the lien of his judgment on certain property of the defendant and permits its sale he will be enjoined from enforcing his judgment against the property sold. *Wagner v. Pegues*, 10 S. C. 259, explaining *Hurd v. Eaton*, 28 Ill. 122.

[b] Laches of the creditor in enforcing his judgment against the debtor's property until the debtor's estate is insolvent will not authorize a purchaser of lands of the debtor to enjoin the enforcement of the execution against the property purchased by the plaintiff. *Wagner v. Pegues*, 10 S. C. 259.

[c] A purchaser of property from a surety on a joint and several bond

to other purchasers.<sup>30</sup> So also a replevin bail may enjoin a threatened levy and sale of his property before exhausting the property of the debtor.<sup>31</sup>

An injunction is a proper remedy to enforce an agreement among the parties as to the order in which the property of the defendants shall be taken to satisfy the execution.<sup>32</sup>

d. *To Protect Creditors.*—While equity will not at the instance of simple contract<sup>33</sup> or attaching<sup>34</sup> creditors, who have not reduced their claims to judgment, enjoin the enforcement of a judgment in favor of other creditors alleged to have been obtained fraudulently, in violation of plaintiff's rights, it will sometimes interfere to prevent a sale about to be made in such a manner as will injure their rights.<sup>35</sup> A receiver cannot enjoin the enforcement of a prior judgment lien,<sup>36</sup> unless the lien is preserved by the injunction order.<sup>37</sup>

The debtor cannot enjoin a sale of property on the ground that the property is covered by mortgages.<sup>38</sup> But he may enjoin the enforce-

cannot enjoin enforcement of a writ against his property when there is other property subject to the lien of the judgment, even though the attorney for the creditor is also attorney for the owners of other property subject to the lien and he directs the execution against the plaintiff to save his clients. *Buckley v. Kilker*, 218 Pa. 176, 67 Atl. 55.

30. *Moore v. Trimmer*, 32 S. C. 511, 11 S. E. 548, 552.

31. *Elson v. O'Dowd*, 40 Ind. 300. But see *Waynick v. Connelly*, 8 Blackf. (Ind.) 75.

32. *Gibson v. McClay*, 47 Neb. 900, 66 N. W. 851.

[a] A creditor not a party to the agreement cannot be enjoined from enforcing his execution. *Boyce v. Woods*, 37 Tex. 245.

33. *Wiggins v. Armstrong*, 2 Johns. Ch. (N. Y.) 144; *Artman v. Giles*, 155 Pa. 409, 26 Atl. 668, 32 W. N. C. 361 (where the debtor confessed judgment as to certain creditors); *Meyers v. Rauch*, 4 Pa. Dist. 331. See *Dodd v. Solomons*, 93 Ga. 314, 20 S. E. 320, where plaintiff asked an injunction and receiver but did not allege anything against the bona fides of the judgment.

[a] The holder of a note secured by a mortgage cannot enjoin a sale of the mortgaged property at the instance of the holders of other notes secured by the same mortgage. *City Bank v. McIntire*, 8 Rob. (La.) 467.

34. *Martin v. Michael*, 23 Mo. 50, 66 Am. Dec. 656; *Artman v. Giles*, 155

Pa. 409, 26 Atl. 668, 32 W. N. C. 361. *Contra*, *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519.

[a] Exceptional cases may arise in which creditors having a lien, even though only by attachment may obtain relief in equity but the presumption is against them. *Artman v. Giles*, 155 Pa. 409, 26 Atl. 668, 32 W. N. C. 361.

35. *Reynolds & Hamby Est. Mortg. Co. Ltd. v. Kingsberry*, 118 Ga. 254, 45 S. E. 235.

[a] *Sale in Bulk.*—Where it appears that the sheriff levied on land consisting of different lots and groups of lots which had been laid off long prior to the date of the judgment, and advertised it for sale in bulk, and where it appears such a sale would be detrimental to the unsecured creditors while a sale in parcels would not lessen the security of the execution plaintiff, equity will enjoin the sheriff from selling as he proposes. *Reynolds & Hamby Est. Mortg. Co. Ltd. v. Kingsberry*, 118 Ga. 254, 45 S. E. 235, *distinguishing* *Reeves v. Bolles*, 95 Ga. 402, 22 S. E. 626.

36. *Cherry v. Western Wash. I. Expo. Co.*, 11 Wash. 586, 40 Pac. 136.

37. *State v. Superior Court*, 11 Wash. 63, 39 Pac. 244.

38. *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 211, 79 Am. Dec. 646, the mortgagee himself must claim what ever protection he may be entitled to.

[a] *Where Defendant Has Ejectable Mortgage.*—Defendant in ejectment, against whom judgment has been

ment of an attorney's lien on the judgment after the lien has been extinguished by the assignment of the judgment.<sup>39</sup>

**As Between Junior and Senior Lienholders.** — An incumbrancer who has a lien prior to the lien of a judgment cannot, as a general rule, enjoin the enforcement of the judgment,<sup>40</sup> as the sale under executions

rendered, may maintain a bill to restrain the sale of the land under an execution issued on the judgment, where he has, as the equitable owner of a mortgage on the land, a lien thereon, a court of equity being the only forum having a jurisdiction to determine his rights. *Taylor v. Roniger*, 147 Mich. 99, 110 N. W. 503.

39. *Humtulsips Driving Co. v. Cross*, 65 Wash. 636, 118 Pac. 827.

40. **Ark.**—*Johnson v. Gillenwater*, 75 Ark. 114, 87 S. W. 439. **Fla.**—*American Freehold L. & M. Co. v. Maxwell*, 39 Fla. 489, 22 So. 751, prior mortgagor. **Ga.**—*Sanders v. Foster*, 66 Ga. 292, prior execution plaintiff. **Ill.**—*Chittenden v. Rogers*, 42 Ill. 95. **Ind.**—*Messmore v. Stephens*, 83 Ind. 524. *Compare Shanklin v. Sims*, 110 Ind. 143, 11 N. E. 32 (holding a mortgagee of land, levied on under a judgment which is not a lien on it, may maintain a suit for injunction); *Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562. **Ia.**—*Ramsdell v. Tama Water-Power Co.*, 84 Iowa 484, 51 N. W. 245 (*explaining* *Ruthven Bros. v. Mast & Co.*, 55 Iowa 715, 8 N. W. 659); *Wiedner v. Thompson*, 66 Iowa 283, 23 N. W. 670. **La.**—*Van Loan v. Heffner*, 30 La. Ann. 1213; *Smith & Co. v. Hoey*, 28 La. Ann. 95; *Chaffraix v. Edwards*, 26 La. Ann. 22; *Gleises v. McHatton*, 14 La. Ann. 560 (a pledgee has a remedy by third opposition); *Wallis v. Bourg*, 14 La. Ann. 104; *Ashford v. Tibbitts*, 11 La. Ann. 167; *Gil v. Gil*, 10 Rob. 28; *Bludworth v. Lambeth*, 9 Rob. 256. But see *Robb v. Wagner*, 5 La. Ann. 111, where the plaintiff was a landlord with a lien on the property. **Md.**—*Tome v. Merchants & M. B. & L. Co.*, 34 Md. 12; *Union Bank v. Poultney*, 8 Gill & J. 324. **S. C.**—*McTeer v. Moorer*, Bailey Eq. 62, the mortgagee has an adequate remedy at law. **Tex.**—*Wilkerson v. Stasny* (Tex. Civ. App.), 183 S. W. 1191; *Williams v. Farmers Nat. Bank*, 22 Tex. Civ. App. 581, 56 S. W. 261; *Ivory v. Kempner*, 2 Tex. Civ. App. 474, 21 S. W. 1006; *George v. Dyer*, 1 White & W. Civ. Cas. §780. But in *Click v. Stewart*,

36 Tex. 280, a landlord enjoined an execution sale of certain property upon which he claimed a landlord's lien but which was levied on under executions before the issuing of distress warrants. **Va.**—*Miller v. Crews*, 2 Leigh (29 Va.) 576; *Bowyer v. Creigh*, 3 Rand. (24 Va.) 25. **W. Va.**—*Rollins v. Hess*, 27 W. Va. 570; *Walker v. Hunt*, 2 W. Va. 491, 98 Am. Dec. 779.

*Contra*, *Parker v. Kelly*, 10 Smed. & M. (Miss.) 184 (holder of vendor's lien); *Byrne v. Anderson*, 10 Smed. & M. 81 (allowing an injunction as no demurrer was interposed although doubting the court's jurisdiction); *Parish v. Saunders*, 3 Humph. (Tenn.) 431.

[a] A mortgagee in possession of chattels under the mortgage cannot enjoin a sale thereof as he has an adequate remedy at law. *La Mothe v. Fink*, 8 Biss. 493, 14 Fed. Cas. No. 8,032.

[b] A pledgee of a fractional part of a chose in action cannot enjoin a sale of the remainder at the instance of other creditors. *Van Norden v. Leeds & Co.*, Man. Unrep. Cas. (La.) 198.

[c] The assertion in public by a plaintiff in execution that a mortgage is fraudulent and void, and that the lien of his judgment is superior thereto, will not entitle the mortgagee under said mortgage to an injunction restraining the sale of said real estate under execution by said judgment creditor. *Ramsdell v. Tama Water Power Co.*, 84 Iowa 484, 51 N. W. 245.

[d] Poverty of the senior execution plaintiff disabling him from bidding in the land does not strengthen his right to equitable relief. *Sanders v. Foster*, 66 Ga. 292.

[e] That the purchaser at the sale might remove the property from the county does not affect the rule denying the senior lienholder relief. *Wilkerson v. Stasny* (Tex. Civ. App.), 183 S. W. 1191.

[f] The fact that the senior lien stands canceled of record by a mistake

subsequent to the lien will not impair the lien,<sup>41</sup> and he has a complete remedy at law.<sup>42</sup> If, however, the circumstances are such that adequate relief cannot be had at law, equity will entertain the bill,<sup>43</sup> as where the record does not show the priority of the lien,<sup>44</sup> or where

to which the junior lienholder was not a party and for which he was in no way responsible does not entitle the senior lienholder to an injunction restraining the junior lienholder from selling the property under his execution. *Wiedner v. Thompson*, 66 Iowa 283, 23 N. W. 670.

[g] But a mortgagee in trust for certain bondholders of a railroad company may enjoin the enforcement of a judgment by one of the bondholders under a second mortgage where the property of the railroad company is not sufficient to pay the first mortgage, as the enforcement of the second mortgage consistent with the first mortgage would work only inconvenience and harm to the first without any benefit to the second. In addition thereto the proceeding by one only of the bondholders on the second mortgage would disturb the pro rata distribution in the event of a deficiency. *Pennock v. Coe*, 23 How. (U. S.) 117, 131, 16 L. ed. 436; *Ruggles v. Simonton*, 3 Biss. 325, 20 Fed. Cas. No. 12,120; *Ludlow v. Hurd*, 1 Disn. (Ohio) 552, 12 Ohio Dec. 791.

[h] **To Prevent Multiplicity of Suits and Remove Cloud.**—A trustee of a deed of trust who is also the largest beneficiary may enjoin levies and sales by other creditors, some having paramount liens and some having liens subordinate to that of the trustee, on the ground of preventing a multiplicity of suits, removing a cloud, and on the ground that a mortgagee although he has a power of sale may come into chancery to foreclose. *Alabama Life Ins. & Tr. Co. v. Pettway*, 24 Ala. 544, 562.

[i] **A creditor who serves a foreign attachment on a garnishee of a person having property of an absent debtor may enjoin a sale of the property by other creditors who subsequently attached the property.** *Moore v. Holt*, 10 Gratt. (51 Va.) 284, on the authority of *Erskine v. Staley*, 12 Leigh (39 Va.) 406.

[j] **Pending a suit to determine priority of liens an attaching creditor may enjoin levy and sale of property in the hands of garnishee, by execution**

creditor. *Northfield Knife Co. v. Shapleigh*, 24 Neb. 635, 39 N. W. 788, 8 Am. St. Rep. 224.

[k] **Substituting Sureties of Purchaser to Vendor's Rights.**—The sureties of a purchaser of property on which a lien was retained for the purchase money, may enjoin a sale of the property on execution in favor of other creditors although the purchase money has not been paid, as they have a right to be substituted to the rights of the vendor before they have discharged the debt. *Henry v. Compton*, 2 Head (Tenn.) 549.

41. Fla.—*American Freehold L. & M. Co. v. Maxwell*, 39 Fla. 489, 22 So. 751. Ind.—*Messmore v. Stephens*, 83 Ind. 524. La.—*Bludworth v. Lambeth*, 9 Rob. 256; *Vanhille v. Her Husband*, 5 Rob. 496; *Casson v. Louisiana State Bank*, 7 Mart. N. S. 277; *Hebert's Heirs v. Babin*, 6 Mart. N. S. 614. Md. *Union Bank v. Poultney*, 8 Gill & J. 324. Tex.—*Wilkerson v. Stasny* (Tex. Civ. App.), 183 S. W. 1191. W. Va. *Rollins v. Hess*, 27 W. Va. 570.

42. Ill.—*Chittenden v. Rogers*, 42 Ill. 95. La.—*Glaises v. McHatton*, 14 La. Ann. 560. S. C.—*McTeer v. Moorser*, *Bailey Eq.* 62. Va.—*Miller v. Crews*, 2 Leigh (29 Va.) 576; *Bowyer v. Creigh*, 3 Rand. (24 Va.) 25.

43. *Martin v. Jewell*, 37 Md. 530.

[a] **A landlord who is entitled to one-half a crop of wheat by way of rent and who has a mortgage on the other half and on the farming implements necessary to caring for the crop, may enjoin a sale of the property on fieri facias as there could be no adequate compensation at law.** *Martin v. Jewell*, 37 Md. 530.

[b] **One who files a bill in a federal court claiming a specific lien on an estate, may by bill in equity enjoin the sheriff from paying over money recovered on sale of the estate under executions of individual creditors.** *Read v. Dews*, R. M. Charl. (Ga.) 355.

44. Kan.—*Plumb v. Bay*, 18 Kan. 415, for the sale without reference to the prior lien will pass title to an innocent purchaser free of the lien. And see *Bowling v. Garrett*, 49 Kan. 504,

the sale will cloud the creditor's title.<sup>45</sup> Where the senior lien holder acquires title to the property, equity will sometimes preserve the lien when it would be merged at law, and will enjoin an execution sale by a junior judgment creditor in defiance of the lien.<sup>46</sup>

On the other hand, a junior lien holder cannot, as a general rule, enjoin a prior lien holder from enforcing a judgment obtained on his lien.<sup>47</sup> but, in a proper case, a junior lien holder may compel a senior lien holder whose lien is secured by two or more parcels of land to enforce his lien out of the parcels which the former cannot reach.<sup>48</sup>

**Enjoining Sale of Equity of Redemption.**—A court of equity will enjoin a sale of an equity of redemption when the exercise of the right would of necessity greatly impair, if not destroy, the rights of the mortgagee.<sup>49</sup>

**e. To Prevent Sacrifice at Sale.**—It is not ground for an injunction that because of the unsettled state of finances in the country,<sup>50</sup>

523, 31 Pac. 135, 33 Am. St. Rep. 377. **Miss.**—Walton v. Hargroves, 42 Miss. 18, 97 Am. Dec. 429 (enjoining execution at the instance of a vendor who executed a deed although the purchase money was not paid); Kelly v. Mills, 41 Miss. 267, where the deed of the vendor was not recorded. **Tex.** Ivory v. Kempner, 2 Tex. Civ. App. 474, 21 S. W. 1006.

45. Ivory v. Kempner, 2 Tex. Civ. App. 474, 21 S. W. 1006.

**As to injunction where sale will cloud title,** see *supra*, IV, E, 4, b.

46. Richardson v. Hockenhull, 85 Ill. 124.

[a] **The holder of a mechanic's lien** who has acquired title in such a manner that the lien is not merged in the title and whose lien is prior to a judgment lien against his grantor may enjoin an execution sale about to be made without reference to his lien, as an innocent purchaser would obtain title free of the lien, there being no record at that time showing conclusively that the lien had any legal existence for any amount. Bowling v. Garrett, 49 Kan. 504, 523, 31 Pac. 135, 33 Am. St. Rep. 377.

47. **U. S.**—Searles v. Jacksonville, P. & M. R. Co., 2 Woods 621, 21 Fed. Cas. No. 12,586. **Cal.**—Ketchum v. Crippen, 37 Cal. 223; Domec v. Stearns, 30 Cal. 114, junior attaching creditor. **Ga.**—Winn v. Henderson, 63 Ga. 365. **Ind.**—Wood v. Rice, 68 Ind. 320, junior judgment creditor. **La.**—See Henry v. Tricou, 36 La. Ann. 519, where plaintiff is purchaser on junior execution.

[a] **Where Judgment Is Paid.**—The holder of a junior lien, not reduced to judgment, may enjoin the execution of a prior judgment as against property subject to the lien where the judgment has been paid and the sale would impair the security. Brigham v. White, 44 Iowa 677.

[b] **A trustee in a deed who is also principal beneficiary** may come into equity to prevent a sale of the property under executions at law. Alabama Life Ins. & Tr. Co. v. Pettway, 24 Ala. 544. See also Whitfield v. Clark, 48 Ala. 555.

48. See *supra*, IV, E, 4, c, and the title "Marshaling Assets."

49. Van Mater v. Conover, 18 N. J. Eq. 38; Smithurst v. Edmunds, 14 N. J. Eq. 408; Severns v. Woolston's Exrs., 4 N. J. Eq. 220.

50. Winn v. Henderson, 63 Ga. 365; Poullain v. English, 57 Ga. 492; McGown v. Sandford, 9 Paige (N. Y.) 290.

[a] **That the property will not bring its full value** from the condition of the times, is no ground for an injunction against a sale under a prior lien by the holder of a junior. Winn v. Henderson, 63 Ga. 365.

[b] **During Pestilence or Invasion.** Where a master is proceeding to sell property under a decree of chancery at an improper time, when such sale must necessarily sacrifice the property, as during the raging of a pestilence, or while there is a threatened invasion, which will destroy all chance of fair competition by deterring bidders from attending the sale, it will be the duty

or the absence of a market for the particular property to be sold,<sup>51</sup> the property will not bring its full value at the sale. Nor will a sale of the property of an insolvent be enjoined because the interposition of certain claims will cause it to sell at a reduced price to the injury of other creditors,<sup>52</sup> or because a sale can be conducted more advantageously by a receiver.<sup>53</sup> But equity may decree a sale of land in parcels when its sale as a whole would result in gross injustice.<sup>54</sup>

f. *Where Writ Is Used Oppressively.*—An injunction will lie where the execution is used to harass or annoy another.<sup>55</sup>

g. *Proceeding in Violation of Stay of Execution.*—It seems that as a general rule, an injunction will not be granted to restrain a sheriff from proceeding under the writ on the ground it has been stayed.<sup>56</sup>

h. *Nonresidence of Parties.*—Nonresidence of the execution defendant is not ground for enjoining an execution sale, where no supersedeas is filed.<sup>57</sup>

i. *Against Removal of Fixtures.*—Equity will in a proper case enjoin a sheriff from wrongfully removing and selling fixtures, where such removal will occasion unusual damage.<sup>58</sup> But where the removal will not occasion such damage, equity will leave the party to his remedy at law,<sup>59</sup> unless the judgment creditor by his conduct fraud-

of a court of chancery to interfere. But the court has no legal right to interfere for the relief of an individual by arbitrarily suspending the ordinary operation of the laws for the collection of debts to meet his particular case. *McGown v. Sandford*, 9 Paige (N. Y.) 290.

51. *Trust Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763.

[a] That a valuable painting about to be sold on execution cannot be sold in the forum except at a great sacrifice does not warrant equitable relief. *Trust Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763.

52. *Robinson v. Thompson & Co.*, 30 Ga. 933.

53. *Lowry v. Phila. Optical & Watch Co.*, 161 Pa. 123, 28 Atl. 1004; *Pairpoint Mfg. Co. v. Phila. Optical & Watch Co.*, 161 Pa. 17, 28 Atl. 1003, 34 W. N. C. 216.

54. *Reeves v. Bolles*, 95 Ga. 402, 22 S. E. 626.

[a] But where land is pledged for debt in its entirety, equity will not enjoin the creditor from selling it and cause the land to be surveyed and platted so that it may be sold in par-

cels. *Reeves v. Bolles*, 95 Ga. 402, 22 S. E. 626.

55. *Colt v. Cornwell*, 2 Root (Conn.) 109; *Barrell v. Adams*, 26 Pa. Super. 635.

56. See *Jaedicke v. Patrie*, 15 Kan. 287.

[a] The better practice is to file a motion in the cause for an order on the officer to return the writ. *Jaedicke v. Patrie*, 15 Kan. 287.

57. *Parker-Hensel Engineering Co. v. Schuler*, 133 Ga. 696, 66 S. E. 800.

58. *Harrell v. Americus Refrigerating Co.*, 92 Ga. 443, 17 S. E. 623; *Patton Malone & Co. v. Moore*, 16 W. Va. 428, 37 Am. Rep. 789.

[a] A trustee of a deed of trust, in possession of the property of a corporation may enjoin a sheriff from removing fixtures under execution against the company, where the removal would occasion unusual damages. *Jenney v. Jackson*, 6 Ill. App. 32.

[b] A sale of fixtures as personalty may be enjoined. *Landell v. Harrison*, 16 Phila. (Pa.) 85, 40 Leg. Int. 4, on the authority of *Morris' Appeal*, 88 Pa. 368.

59. *Beatty v. Smith*, 14 S. D. 24, 84 N. W. 208.

ulently encourages the erection of improvements by a purchaser.<sup>60</sup> A mortgagee of a railroad may, however, enjoin a levy and sale of rolling stock as personalty,<sup>61</sup> but the company which is able but unwilling to pay the judgment cannot maintain such a suit.<sup>62</sup> A levy on fixtures fraudulently removed from the realty may be enjoined.<sup>63</sup>

j. *Enjoining Executions Against Executors, Administrators and Heirs.*—In a proper case equity will enjoin an execution against an executor or administrator.<sup>64</sup> Thus an executor will be relieved in equity from an enforcement of a judgment against himself personally, where after the rendition of judgments *de bonis testatoris*, or after an execution *de bonis intestatis* is returned “no property,” the value of the property unexpectedly depreciates or the estate becomes insolvent through circumstances beyond the control of the executor.<sup>65</sup> An executor may in a proper case enjoin a seizure and sale of a portion of the estate by creditors of the heirs and legatees,<sup>66</sup> and the legatees, on the other hand, may obtain an injunction to restrain a sale of property allotted to them, on a proper showing.<sup>67</sup>

60. *Dellett v. Kemble*, 23 N. J. Eq. 58.

61. *Ill.*—*Titus v. Ginheimer*, 27 Ill. 462; *Titus v. Mabee*, 25 Ill. 257. *Ind.*—*Midland R. Co. v. Stevenson*, 130 Ind. 97, 29 N. E. 385. *Minn.*—*Central Trust Co. v. Moran*, 56 Minn. 188, 57 N. W. 471, 29 L. R. A. 212.

62. *Midland R. Co. v. Stevenson*, 130 Ind. 97, 29 N. E. 385.

63. *Witmer's Appeal*, 45 Pa. 455, 84 Am. Dec. 505.

64. *U. S.*—*Williams v. Benedict*, 8 How. 107, 12 L. ed. 1007. *Ark.*—*Brice v. Taylor*, 51 Ark. 75, 9 S. W. 854. *Ill.*—*Cohen v. Menard*, 136 Ill. 130, 24 N. E. 604. *Miss.*—*Neibert's Admr. v. Withers*, Smed. & M. Ch. 599.

[a] A creditor who has no priority over other creditors will be enjoined from enforcing a judgment against an insolvent estate beyond his pro rata share. *Crenshaw v. Delgado*, 1 N. M. 376.

65. *Ala.*—*Balkum v. Harper's Admr.*, 50 Ala. 429; *Lambert v. Mallett*, 50 Ala. 73. *Ga.*—*Gause v. Walker*, 55 Ga. 129; *Hendricks v. Mitchell*, 37 Ga. 230. *Ore.*—*Brenner v. Alexander*, 16 Ore. 249, 19 Pac. 9, 8 Am. St. Rep. 301. *Va.*—*Miller's Exrs. v. Rice*, 1 Rand. (22 Va.) 438. See *Royall's Admr. v. Johnson*, 1 Rand. (22 Va.) 421.

[a] But if upon a miscalculation of the amount of assets in his hands, the executor confesses judgment for a debt of the testator, and it afterwards appears the assets are insufficient, equity

will not grant relief. *Brenner v. Alexander*, 16 Ore. 249, 19 Pac. 9, 8 Am. St. Rep. 301; *Freelands v. Royall*, 2 Hen. & M. (12 Va.) 575.

[b] Ignorance of insufficiency of assets is no ground for relief from a judgment at law. *Page v. Haines*, 56 Ga. 263.

[c] A bill filed six years after administration granted, to enjoin certain judgments on the ground of insolvency of the estate comes too late as he was bound to know the condition of the estate long before. *Hamilton v. Newman*, 10 Humph. (Tenn.) 557.

[d] By statute, an administrator may, at any time before his personal liability is fixed by judgment against him individually, enjoin all judgments against him as administrator and have a pro rata distribution of the assets of the estate if it is insolvent. *Mosier v. Zimmerman*, 5 Humph. (Tenn.) 62.

[e] Decree.—An injunction in favor of an executor on the ground of deficiency of assets should be only until assets come into his hands to satisfy the judgment or any part thereof. *Haydon v. Goode*, 4 Hen. & M. (14 Va.) 460.

66. See *Turner's Estate*, 7 Kulp (Pa.) 481.

67. *Scott v. Halliday*, 5 Munf. (19 Va.) 103; *Chapman v. Washington*, 4 Call (7 Va.) 327.

[a] Where Sale Unnecessary. Where an order by a court of ordinary authorizing the sale of certain real es-

A purchaser of land from the heirs may enjoin a sale thereof to pay debts of the estate where the representative received sufficient personal assets for that purpose and wasted them.<sup>68</sup> But a creditor as such cannot enjoin other creditors from enforcing their judgments against the estate although the heirs may have renounced their inheritance.<sup>69</sup>

k. *Until Relief Can Be Had at Law.*—Sometimes an injunction will be granted when necessary to stay proceedings on the execution until relief can be had at law, or the proceeding for relief determined.<sup>70</sup> But it seems that this relief will not be granted if it would prejudice the rights of the creditor.<sup>71</sup>

5. *Proceedings for Relief.*—a. *Jurisdiction and Venue.*—(I.) In *General.*—A court of equitable jurisdiction obviously has authority

tate is made and where in a bill for a settlement, distribution and injunction, it is shown no sale is necessary and that the estate is ready for distribution, equity will enjoin the administrator from selling the real property. *McCook v. Pond*, 72 Ga. 150.

68. *Banks v. Speers*, 103 Ala. 436, 16 So. 25.

[a] *The necessary parties defendant* to the bill are the administrator de bonis non, the widow and heirs of the deceased from whom the land was purchased and the plaintiffs in the judgment. *Banks v. Speers*, 103 Ala. 436, 16 So. 25.

69. *Vienne v. Boissier*, 10 Mart. O. S. (La.) 359.

70. *U. S.*—*State of Georgia v. Brailsford*, 2 Dall. 402, 1 L. ed. 433, staying money in a marshal's hands until the title of the state thereto could be determined at law. *Ind.*—*Martin v. Pifer*, 96 Ind. 245; *Lasselle v. Moore*, 1 Blackf. 226. *La.*—*Wiley v. Woodman*, 19 La. Ann. 210; *Wiley v. Woodman*, 19 La. Ann. 185. *Me.*—*Vermeule v. York Water Co.*, 112 Me. 437, 92 Atl. 513. *Miss.*—*Cooper v. Newell*, 36 Miss. 316, 319; *Henderson v. Garrett*, 35 Miss. 554; *Preston v. Harris*, 24 Miss. 247. *Neb.*—*Northfield Knife Co. v. Shapleigh*, 24 Neb. 635, 39 N. W. 788, 8 Am. St. Rep. 224, pending suit to determine priority of liens.

[a] *Where Defendant Has Not Sufficient Time.*—(1) Should an execution, imprudently issued, press the defendant so closely, that he cannot give the required notice and have it set aside on motion in a court at law, he may, by application to the chancellor, have an injunction or order to stay

proceedings until he can be heard. *Lasselle v. Moore*, 1 Blackf. (Ind.) 226. (2) But *Drigg's Bank v. Norwood*, 49 Ark. 136, 4 S. W. 448, 4 Am. St. Rep. 30, holds equity will not grant an injunction against an execution upon exempt property where the party is not apprised of the levy until too late to give the statutory notice, as he has a remedy by application for a stay of proceedings until the claim of exemption can be made and determined.

[b] *Pending Garnishment Proceeding.*—(1) A judgment debtor who has been garnished by a judgment creditor of his judgment creditor may have the enforcement of an execution sued out by his judgment creditor enjoined until the right to the fund is settled. *Preston v. Harris*, 24 Miss. 247; *Barcus v. O'Brien* (Tex. Civ. App.), 171 S. W. 492. (2) But in Texas, under this statement of facts the county court cannot enjoin the issuance and levy of the execution of the garnishee's creditor based upon the judgment of the district court. *Barcus v. O'Brien* (Tex. Civ. App.), 171 S. W. 492.

*Injunction by infant until he can show error in judgment*, see 12 *STANDARD PROC.* 792.

71. See *Hart v. Marshall*, 4 Minn. 294.

[a] Where the interference by injunction would result in delaying the sale until the time limited therefor had expired, a temporary injunction will be denied a purchaser of property pendente lite who claims the judgment is not a lien thereon and who has brought an action to set it aside. *Hart v. Marshall*, 4 Minn. 294.

in a proper case to enjoin the execution of a judgment,<sup>72</sup> and independent of statute.<sup>73</sup> Jurisdiction and venue in this class of cases is frequently regulated by statute.<sup>74</sup> Some statutes provide that injunctions to stay proceedings on judgments or to stay execution of a judgment shall be granted only in the court which rendered the judgment.<sup>75</sup> This statute does not apply to a suit to restrain the enforce-

72. **U. S.**—*Freeland v. Williams*, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. ed. 193. **Colo.**—*Bell v. Murray*, 13 Colo. App. 217, 57 Pac. 488. **Tenn.**—*Anderson v. Mullenix*, 5 Lea 287. **Wash.**—*Phelan v. Smith*, 22 Wash. 397, 61 Pac. 31.

**Jurisdiction of equity to enjoin a judgment for matters connected with its obtainment, see the title "Judgments."**

[a] **Equity May Enjoin Execution on Its Own Decrees.**—*Mann v. Flower*, 26 Minn. 479, 5 N. W. 365; *Montgomery v. Whitworth*, 1 Tenn. Ch. 174.

[b] **A court of one county may enjoin an illegal exercise of power under an unquestioned execution of another county.** *Zimmerman v. Makepeace*, 152 Ind. 199, 52 N. E. 992; *Corbett v. Provident Nat. Bank*, 23 Tex. Civ. App. 602, 57 S. W. 61.

[c] **A district court of one county has jurisdiction to restrain a sheriff in that county from acting under an execution from a court of coordinate jurisdiction in another county. But the defendant is entitled to a change of venue if he asks for it.** *Ohio Colorado Min. & Mill. Co. v. Wiley*, 18 Colo. App. 311, 71 Pac. 1001.

[d] **A writ sent to another parish may be there enjoined.** *Morgan v. Liddell*, Man. Unrep. Cas. (La.) 278.

73. *Bell v. Murray*, 13 Colo. App. 217, 57 Pac. 488.

74. See generally the statutes.

[a] **Levy as "Pending Proceeding."**—A levy of an execution and the acts to effect a sale are not a pending proceeding within the meaning of a statute providing that bills for injunction to stay pending proceedings may be filed in the county where the proceedings are pending. *Rounsaville v. McGinnis*, 93 Ga. 579, 21 S. E. 123.

[b] **A court which has no authority to try title to real estate cannot enjoin a sale of a homestead where it is necessary to try the question of the homestead and its title.** *S. K. McCall*

*Co. v. Page* (Tex. Civ. App.), 155 S. W. 655.

75. **Ia.**—*Hawkeye Ins. Co. v. Houston*, 115 Iowa 621, 89 N. W. 29; *Bennett v. Hanchett*, 49 Iowa 71; *Anderson v. Hall*, 48 Iowa 346; *Lockwood v. Kitteringham*, 42 Iowa 257. **Ky.**—*C. O. & S. W. R. Co. v. Reasor*, 84 Ky. 369, 1 S. W. 599; *Mallory v. Dauber*, 83 Ky. 239; *McConnell v. Raive*, 8 Ky. L. Rep. 343, 1 S. W. 582. **Tex.**—*Hendrick v. Cannon*, 2 Tex. 259; *Brown v. Fleming* (Tex. Civ. App.), 178 S. W. 964; *Texas & P. R. Co. v. Butler*, 52 Tex. Civ. App. 327, 135 S. W. 1064; *Capps v. Leachman* (Tex. Civ. App.), 35 S. W. 397; *Hugo v. Dignowitty*, 1 White & W. Civ. Cas. §158; *Wheeler & Wilson Mfg. Co. v. Collins*, 1 White & W. Civ. Cas. §132.

[a] **This statute is imperative.** *Van Rateliff v. Call*, 72 Tex. 491, 10 S. W. 578; *Capps v. Leachman* (Tex. Civ. App.), 35 S. W. 397; *Hugo v. Dignowitty*, 1 White & W. Civ. Cas. (Tex.) §158.

[b] **Statute Construed.**—The expressions used in *Van Rateliff v. Call*, 72 Tex. 491, 10 S. W. 578, "which would make the expression, 'to stay proceedings in an execution on a judgment,' mean to attack the judgment or question its validity, were not called for in the decision of the case, and not justified by the language of the statute. It is the validity of the process, and not necessarily that of the judgment, that must be attacked, to call for the return of injunction proceedings to the court from which the execution was issued. . . . There are instances, of course, where the invalidity of the judgment causes the invalidity of the process issued under it; but, under the statute, it would still be an attack on the process." *Capps v. Leachman* (Tex. Civ. App.), 35 S. W. 397.

[c] **The statute applies only when the suit is to restrain the execution of a judgment because of some infirmity in the judgment or the writ or of some**

ment of a general execution against the property of a person who was not a party to the judgment,<sup>76</sup> to enjoin the enforcement of the judgment in favor of one not entitled to have it enforced,<sup>77</sup> or to a suit by a debtor to restrain the sale of his homestead,<sup>78</sup> or of exempt property.<sup>79</sup> A suit to enjoin the sale of property levied upon under a special execution is within the provisions of the statute, however.<sup>80</sup> A person whose property has been taken on execution against another is not, in the absence of statute to the contrary, required to seek relief in the court which rendered the judgment.<sup>81</sup> He may seek relief in the court of his domicile,<sup>82</sup> or, if the property is land, in the county

equity which has arisen since the rendition of the judgment which should prevent its enforcement. *Seligson & Co. v. Collins*, 64 Tex. 314; *Parsons v. McKinney* (Tex. Civ. App.), 133 S. W. 1084; *Capps v. Leachman* (Tex. Civ. App.), 35 S. W. 397.

[d] Although another court may grant an interlocutory injunction, it cannot finally dispose of the case. *Capps v. Leachman* (Tex. Civ. App.), 35 S. W. 397; *George v. Dyer*, 1 White & W. Civ. Cas. (Tex.) §780. See *El Paso & S. W. Ry. Co. v. Goff* (Tex. Civ. App.), 146 S. W. 573; *Lincoln v. Anderson* (Tex. Civ. App.), 51 S. W. 278; *Bell v. York* (Tex. Civ. App.), 43 S. W. 68.

[e] Where the writ of possession is void because not returned within ninety days, a suit to enjoin the enforcement of the writ by putting the creditor in possession of property claimed by the plaintiffs under a superior title, is not a suit enjoining the execution of a judgment but a suit to restrain the officer from committing a trespass, and the writ need not be returned to the court from which the writ issued. *Reagan v. Evans*, 2 Tex. Civ. App. 35, 21 S. W. 427.

[f] **Execution From Supreme Court.** (1) The district court of a county in which an execution from the supreme court is sought to be levied may on a proper showing enjoin such levy. *Masie v. Mann*, 17 Iowa 131; *Davis v. Bonar*, 15 Iowa 171. (2) While a Kentucky circuit court has no jurisdiction to enjoin an execution for costs issued on a judgment of the court of appeals, it has jurisdiction over a fee bill. *Shackelford v. Phillips*, 112 Ky. 563, 66 S. W. 419, 68 S. W. 441.

76. **Ia.**—*Bennett v. Hanchett*, 49 Iowa 71; *Lockwood v. Kitteringham*, 42 Iowa 257. **Ky.**—*Robinson v. Carlton*, 29 Ky. L. Rep. 376, 90 S. W. 549 (char-

acterizing a contrary statement in *Malory v. Dauber*, 83 Ky. 239 as dictum); *Bean v. Everett*, 21 Ky. L. Rep. 1790, 56 S. W. 403. **Tex.**—*Winnie v. Grayson*, 3 Tex. 429; *Ferguson v. Fain* (Tex. Civ. App.), 142 S. W. 1184; *Brown & Co. v. Young*, 1 White & W. Civ. Cas. §1240.

77. *Kruegel v. Rawlins* (Tex. Civ. App.), 121 S. W. 216.

78. See 11 STANDARD PROC. 412.

79. *Ferguson v. Fain* (Tex. Civ. App.), 142 S. W. 1184; *Parsons v. McKinney* (Tex. Civ. App.), 133 S. W. 1084; *Anderson v. Larremore*, 1 White & W. Civ. Cas. §947.

[a] The suit may be brought in any court of the county having jurisdiction of the subject-matter, in which any of the defendants reside or in which the property, if real estate, is situated. *Ferguson v. Fain* (Tex. Civ. App.), 142 S. W. 1184; *Parsons v. McKinney* (Tex. Civ. App.), 133 S. W. 1084; *Anderson v. Larremore*, 1 White & W. Civ. Cas. §947.

80. *Anderson v. Hall*, 48 Iowa 346; *Lockwood v. Kitteringham*, 42 Iowa 257; *Brown v. Fleming* (Tex. Civ. App.), 178 S. W. 964.

81. *Zimmerman v. Makepeace*, 152 Ind. 199, 52 N. E. 992; *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *Corbett v. Provident Nat. Bank*, 23 Tex. Civ. App. 602, 57 S. W. 61. See *Hensell v. Warden*, 17 Leg. Int. (Pa.) 332, holding that a court of common pleas may restrain the issuance of an execution from the district court.

[a] A court of general jurisdiction may enjoin the sale of the lands of a stranger on an execution issued by a court of inferior jurisdiction. *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471, *distinguishing* *Indiana & Ill. R. R. Co. v. Williams*, 22 Ind. 198.

82. *Winnie v. Grayson*, 3 Tex. 429; *Huggins v. White*, 7 Tex. Civ. App.

where the land lies.<sup>83</sup> Some statutes require the application by any person against whose property an execution shall be issued to apply for relief to the court issuing the judgment.<sup>84</sup>

(II.) **State and Federal Courts.**—The jurisdiction of state court to enjoin enforcement of an execution from a federal court, and vice versa, is treated elsewhere in this work.<sup>85</sup>

(III.) **Matter in Dispute.**<sup>86</sup>—Generally in a suit by a defendant to enjoin the enforcement of a judgment, the amount in dispute and the test of jurisdiction is the amount of the judgment.<sup>87</sup> But where a homesteader seeks to enjoin an execution against the homestead, the value of the property is the amount in dispute.<sup>88</sup> This is the test of jurisdiction also where a third person sues to enjoin enforcement against his property of an execution to which he is not a party.<sup>89</sup>

563, 27 S. W. 1066; *Brown & Co. v. Young*, 1 White & W. Civ. Cas. §1240.

83. *Van Ratcliff v. Call*, 72 Tex. 491, 10 S. W. 578; *Brown v. Fleming* (Tex. Civ. App.), 178 S. W. 964; *Horevets v. Dunman*, 46 Tex. Civ. App. 177, 102 S. W. 462; *Huggins v. White*, 7 Tex. Civ. App. 563, 27 S. W. 1066.

84. *Donnell v. Parrott*, 13 La. Ann. 251; *Oger v. Daunoy*, 7 Mart. N. S. (La.) 656, followed in *Borne v. Porter*, 4 Rob. (La.) 57; *Mo. Rev. St.*, 1909, §2244; *Noble v. Cates*, 230 Mo. 189, 130 S. W. 302; *Scrutchfield v. Sauter*, 119 Mo. 615, 24 S. W. 137; *Mellier v. Bartlett*, 89 Mo. 134, 1 S. W. 220; *Pettus v. Elgin*, 11 Mo. 411; *Farris v. Smith-peter*, 180 Mo. App. 466, 166 S. W. 655.

[a] **An injunction to restrain a sale** under execution has the effect of staying the execution within the meaning of the statute. *Scrutchfield v. Sauter*, 119 Mo. 615, 24 S. W. 137.

[b] **Where Injunctive Feature Is Eliminated.**—In a suit to vest title in plaintiff and enjoin a sale on execution against the holder of the legal title, the court of the county where the land is situated has jurisdiction although the execution issued from the court of another county where this feature is eliminated by refusal of the injunction. *Scrutchfield v. Sauter*, 119 Mo. 615, 24 S. W. 137.

[c] **Where Execution Is Levied in Distant Parish.**—Where the parish in which the execution is sought to be enforced is distant from that in which judgment is rendered, the owner of the property seized may bring his action in the county where it is sought to enforce the writ. *Arenstein v. Weber*, 21 La. Ann. 199; *Hobgood v. Brown*, 2 La.

Ann. 323; *Lawes v. Chinn*, 4 Mart. N. S. (La.) 388, personal property.

[d] **Where Property Exceeds Court's Jurisdiction.**—Where the value of the property seized on execution from a parish court exceeds the jurisdiction of such court, the district court has jurisdiction of a suit by the owner to enjoin the execution. *McDonogh v. Doyle*, 9 Rob. (La.) 302.

85. See the title "Jurisdiction."

86. See generally the title "Jurisdiction."

87. *Speyrer v. Miller*, 108 La. 204, 32 So. 524, 61 L. R. A. 781 (overruling *McGinty v. Richmond*, 27 La. Ann. 606); *Cushing v. Sambela*, 30 La. Ann. 426; *Bruneau v. Haughton*, 16 La. Ann. 47.

88. *Speyrer v. Miller*, 108 La. 204, 32 So. 524, 61 L. R. A. 781, note; *Grangell v. Taylor*, 105 La. 324, 29 So. 885, where notary claimed his fees as exempt.

[a] **Where a homestead is seized** and the seizure is enjoined, the matter in dispute in the injunction suit is the homestead, and not the amount of the judgment sought to be executed; and the injunction suit must be filed in another court than that of the seizure if the latter court has not jurisdiction *ratione materiae*. *Speyrer v. Miller*, 108 La. 204, 32 So. 524, 61 L. R. A. 781, note.

89. **La.**—*Speyrer v. Miller*, 108 La. 204, 32 So. 524, 61 L. R. A. 781; *Rhodes v. Black*, 34 La. Ann. 406; *Meyer, Weiss & Co. v. Logan*, 33 La. Ann. 1055; *Thompson v. Lemelle*, 32 La. Ann. 932; *Testart v. Belot*, 32 La. Ann. 603; *State v. Judge*, 12 La. Ann. 48; *Stroud v. Humble*, 1 La. Ann. 310; *Chapelle v. Lémans*, 12 Rob. 519; *Mar-*

In a suit by a creditor having a lien on property by a levy or otherwise to enjoin a seizure and sale of that property by another creditor, the test of jurisdiction is the amount of the judgment sought to be enjoined.<sup>90</sup> If the value of the property is less than the jurisdictional amount, it is not permissible to add thereto the amount of damages claimed by the defendant in the event of dissolution of the injunction.<sup>91</sup>

b. *Bond or Deposit.*<sup>92</sup>—In certain cases an injunction may issue without a bond,<sup>93</sup> but it is generally required as a prerequisite to the issuance of a preliminary injunction that a good and sufficient bond be filed or a certain sum of money be deposited in court.<sup>94</sup> A bond

*soudet v. Clancy*, Man. Unrep. Cas. 38. **Tex.**—*Brown & Co. v. Young*, 1 White & W. Civ. Cas., §1240. **Va.**—*Snoddy v. Has-kins*, 12 Gratt. (53 Va.) 363, query, as the court, being equally divided on the question, settled the law as to this case only.

[a] In an action by tenants by entirety to enjoin a levy on lands of the entirety, on an execution against one of the tenants, the amount involved is the value of the property taken. *Wight v. Roethlisberger*, 116 Mich. 241, 74 N. W. 474.

[b] Where the plaintiff asks an injunction and damages, the controversy involves the sum laid as damages and the ownership and possession of the property. *Bouligny v. M. White & Co.*, 5 La. Ann. 31.

90. *Ross v. Prentiss*, 3 How. (U. S.) 771, 11 L. ed. 824; *State ex rel. MacKenzie v. Judges*, etc., 39 La. Ann. 508, 2 So. 68.

[a] Upon eight judgments in favor of plaintiff against a defendant, each less than \$100, plaintiff seized a piece of property worth several hundred dollars. Subsequently another creditor seized the same property on a judgment against the defendant for less than \$100. A suit by the first creditor to enjoin the second was dismissed by the court in which it was brought on the ground that it had no jurisdiction, its lower limit being \$100 and the amount in dispute being the amount of the judgments sought to be enjoined, which is less than \$100. *State ex rel. MacKenzie v. Judges*, etc., 39 La. Ann. 508, 2 So. 68.

91. *Thompson v. Lemelle*, 32 La. Ann. 932; *Poree v. Valische*, 15 La. Ann. 292.

92. As to necessity for bond generally, see 13 STANDARD PROC. 159.

93. *Cape Sable Co's. Case*, 3 Bland (Md.) 606, 615.

[a] Injunction will lie to prevent the sale of plaintiff's land on a judgment against the legal holder of the estate without requiring bond. *Cross v. Mullikin*, 3 Bland (Md.) 616 note; *Stewart v. Yates*, 3 Bland (Md.) 615 note; *Hampson v. Edelen*, 2 Har. & J. (Md.) 64, 3 Am. Dec. 530.

[b] Only the defendant in executory process can enjoin a sale without bond in Louisiana. An intervenor in a foreclosure proceeding cannot. *O'Reilly v. Pietri*, 135 La. 1, 64 So. 922.

94. **Ala.**—*Halsey v. Murray*, 112 Ala. 185, 196, 20 So. 575; *Ex parte Fecheheimer*, 103 Ala. 154, 15 So. 647. **Ill.** *Greenberg v. Holmes*, 100 Ill. App. 186. **Ind.**—*State Bank v. Macy*, 4 Ind. 362. **Ia.**—*Hardin v. White*, 63 Iowa 633, 16 N. W. 580, 19 N. W. 822. **Ky.**—*Pell v. Lander*, 8 B. Mon. 554. **La.**—*Speyrer v. Miller*, 108 La. 204, 32 So. 524, 61 L. R. A. 781. **Mich.**—*Hinkle v. Baldwin*, 93 Mich. 422, 53 N. W. 534. **N. J.**—*Marlatt v. Perrine*, 17 N. J. Eq. 49. **N. Y.**—*Cook v. Dickerson*, 2 Sandf. 691, 3 Code Rep. 207. **N. C.**—*Jackson v. Sloan*, 76 N. C. 306. **Tenn.**—*Bridges v. Robinson*, 3 Tenn. Ch. 352. **Tex.** *Sanders v. Bledsoe* (Tex. Civ. App.), 173 S. W. 539; *Pierson v. Connelley* (Tex. Civ. App.), 145 S. W. 1039. **Wash.** *Cherry v. Western Wash. Ind. Expo. Co.*, 11 Wash. 586, 40 Pac. 136.

[a] That the defendant is not the judgment creditor does not obviate the necessity of a bond as a prerequisite for a temporary injunction. *Hinkle v. Baldwin*, 93 Mich. 422, 53 N. W. 534.

[b] A judgment by confession upon bond with warrant of attorney is a judgment in a personal action and a bond is necessary under a statute requiring a bond before the issuance of

may be required independently of statute, however.<sup>95</sup> The requisites of the injunction bond is frequently regulated by statutes.<sup>96</sup>

c. *Supporting Affidavits.*—Supporting affidavits are sometimes required.<sup>97</sup>

d. *Party Must Do Equity.*—Where it appears that the execution is in part lawful, the debtor must offer to satisfy it to that extent, before relief will be granted as to any illegality or excess in it.<sup>98</sup>

e. *Parties.*—(I.) *In General.*—The general rules in equity as to proper parties plaintiff and defendant apply to this proceeding.<sup>99</sup> All persons interested should be made parties.<sup>1</sup>

an injunction to stay proceedings at law in any personal action after verdict or judgment. *Marlatt v. Perrine*, 17 N. J. Eq. 49.

[c] **Where Bill Is by Owner Not a Party to Judgment.**—(1) A bill to enjoin the enforcement of an execution against the property of the plaintiff, a stranger to the action, is not within the statute requiring a deposit or security in an injunction suit to stay proceedings in an action at law (*Hegeman v. Wilson*, 8 Paige (N. Y.) 29), (2) or a suit "to stay proceedings after judgment." *Halsey v. Murray*, 112 Ala. 185, 20 So. 575.

95. *Hegeman v. Wilson*, 8 Paige (N. Y.) 29, where the property levied on is a leasehold premises, a planing mill and machinery situated thereon.

96. See generally the statutes, and *State Bank v. Macy*, 4 Ind. 362.

[a] Under a statute requiring that a bond given in order to obtain an injunction "to stay proceedings after judgment" should be conditioned to pay the amount of the judgment in the event of the dissolution of the judgment, applies only where an injunction is sought by a defendant in a judgment and does not apply to strangers seeking to prevent the collection of the judgment out of their property. They should execute the bond required by a statute providing for bonds in cases other than injunctions against judgments conditioned for payment of damages in case of dissolution of the injunction. *Halsey v. Murray*, 112 Ala. 185, 20 So. 575. To similar effect, see *Hardin v. White*, 63 Iowa 633, 16 N. W. 580, 19 N. W. 822.

97. See 13 STANDARD PROC. 154.

[a] An affidavit stating that "this affiant further says that he expects and fears momentarily that the sheriff of C. county will act under the writ of

restitution described in said bill of complaint" is sufficiently certain. *New Music Hall Co. v. Orpheon Music Hall Co.*, 100 Ill. App. 278.

[b] An affidavit that the sheriff seized the individual property of the plaintiff, without describing the property or stating its value is too vague to authorize an injunction. *McRae v. Brown*, 12 La. Ann. 181.

[c] **Affidavit should be positive and not upon information and belief.** *American Nat. Bank v. Strong* (Tex. Civ. App.), 188 S. W. 1014.

[d] **Demurrer as Remedy for Omission.**—That an amended complaint, filed by leave of court after granting a restraining order upon a properly verified complaint, is not supported by affidavit cannot be raised by demurrer. *Hall v. Hough*, 24 Ind. 273.

98. *Ga.*—*Wilkinson v. Holton*, 119 Ga. 557, 46 S. E. 620. *Ind.*—*Eaton v. Markley*, 126 Ind. 123, 25 N. E. 150; *Russell v. Cleary*, 105 Ind. 502, 5 N. E. 414; *Baragree v. Cronkhite*, 33 Ind. 192. *Ia.*—*Anamosa v. Wurzbacher*, 37 Iowa 25.

[a] Notwithstanding an agreement allowing the debtor a certain time in which to pay the judgment, the judgment creditor, in *Anamosa v. Wurzbacher*, 37 Iowa 25, caused execution to issue. After the time for payment had expired, the debtor sought to enjoin the proceedings. It was held that he had no standing in court as he had made no offer of performance.

99. *Titus v. Bennet*, 8 N. J. Eq. 267. See generally the titles "Injunctions," "Parties."

1. *Scott v. Bennett*, 6 Ill. 646. See *Pittsmond Copper Co. v. O'Rourke*, 49 Mont. 281, 141 Pac. 849.

[a] A judgment debtor who has lost his right to redeem is not a necessary party in a suit to enjoin the sheriff

(II.) **Plaintiff.**—The party whose interests are to be protected should bring the action.<sup>2</sup> In an action to restrain a sale of certain property of a judgment debtor on an execution against several debtors, his co-debtors need not be joined.<sup>3</sup> And where property is owned by several different parties in severalty and not in common the owners cannot unite in a bill to enjoin its sale.<sup>4</sup> In a suit to enjoin an execution sale of the trust estate, the trustee is the proper plaintiff,<sup>5</sup> but if he neglects, refuses to act,<sup>6</sup> or has resigned<sup>7</sup> the cestui que trust may bring the suit.

(III.) **Defendant.**—In suits in equity to restrain the enforcement of executions upon judgments at law, the plaintiffs in execution are generally held to be necessary parties defendant.<sup>8</sup> Where the prop-

erty is sold from re-selling the property; nor need a person who has loaned the purchaser the money to buy in the property a necessary party. *Burnham v. Roth*, 244 Ill. 344, 91 N. E. 472.

[b] **The creditors of a deceased married woman, the owner of a stock of merchandise seized on execution against her husband were allowed, in** *Weakley v. Woodard*, 2 Tenn. Ch. App. 586, to enjoin the execution. It was held to be no objection that all the creditors were not joined.

[c] **In an action by owners in entirety of land to enjoin a levy made thereon under an execution against the husband, the wife is a proper party.** *Wight v. Roethlisberger*, 116 Mich. 241, 74 N. W. 474.

[d] **Mortgagees.**—In an action by a debtor for injunction against a judgment creditor about to sell under execution property, upon which there are mortgages which the judgment creditor claims to be fraudulent, the mortgagees should be made parties in order that the rights of all concerned may be determined in one action. *Gaster v. Hardie*, 75 N. C. 460.

[e] **The judgment debtor is a necessary party where it is claimed the execution issued for more than is due.** *Warner v. Paine*, 3 Barb. Ch. (N. Y.) 630.

2. *Marsoulet v. Clancy*, Man. Unrep. Cas. (La.) 38; *F. & C. Turnpike Co. v. Young*, 8 Humph. (Tenn.) 103, state interested in a turnpike company.

[a] **The party bringing action must have an interest entitling him to sue.** *Boyer v. Cannon*, 46 La. Ann. 767, 15 So. 86; *Gothard v. Reiley*, 14 Tex. 461.

[b] **A person in his representative**

**capacity** (1) cannot enjoin a sale of his individual property. *Marsoulet v. Clancy*, Man. Unrep. Cas. (La.) 38. (2) But where a party obtains an injunction against an execution against him as an executor and individually, it will be presumed he obtained it in both capacities. *Davis v. Hoopes*, 33 Miss. 173.

3. *Merriman v. Walton*, 105 Cal. 403, 38 Pac. 1108, 45 Am. St. Rep. 50, 30 L. R. A. 786; *McGill v. Sutton*, 67 Kan. 234, 72 Pac. 853. See *Williams v. Bradbury*, 9 Tex. 487.

4. *Baker v. Rinehard, Mayer & Co.*, 11 W. Va. 238.

5. *Zimmerman v. Makepeace*, 152 Ind. 199, 52 N. E. 992. See generally the title, "**Trusts and Trustees.**"

6. *Zimmerman v. Makepeace*, 152 Ind. 199, 52 N. E. 992.

7. *Zimmerman v. Makepeace*, 152 Ind. 199, 52 N. E. 992.

8. **Ark.**—*King v. Clay*, 34 Ark. 291. **Fla.**—*Mast v. Baker*, 69 Fla. 585, 68 So. 769. **Ill.**—*Howell v. Foster*, 122 Ill. 276, 13 N. E. 527. **Ind.**—See *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731, they are proper, if not necessary parties. **N. C.**—*Beam v. Blanton*, 38 N. C. 59. **Ohio.**—*Schubert v. Taylor*, 10 Ohio Dec. 585; *Wittstein v. Huntsman*, 20 Ohio Cir. Ct. (N. S.) 404. **Pa.**—*Artman v. Giles*, 155 Pa. 409, 26 Atl. 668, 32 W. N. C. 361. **Tenn.**—*Blanton v. Hall*, 2 Heisk. 423. **Tex.**—*Allen v. Carpenter* (Tex. Civ. App.), 182 S. W. 430; *Ryburn v. Getzendaner*, 1 Posey Unrep. Cas. 349.

[a] **The judgment creditor is a proper but not a necessary party in an action to enjoin a sheriff from selling the property of a third person under an execution in a case to which he was not a party. The sheriff may make**

erty of the plaintiff is levied upon under several executions issued on distinct judgments against another person, the plaintiff may join the creditors on the different judgments as defendants in a suit to restrain the sale of his property.<sup>9</sup> But the joinder of execution creditors on distinct executions is not a practice to be encouraged.<sup>10</sup>

The clerk of the court is a mere minister of the law and should not be made a party.<sup>11</sup>

**Sheriff.**—The courts are in conflict as to the necessity of making the sheriff a party defendant in an action to enjoin an execution. In some states he is the real party defendant.<sup>12</sup> In others he is a proper party and it is usual to join him.<sup>13</sup> Some states hold that the sheriff is not a necessary,<sup>14</sup> and some that he is not even a proper<sup>15</sup>

all defenses which he and the judgment creditor could make, either jointly or severally. *Yount v. Hoover*, 95 Kan. 752, 149 Pac. 408, L. R. A. 1915F, 1120; *Barnett v. Schad*, 73 Kan. 414, 85 Pac. 411, 91 Pac. 539.

[b] **Absence of Creditor.**—The fact that one of the execution creditors is in a sister state does not necessitate the plaintiff bringing separate suits. *Clegg v. Varnell*, 18 Tex. 294.

9. *Clegg v. Varnell*, 18 Tex. 294.

[a] **Joining Creditor Not Seeking To Enforce His Judgment.**—A person who has a judgment against the plaintiff's grantor and who has made no attempt to enforce his judgment on plaintiff's land is not a proper party defendant to a bill to enjoin an execution sale on the ground that it will cloud plaintiff's title. *Burt v. Cassey*, 12 Ala. 734.

10. *Oliphint v. Mansfield & Co.*, 36 Ark. 191; *Speyrer v. Miller*, 108 La. 204, 32 So. 524, 61 L. R. A. 781.

[a] **It can be sanctioned only in exceptional cases** where no inconvenience to the defendants can be occasioned and no complications can possibly arise. *Speyrer v. Miller*, 108 La. 204, 32 So. 524, 61 L. R. A. 781.

11. *Newlin v. Murray*, 63 N. C. 566; *Edney v. King*, 39 N. C. 465; *Olin v. Hungerford*, 10 Ohio 268; *Wittstein v. Huntsman*, 20 Ohio Cir. Ct. (N. S.) 404.

12. *Kan.*—See *Yount v. Hoover*, 95 Kan. 752, 149 Pac. 408, L. R. A. 1915F, 1120. *Mich.*—See *Hinkle v. Baldwin*, 93 Mich. 422, 53 N. W. 534, where the suit was against the sheriff and his deputy only. *R. I.*—*Nye v. Nightingale*, 6 R. I. 439, holding he is no formal or unnecessary party.

13. *Ga.*—*Thomas v. Wilkinson*, 65 Ga. 405. *N. J.*—*Brooks v. Lewis*, 13 N. J. Eq. 214. *Ore.*—*Pursel v. Deal*, 16 Ore. 295, 18 Pac. 461. *Tenn.*—*Weakley v. Woodard*, 2 Tenn. Ch. App. 586.

[a] **An allegation of a levy as sheriff sufficiently shows the suit is against the defendant in his official capacity.** *Wight v. Roethlisberger*, 116 Mich. 241, 74 N. W. 474.

14. *Cal.*—*Buffandeau v. Edmondson*, 17 Cal. 436, 79 Am. Dec. 139, query. *Fla.*—*Mast v. Baker*, 69 Fla. 585, 68 So. 769. *Mo.*—*Holthaus v. Hornbostle*, 60 Mo. 439. *N. J.*—*Smalley v. Line*, 28 N. J. Eq. 348. *Pa.*—*Natalie Anthracite Coal Co. v. Ryon*, 188 Pa. 138, 41 Atl. 462 (holding sheriff improperly joined); *Artman v. Giles*, 155 Pa. 409, 26 Atl. 668, 32 W. N. C. 361. *Tenn.* *Bloomstein v. Brien*, 2 Tenn. Ch. 778 (proceeding to enjoin writ issued on order of court confirming tax collector's report); *Montgomery v. Whitworth*, 1 Tenn. Ch. 174. See *Weakley v. Woodard*, 2 Tenn. Ch. App. 586, holding the sheriff to be a proper party.

[a] **A decree against the plaintiff in execution as sole defendant is as effectual as though the officer having the process had been made a party and included in the decree.** *Holthaus v. Hornbostle*, 60 Mo. 439.

[b] **He is at Most a Mere Formal Party.**—*Buffandeau v. Edmondson*, 17 Cal. 436, 79 Am. Dec. 139; *Ryburn v. Getzendaner*, 1 Posey Unrep. Cas. (Tex.) 349.

[c] **After Sale.**—See *Luft v. Gossrau*, 31 Ill. App. 530.

15. *Fla.*—*Mast v. Baker*, 69 Fla. 585, 68 So. 769, it is doubtful if he is a proper party. *N. C.*—*Stout v. Mc-*

party defendant. Statutes sometimes allow a joinder of the sheriff.<sup>16</sup>

f. *Bill or Complaint.*—(I.) *In General.*—The general rules pertaining to bills or complaints in equity apply in a suit to enjoin an execution or the proceedings thereunder.<sup>17</sup> The bill or complaint must state sufficient facts to warrant equitable relief,<sup>18</sup> with directness, certainty and particularity.<sup>19</sup>

(II.) *General Allegations.*—(A.) *ALLEGATION OF JUDGMENT AND EXECUTION.* In a suit to enjoin a threatened sale on execution, the plaintiff must

Neill, 98 N. C. 1, 3 S. E. 915; Newlin v. Murray, 63 N. C. 566; Lackay v. Curtis, 41 N. C. 199; Edney v. King, 39 N. C. 465; Beam v. Blanton, 38 N. C. 59. **Ohio.**—Olin v. Hungerford, 10 Ohio 268; Adams v. Boynton, 4 Ohio Dec. (Reprint) 348. For present law in Ohio, see 5 Page & Adams Ann. Gen. Code §11264. **Pa.**—Natalie Anthracite Coal Co. v. Ryon, 188 Pa. 138, 41 Atl. 462, 43 W. N. C. 265; Meyers v. Rauch, 4 Pa. Dist. 331; Ashton v. Parkinson, 8 Phila. 338, 28 Leg. Int. 5. *Compare* Landell v. Harrison, 16 Phila. 85, 40 Leg. Int. 4, holding a sheriff can be enjoined.

[a] But if there is a fraudulent combination between the sheriff and the judgment creditor, it may be proper to join the sheriff. Olin v. Hungerford, 10 Ohio 268.

16. See generally the statutes, and Ohio Gen. Code, §11264.

17. Hall v. Theisen, 61 Cal. 524. See generally the title "Bills and Answers." See also the title "Declaration and Complaint."

[a] *Filing of Bill.*—After the indorsement of an order for an injunction to issue upon the filing of the bill, the bill should be filed whether the injunction is made use of or not. If not filed for four months, it will be dismissed with costs. Stimson v. Bacon, 9 N. J. Eq. 144.

18. See the following: **Cal.**—Hall v. Theisen, 61 Cal. 524. **Colo.**—Wyoming National Bank v. Shippey, 23 Colo. App. 225, 130 Pac. 1021. **Ind.**—Goldthait v. Walker, 134 Ind. 527, 34 N. E. 378 (complaint held sufficient); First Nat. Bank v. Deitch, 83 Ind. 131; First Nat. Bank v. Savin, 47 Ind. App. 266, 94 N. E. 347. **Mich.**—Manistique Lumbering Co. v. Lovejoy, 55 Mich. 189, 20 N. W. 899. **Neb.**—Rickards v. Coon, 13 Neb. 420, 14 N. W. 163. **N. J.**—Dawes v. Taylor, 35 N. J. Eq. 40. **N. C.**—Dupre v. Williams, 58 N. C. 96. **Okla.**—Harris v. Smiley, 36 Okla. 89, 128 Pac.

276. **Tex.**—Williams v. Bradbury, 9 Tex. 487; Coca Cola Co. v. Allison, 52 Tex. Civ. App. 54, 113 S. W. 308; Demmitt v. Garnier, 2 Pos. Unrep. Cas. 333.

[a] *Threatened levy* must be alleged. Ke-tuc-e-mun-guah v. McClure, 122 Ind. 541, 23 N. E. 1080, 7 L. R. A. 782; Elson v. O'Dowd, 40 Ind. 300; Taylor & Co. v. Clark, 11 La. Ann. 560, 568.

[b] *Violation of Agreement Not To Levy.*—A bill for an injunction for violation of an agreement not to levy on plaintiff's property must show that a levy has been made or is threatened. Crook v. Lipsecomb, 30 Tex. Civ. App. 567, 70 S. W. 993.

[c] *Defects in the proceedings* relied on must be pointed out. Manistique Lumbering Co. v. Lovejoy, 55 Mich. 189, 20 N. W. 899.

*Offering equity* where judgment is dormant, see *infra*, IV, B, 5, g, (III), (A).

[d] *Alleging Violation of Previous Injunction.*—Dunn v. Bank of Mobile, 2 Ala. 152.

[e] *Interest of Plaintiff in Property.* A petition to enjoin the sale of property seized as the property of the petitioner and his co-defendant on the ground that the latter is dead and a sale without administration and a revival of judgment is improper is insufficient where there is no averment that the petitioner has any right or interest in the property. Gotzard v. Reiley, 14 Tex. 461.

[f] *Execution Issued Without Judgment.*—In a complaint to enjoin an execution based upon a mere finding, it need not be alleged that plaintiff does not owe the debt sued on; for an execution does not issue upon a debt due, but upon a judgment rendered. Sare v. Butcher, 141 Ind. 146, 40 N. E. 749.

19. Ashton v. Parkinson, 8 Phila. (Pa.) 338, 28 Leg. Int. 5; Shannon v. Hay (Tex. Civ. App.), 153 S. W. 360.

allege the judgment and execution,<sup>20</sup> but they need not be made exhibits.<sup>21</sup>

(B.) AS TO LEGAL REMEDY.<sup>22</sup>—The bill must show that the plaintiff pursued and exhausted all the legal remedies he has,<sup>23</sup> or give a good reason why he did not resort thereto,<sup>24</sup> as that they are inadequate to give the plain and speedy relief to which he is entitled.<sup>25</sup>

**Insolvency of Defendant.**—Although it is proper to allege the insolvency of the defendant in a bill to enjoin a sale of plaintiff's property under an execution against a third person,<sup>26</sup> its absence is not ground for demurrer where the bill states other facts showing the inadequacy of the legal remedy.<sup>27</sup>

(C.) AS TO IRREPARABLE INJURY.—The general rule pertaining to petitions for injunctions, that the plaintiff must show irreparable injury will be suffered if the injunction is not granted applies to bills for equitable relief against executions.<sup>28</sup> In alleging irreparable injury,

20. *Trueblood v. Hollingsworth*, 48 Ind. 537. See also *Schuyler v. Broughton*, 65 Cal. 252, 3 Pac. 870.

[a] **Particularity Required.**—(1) While the plaintiff need not set forth the judgment and execution, under which the sale is about to be made, with as much particularity as if he claimed under them, yet it is necessary to show them with sufficient particularity to give a color of right in the sheriff to make the levy and sale. *Trueblood v. Hollingsworth*, 48 Ind. 537. (2) The time of rendition of judgment should be alleged. *First Nat. Bank v. Deitch*, 83 Ind. 131.

21. *Trueblood v. Hollingsworth*, 48 Ind. 537; *Hall v. Hough*, 24 Ind. 273.

22. See generally the title "Legal Remedy."

23. *Jones v. Crowley*, 68 Ga. 175; *Harris v. Smiley*, 36 Okla. 89, 128 Pac. 276.

[a] **Exhausting Legal Remedy.** Where a party has a remedy by offering the sheriff a proper claim with good security, it must appear that such a one was offered and that the sheriff without any reason refused to accept it. *Jones v. Crowley*, 68 Ga. 175.

24. *Ferguson v. Herring*, 49 Tex. 126.

25. **Mont.**—*Eisenhauer v. Quinn*, 36 Mont. 368, 93 Pac. 38. **Okla.**—*Harris v. Smiley*, 36 Okla. 89, 128 Pac. 276. **Tex.**—*Mann v. Wallis, Landes & Co.*, 75 Tex. 611, 12 S. W. 1123.

[a] Facts from which the conclusion can be drawn that there is no ade-

quate remedy at law must be alleged. *Eisenhauer v. Quinn*, 36 Mont. 368, 93 Pac. 38.

26. *First Nat. Bank v. Savin*, 47 Ind. App. 266, 94 N. E. 347, based on *Wabash R. Co. v. Engleman*, 160 Ind. 329, 66 N. E. 892.

**Injunction against levy on property of stranger** to the judgment or writ, see *supra*, IV, E, 5, a, (III), (B).

27. *First Nat. Bank v. Savin*, 47 Ind. App. 266, 94 N. E. 347. But *Payne v. Ramsey*, 30 Okla. 356, 120 Pac. 595, and *Beatty v. Smith*, 14 S. D. 24, 84 N. W. 208, hold the complaint insufficient without an allegation of the insolvency of the defendant, for otherwise there is no showing that plaintiff cannot obtain compensation in damages for the sale of his property.

[a] **In Kentucky**, an allegation of insolvency or of other facts showing that a judgment at law would not afford adequate relief is not necessary in a petition to enjoin a sale of plaintiff's land under an execution against a stranger. *Robinson v. Carlton*, 123 Ky. 419, 96 S. W. 549.

28. **Mo.**—*Bailey v. Wade*, 24 Mo. App. 186. **Okla.**—*Payne v. Ramsey*, 30 Okla. 356, 120 Pac. 595. **Tex.**—*Gothard v. Reiley*, 14 Tex. 461 (the plaintiff must suffer injury); *Shannon v. Hay* (Tex. Civ. App.), 153 S. W. 360.

[a] **In a bill to prevent a sale of one's personal property** on an execution against another there must be an allegation of irreparable injury. *Dupre v. Williams*, 58 N. C. 96.

the party must allege facts, showing that the acts stated will result in such injury.<sup>29</sup>

(III.) **Particular Allegations.**—(A.) WHERE EXECUTION ISSUED ON DORMANT JUDGMENT.<sup>30</sup>—Where an injunction is sought on the ground of dormancy of the judgment, the petitioner must allege facts showing the issuance of the execution was improper.<sup>31</sup>

(B.) PROPERTY LEVIED ON IN WRONG ORDER.—A complaint to enjoin a levy and sale because other property should have been taken first, must show the existence of such other property,<sup>32</sup> must identify it,<sup>33</sup> and show that it is in the county where the judgment was rendered or otherwise available for levy.<sup>34</sup> In addition thereto the plaintiff must allege facts making it the duty of the sheriff to take that property first.<sup>35</sup> If the petitioner is the judgment debtor claiming his per-

29. *McCormick v. Riddle*, 10 Mont. 467, 26 Pac. 202; *Payne v. Ramsey*, 30 Okla. 356, 120 Pac. 595.

[a] **Irreparable Injury a Conclusion.**—The mere statement that the acts stated will result in irreparable loss is a statement of a conclusion and is insufficient. *Payne v. Ramsey*, 30 Okla. 356, 120 Pac. 595.

[b] **In Indiana** by virtue of the code only facts showing great injury need be alleged. *First Nat. Bank v. Savin*, 47 Ind. App. 266, 94 N. E. 347. See also *Covert v. Bray*, 26 Ind. App. 671, 60 N. E. 709.

30. **Execution on dormant judgment as a ground for injunction**, see *supra*, IV, E, 5, a, (II), (C).

31. See *Pursel v. Deal*, 16 Ore. 295, 18 Pac. 461; *Jordan v. Corley*, 42 Tex. 284.

[a] **Negating Previous Executions.**—A petition alleging that the execution issued more than twelve months after rendition of judgment without showing that it had not been preceded by the issuance of other executions is insufficient. *Jordan v. Corley*, 42 Tex. 284.

[b] **Defective Revivor.**—A petition in a suit to enjoin an execution because the judgment is dormant and that the statute regulating the manner of revivor was not complied with is insufficient which alleges that personal service was not had, but service by publication was had and that the motion and affidavit for publication of summons failed to assert that the original judgment was a lien on any particular estate. The petition fails to show that the debtor did not appear by himself or attorney at the hearing of the motion, or that said proceeding was had

without notice, or show whether or not he was at the time a resident of the state or what was the particular reason for ordering publication of summons. *Pursel v. Deal*, 16 Ore. 295, 18 Pac. 461.

32. *Agricultural Bank v. Pallen*, 8 Smed. & M. (Miss.) 357, 47 Am. Dec. 92.

33. *Gibson v. Hughes*, 6 How. (Miss.) 315.

[a] **The property must be identified in such a way** as to enable the creditor or sheriff to make the levy. *Gibson v. Hughes*, 6 How. (Miss.) 315.

34. *Elson v. O'Dowd*, 40 Ind. 300; *Anderson v. Oldham*, 82 Tex. 228, 18 S. W. 557; *Smith v. Frederick*, 32 Tex. 256; *Denson v. Taylor* (Tex. Civ. App.), 132 S. W. 811, bill by surety whose property was first taken.

[a] **A petition to enjoin a sale of land purchased from a testator on the ground that the testator has other assets**, if allowable, must specifically mention and point out such assets and show that they are equally available for the payment of the judgment. *Latimer v. Ballew*, 41 S. C. 517, 19 S. E. 792, 44 Am. St. Rep. 748.

[b] **Sufficient Allegation.**—In a complaint to enjoin a sale of the relevin bail's property before exhausting the personal property of the principal debtor, an averment that such personal property is subject to levy and sale on the execution is a sufficient averment that it is in the county. *Elson v. O'Dowd*, 40 Ind. 300.

35. *Denson v. Taylor* (Tex. Civ. App.), 132 S. W. 811.

[a] **Fact of Suretyship.**—A petition to enjoin a sale of a surety's property on the ground that it was taken before

sonal property should have been first taken, he must allege that he offered it or designated it for levy<sup>36</sup> or circumstances rendering a designation unnecessary,<sup>37</sup> and that he had the personality at the time the levy was made.<sup>38</sup>

If the petitioner complains that the levy was made in disregard of his designation, his petition should show that the property designated is clear of incumbrances and not a homestead,<sup>39</sup> and belonged to him.<sup>40</sup>

(C.) **LEVY ON STRANGER'S PROPERTY.**—The complaint of one seeking to enjoin the seizure or sale of his property on execution against another, must show that the property is not subject to the debt represented by the judgment and execution.<sup>41</sup> It must show either an actual or

that of the principal, must show that the fact of suretyship appears on the face of the execution or the indorsement by the clerk. *Denson v. Taylor* (Tex. Civ. App.), 132 S. W. 811.

[b] A petition of a surety is not sufficient where it is not shown that he signed the obligation as security, or that he ever served the creditor notice, either written or verbal, demanding that he proceed against the principal. *Dailey v. Wynn*, 33 Tex. 614.

36. *Texas Mexican Ry. Co. v. Wright*, 88 Tex. 346, 31 S. W. 613, 31 L. R. A. 200; *Anderson v. Oldham*, 82 Tex. 228, 18 S. W. 557; *Stone v. Tilley* (Tex. Civ. App.), 95 S. W. 718, 100 Tex. 487, 101 S. W. 201, 10 L. R. A. (N. S.) 678; *Ellis v. Harrison*, 24 Tex. Civ. App. 13, 56 S. W. 592, 57 S. W. 984; *Alexander v. Banner*, 10 Tex. Civ. App. 111, 30 S. W. 563. See *Cook v. De la Garza*, 13 Tex. 431.

[a] A petition which does not allege that any effort had been made to prevent a sale of any of the property levied on by a tender to the sheriff of other property subject to execution or that other steps had been taken to obtain relief before applying for an injunction, is insufficient. *Alexander v. Banner*, 10 Tex. Civ. App. 111, 30 S. W. 563.

37. See *Smith v. Frederick*, 32 Tex. 256.

[a] **Knowledge of Sheriff.**—A petition stating that the petitioner did not point out any property to be levied on but that the sheriff knew that plaintiff had other property, is insufficient where it is not alleged that the sheriff knew the location of the other property and that he could levy upon it, and where

no property to be levied on is pointed out in the petition. *Smith v. Frederick*, 32 Tex. 256.

38. *Anderson v. Oldham*, 82 Tex. 228, 18 S. W. 557.

[a] An allegation that petitioner "has personal property subject to execution," is evasive. *Anderson v. Oldham*, 82 Tex. 228, 18 S. W. 557.

39. *Pierson v. Connellee* (Tex. Civ. App.), 145 S. W. 1039.

40. *Alexander v. Mullin*, 42 Ind. 398; *Forbes, Brooks & Co. v. Hill*, Dall. Dig. (Tex.) 486.

41. *First Nat. Bank v. Deitch*, 83 Ind. 131.

[a] An allegation that plaintiff is in no way liable for the debt is not equivalent to saying the land is in no way subject to the debt, that the judgment is not a lien on the land, or that the execution defendant had no interest in the land at the date of the judgment or since. *First Nat. Bank v. Deitch*, 83 Ind. 131.

[b] **Showing Color of Title in Former Trustee.**—A bill to enjoin a sale of plaintiff's property on execution against a former trustee of the property should sufficiently allege the trust to give it color of right in the trustee, otherwise there is nothing to enjoin. *Trueblood v. Hollingsworth*, 48 Ind. 537.

[c] **Negating Plaintiff's Liability for Debt.**—In an action to enjoin a sale of plaintiff's land under an execution against another, the plaintiff need not allege that he was not at the time of the rendition of the judgment indebted to the defendant on the demand represented thereby. *Robinson v. Carlton*, 123 Ky. 419, 96 S. W. 549.

threatened seizure,<sup>42</sup> and he must clearly allege his title,<sup>43</sup> and show when he acquired title to the property.<sup>44</sup> The plaintiff is sometimes required to allege that he is a bona fide purchaser.<sup>45</sup> If the property taken is personalty, he must generally show that the property is of such a character or possesses such peculiar value to the owner that he cannot be adequately compensated therefor at law.<sup>46</sup>

(D.) WHERE LEVY AND SALE WILL CLOUD TITLE.—A petition to enjoin an execution sale on the ground that the sale will cast a cloud on petitioner's title must allege facts showing that the threatened sale will cast a cloud on his title.<sup>47</sup> The plaintiff must show a perfect

42. *Taylor & Co. v. Clark*, 11 La. Ann. 560.

43. Ala.—*Harton v. Enslen*, 182 Ala. 408, 62 So. 696; *Robinson v. Joplin*, 54 Ala. 70. Fla.—*Benner v. Kendall*, 21 Fla. 584. Md.—*Warnick v. Michael*, 11 Gill & J. 153. Miss.—*Grayson v. Wilson*, 27 Miss. 553. N. J. *Johnson v. Vail*, 14 N. J. Eq. 423. Tenn.—*Bryan v. Earthman*, 6 Yerg. 24; *Loflin v. Espy*, 4 Yerg. 84. Tex.—*Henderson v. Morrill*, 12 Tex. 1.

But see *Cooper v. Newell*, 36 Miss. 316, 319.

As to allegations of title or ownership see the title "Title."

[a] **Character of Title Necessary.** An owner in possession seeking to restrain defendants having no title from enforcing their execution against his real property need show only a presumptive title,—that is, facts from which title may fairly be inferred. *Moore v. Kleppish*, 104 Iowa 319, 73 N. W. 830.

[b] **Where the owner claims under a tax sale**, he must allege that the statutory steps have been taken. *Hall v. Theisen*, 61 Cal. 524.

[c] **When plaintiff is a married woman**, a bill containing an express averment that the title is in her, and that the purchase money was paid out of her separate estate is not wanting in equity because it does not show with legal precision how the land originally became her separate property. *Johnson v. Vail*, 14 N. J. Eq. 423.

44. *First Nat. Bank v. Deitch*, 83 Ind. 131; *Wenzel v. Milbury*, 93 Md. 427, 49 Atl. 618, denying relief as plaintiff did not show his title to the goods was prior to the judgment.

45. *Petry v. Ambroscher*, 100 Ind. 510.

[a] An indorser paid a judgment against the maker and himself and assigned the judgment and the assignee

levied on property of the plaintiff. The property, originally owned by the maker, was purchased after an examination of the record by the plaintiff who found the judgment indorsed "settled in full." A bill by the purchaser for an injunction must allege that the plaintiff or those through whom he claims is an innocent purchaser for value. *Yeates v. Mead*, 65 Miss. 89, 3 So. 651.

[b] **An owner who alleges himself to be the holder of a legal title** may enjoin a sale of the property on execution against his grantor without alleging himself to be a bona fide purchaser. *Austin v. Union Paving & Con. Co.*, 4 Cal. App. 610, 88 Pac. 731.

46. *Lewis v. Levy*, 16 Md. 85. And see *supra*, IV, E, 3, 5, a, (III), (B), (2).

47. *Purington v. Davis*, 66 Tex. 455, 1 S. W. 343; *Alexander v. Banner*, 10 Tex. Civ. App. 111, 30 S. W. 563 (holding insufficient a petition which did not show in whose names the record titles to the homesteads stood or how the sale would cloud the title); *Cook v. Texas*, etc. R. Co., 3 Tex. Civ. App. 145, 22 S. W. 58.

See generally the title "Quieting Title."

[a] **Lack of Interest in Execution Defendant.**—Under a statute allowing an injunction where a cloud would be put on the title of real estate being sold under execution against a person having no interest in the property, a bill must show that such person had no interest in the real estate. *S. K. McCall Co. v. Page* (Tex. Civ. App.), 155 S. W. 655.

[b] **Legal Conclusion.**—The allegation that the deed if executed will be a cloud upon plaintiff's title is merely the allegation of a legal conclusion. *Schuyler v. Broughton*, 65 Cal. 252, 3 Pac. 870.

legal or equitable title in himself,<sup>48</sup> but he need not aver that he is in possession of the premises.<sup>49</sup>

(IV.) Multifariousness. — The bill should not be multifarious.<sup>50</sup>

(V.) Prayer.<sup>51</sup> — A prayer for more relief than the party is entitled to does not render his petition demurrable.<sup>52</sup> Where the officer is not a necessary party no relief or decree need be prayed against him.<sup>53</sup>

(VI.) Verification. — Generally a bill praying a temporary injunction must be verified.<sup>54</sup>

g. *Demurrer*. — A demurrer will lie to the bill or petition, under proper circumstances.<sup>55</sup>

h. *Answer*. — The necessity for and contents of an answer are governed by general rules elsewhere treated.<sup>56</sup>

i. *Cross-Bill, Cross-Complaint and Counterclaim*. — The general rules as to cross-bill, cross-complaint and counterclaim apply.<sup>57</sup> Fraud in the acquirement by the plaintiff of the title on which he relies may be made the subject by defendant of a cross-bill, cross-complaint,<sup>58</sup> or

48. *Duncan v. Robertson*, 57 Miss. 820; *Byrd v. Clarke*, 52 Miss. 623.

49. *East Marshfield Land Co. v. Werley*, 67 Ore. 57, 135 Pac. 315.

50. *Clary v. Haines*, 61 Ga. 520; *Baker v. Rinehard Mayer & Co.*, 11 W. Va. 238, holding bill not multifarious. See generally the title "Multifariousness."

[a] A petition filed by a husband and wife to enjoin the sale of property levied on under several executions upon several judgments against the husband, on the ground that the property seized is the separate property of the wife and upon the ground that one of the executions issued upon a dormant judgment is not multifarious. *Clegg v. Varnell*, 18 Tex. 294, 305.

51. See generally the title "Prayer."

52. *Updegraff v. Lucas*, 76 Kan. 456, 93 Pac. 630, 94 Pac. 121, 13 Ann. Cas. 860.

[a] *Surplusage*. — In a petition to enjoin execution upon a dormant judgment, a prayer for quieting plaintiff's title and for damages is surplusage. *Updegraff v. Lucas*, 76 Kan. 456, 93 Pac. 630, 94 Pac. 121, 13 Ann. Cas. 860.

53. *Brooks v. Lewis*, 13 N. J. Eq. 214.

When sheriff is necessary party, see *supra*, IV, E, 5, f, (III).

54. *Manistique Lumbering Co. v. Lovejoy*, 55 Mich. 189, 20 N. W. 899. See 13 STANDARD PROC. 89.

55. See 8 STANDARD PROC. 480; 13 STANDARD PROC. 110.

[a] *For Insufficient Notice to Sheriff of Plaintiff's Ownership*. — *Gray v. Carroll*, 144 Iowa 68, 120 N. W. 1035.

56. See generally the title "Bills and Answers;" and also the title "Answers."

[a] *The sheriff* (1) may answer and in some cases it is proper that he do so, but it is not necessary nor usually expedient. *Brooks v. Lewis*, 13 N. J. Eq. 214. (2) A default judgment will not be rendered on the failure of the sheriff to answer in a suit against the creditor and sheriff. *James McCord Co. v. Rea* (Tex. Civ. App.), 178 S. W. 649.

[b] *Where the ground of relief relates solely to the manner of the levy, execution plaintiffs who are strangers to the acts of the officer levying the execution are not required to answer if the officer does*. *Beaird v. Foreman*, 1 Ill. 385, 12 Am. Dec. 197.

57. *Pittsmt Copper Co. v. O'Rourke*, 49 Mont. 281, 141 Pac. 849. See 6 STANDARD PROC. 258, 294; 8 STANDARD PROC. 486; and the title "Set-Off, Counterclaim and Recoupment."

58. See *Ford v. Douglas*, 5 How (U. S.) 143, 167, 12 L. ed. 89.

[a] *Cross-Bill*. — In a suit by an alleged owner of land to enjoin a sale of the property on execution against another, the defendant may by cross-bill ask that plaintiff be enjoined from

counterclaim.<sup>59</sup> In a suit to enjoin an execution issued on a dormant judgment the defendant may ask that the judgment be revived.<sup>60</sup>

j. *Notice and Citation*.—The requisite notices and citations must be given,<sup>61</sup> but a want of notice may be cured by an appearance without objection.<sup>62</sup>

k. *Preliminary or Conditional Relief*.—A temporary injunction may issue in a proper case.<sup>63</sup> Upon the dissolution of a temporary injunction, conditions may be imposed,<sup>64</sup> or in some jurisdictions, a bond is required pending a trial on the merits.<sup>65</sup> An order restoring the claimant to possession of the seized property pending the trial, may be made in some states.<sup>66</sup>

l. *Hearing and Determination*.—The court having obtained jurisdiction of the cause by the application for the injunction has the authority to determine all the issues between the parties and grant complete relief.<sup>67</sup>

**Court's Discretion**.—The granting or dissolving an injunction against the enforcement of a judgment is within the court's discretion.<sup>68</sup>

asserting his title because fraudulent. *Valentine v. McGrath*, 52 Miss. 112.

59. *Pittsmtont Copper Co. v. O'Rourke*, 49 Mont. 281, 141 Pac. 849.

60. *Trevino v. Stillman*, 48 Tex. 561; *Clegg v. Varnell*, 18 Tex. 294, 305.

61. See *Hardy v. Donellan*, 33 Ind. 501; *Bouligny v. M. White & Co.*, 5 La. Ann. 31.

[a] **To Plaintiff in Execution**.—In a suit to enjoin a sale of plaintiff's property on execution against another, the plaintiff in execution must be cited. *Bouligny v. M. White & Co.*, 5 La. Ann. 31.

62. *Hardy v. Donellan*, 33 Ind. 501.

63. *Idaho*.—*McMahon v. Cooper*, 23 Idaho 413, 130 Pac. 456. **N. J.**—*Van Mater v. Holmes*, 6 N. J. Eq. 575, 593 Pa.—*Natalie Anthracite Coal Co. v. Ryon*, 188 Pa. 138, 41 Atl. 462.

[a] **Where Injury Can Be Avoided by Lis Pendens**.—Where the only injury that plaintiff can suffer by a sale on the execution, that of having a cloud cast on his title, can be avoided by filing a lis pendens, a preliminary injunction will not issue. *Osborn v. Taylor*, 5 Paige (N. Y.) 515.

[b] **The amount of the bond must be fixed by the order**. *Sanders v. Bled soe* (Tex. Civ. App.), 173 S. W. 539.

[c] **The filing of an answer denying the equities of the complaint does not require the dissolution of a restraining order as a matter of course**. *Chace v. Jennings*, 3 Cal. Unrep. Cas.

474, 28 Pac. 681; *Porter v. Jennings*, 89 Cal. 440, 26 Pac. 965.

64. *Runyon v. Brokaw*, 5 N. J. Eq. 340.

65. *Foster v. Shephard*, 33 Tex. 687.

66. *Moore v. Diamant*, 41 N. J. Eq. 612, 7 Atl. 509. But see *State v. Judge*, 6 La. Ann. 548, holding the court has no authority pending suit, to order the property to be restored to the claimant.

67. *First Nat. Bank v. Savin*, 47 Ind. App. 266, 94 N. E. 347; *Spiller v. Hollinger* (Tex. Civ. App.), 148 S. W. 338. See generally 6 STANDARD PROC. 773.

[a] **Ownership**.—In a suit to restrain a sale on the ground that the property seized belongs to the plaintiff instead of the judgment debtor, the only issue that can be made is that of ownership. *Basso v. Benker*, 33 La. Ann. 432; *Lyons v. Cenas*, 22 La. Ann. 113; *McRae v. Brown*, 12 La. Ann. 181.

[b] **Jury trial demandable under the statute**. *Edwards v. Applegate*, 70 Ind. 325. See generally the title "Juries and Jurors."

68. *Cal.*—*Porter v. Jennings*, 89 Cal. 440, 26 Pac. 965. *Colo.*—*Crawford v. Lamar*, 9 Colo. App. 83, 47 Pac. 665, bill to prevent casting of a cloud on plaintiff's title. *Ga.*—*Kendall v. Dow*, 46 Ga. 607. *Md.*—*McCreery v. Sutherland*, 23 Md. 471, 87 Am. Dec. 578.

[a] **Where the plaintiff consented to the sale, an injunction against sell-**

In acting on a bill to enjoin execution, equity acts cautiously,<sup>69</sup> and regards the rights of other parties in the controversy.<sup>70</sup> Actual injury must be impending before the court will grant an injunction.<sup>71</sup> If it appears that the plaintiff will not sustain substantial injury if the injunction is not granted,<sup>72</sup> or if the plaintiff is in default,<sup>73</sup> relief will be denied. And if an injunction will prevent a creditor from obtaining satisfaction of a judgment to which he is legally and equitably entitled, it will not be granted.<sup>74</sup>

m. *Decree*. — (I.) *In General*. — The relief granted should be consistent with the prayer of relief,<sup>75</sup> and should be confined to the issues made.<sup>76</sup>

(II.) *Decree for Plaintiffs*. — Where the object of a bill will be answered by restraining the proceeds of a sheriff's sale in his hands, the sale ought not to be enjoined.<sup>77</sup> The relief granted should be con-

ing will not be continued to restrain a removal of the goods sold or a payment over of the proceeds. *Freeman v. Freeman*, 17 N. J. Eq. 44.

69. *Saffold v. Foster*, 75 Ga. 233.

70. *Hastings v. Cropper*, 3 Del. Ch. 165, where equity gave leave to amend the bill so as to make it a bill of interpleader.

71. *Elson v. O'Dowd*, 40 Ind. 300; *Hinkle v. Baldwin*, 93 Mich. 422, 53 N. W. 534.

[a] *Threatened Illegal Levy*. — (1) It is not sufficient to prove that the execution is in the hands of the officer, but there must be proof that he is about to levy, or threatens to levy, illegally. *Elson v. O'Dowd*, 40 Ind. 300. (2) An injunction to restrain the sale of personal property on execution is properly refused where it appears that the complainant gave no notice to the officer of his claim to the property before filing his bill, and that since receiving such notice the officer has taken no steps under the execution, and on the hearing, disclaims all right to the property or intention to interfere with it in any way. *Hinkle v. Baldwin*, 93 Mich. 422, 53 N. W. 534.

[b] *Where the property has been returned to the plaintiff and disposed of by him*, the injunction will be dissolved as it can no longer subserve any useful purpose. *Logan v. Yoes*, 30 Okla. 65, 118 Pac. 353.

72. *Boone v. Van Gorder*, 164 Ind. 499, 74 N. E. 4; *Covert v. Bray*, 26 Ind. App. 671, 60 N. E. 709; *Morgan v. Whitesides' Curator*, 14 La. 277; *Allen v. Dangerfield*, 2 La. 63, 20 Am. Dec. 297.

73. *Jones v. Gough* (Tex. Civ. App.), 175 S. W. 1107.

74. *Union Iron Wks. v. Bassick M. Co.*, 10 Colo. 24, 44, 14 Pac. 54.

75. *Luft v. Gossrau*, 31 Ill. App. 530; *Kempner v. Ivory* (Tex. Civ. App.), 29 S. W. 538.

[a] *Under a prayer for injunction and general relief* (1) it is proper to decree a sale, subsequent to the filing of the bill, void and confirm title in the plaintiff (*Luft v. Gossrau*, 31 Ill. App. 530), (2) or to permit a sale but require that it be made in subordination to plaintiff's lien. *Kempner v. Ivory* (Tex. Civ. App.), 29 S. W. 538.

76. *Ford v. Douglas*, 5 How. (U. S.) 143, 167, 12 L. ed. 89; *Gibson v. McClay*, 47 Neb. 900, 66 N. W. 851.

[a] *In an action to enjoin the violation of an agreement* requiring the creditor to levy on and exhaust the property of a designated defendant before resorting to that of the others, a decree restraining any levy against the latter's property until such time as all of the other's property is exhausted is too broad. It should be confined to the matters in the present case and more particularly stop the sale under the existing execution and levy. *Gibson v. McClay*, 47 Neb. 900, 66 N. W. 851.

77. *Morris Canal, etc. Co. v. Biddle*, 4 N. J. Eq. 222.

[a] *If the property levied on is perishable*, the injunction order will require the sheriff to sell it and deposit the proceeds in court. *Heath v. Hand*, 1 Paige (N. Y.) 329.

fined to the interests or rights of the plaintiff.<sup>78</sup> Where the execution is excessive, the injunction should be confined to the excess.<sup>79</sup>

(III.) **Decree for Defendants.**—A decree for the defendant in a suit by a person not a party to the execution to prevent the sale of property alleged to be his, should simply dissolve the injunction and dismiss the bill.<sup>80</sup>

No decree for the debt of the creditor can be rendered against a complainant on dissolving an injunction to stay the sale of specific property which does not interfere with the enforcement of the judgment as against other property of the debtor.<sup>81</sup>

Statutes sometimes provide that on the dissolution of the injunction the court shall assess damages,<sup>82</sup> which must be stated in the

78. *Ford v. Douglas*, 5 How. (U. S.) 143, 167, 12 L. ed. 89; *Young v. First Nat. Bank*, 4 Idaho 323, 39 Pac. 557.

[a] **Where Plaintiff Has Limited Interest in Premises.**—Where certain property belonging to the community between a surviving widow and her deceased husband is seized on execution against her, one of the heirs of the deceased can enjoin the sale only as to his interest in the property. *Offutt v. Duson*, 35 La. Ann. 986.

[b] **Where Debtor Is Life Tenant Only.**—Where a levy is made on realty as that of a defendant who is only a life tenant, the injunction should restrain the sale of the remainder only. *Jones v. Crawley*, 68 Ga. 175.

79. *Guillory v. Latour*, 138 La. 142, 70 So. 66; *Barrow v. Robichaux*, 14 La. Ann. 207; *Rowly v. Kemp*, 2 La. Ann. 360.

80. *Lovette v. Longmire*, 14 Ark. 339.

[a] **It is erroneous** (1) to decree a sale of the property taken in execution (*Lovette v. Longmire*, 14 Ark. 339. See *Valentine v. McGrath*, 52 Miss. 112, 118), (2) or render judgment for the amount of the judgment at law. *Hammond v. St. John*, 4 Yerg. (Tenn.) 107; *Carlin v. Hudson*, 12 Tex. 202, 62 Am. Dec. 521.

81. *Hammond v. St. John*, 4 Yerg. (Tenn.) 107.

82. **Ark.**—*Stanley v. Bonham*, 52 Ark. 354, 12 S. W. 706; *Fowler v. Williams*, 20 Ark. 641, 647. **Ill.**—*Moriarty v. Galt*, 125 Ill. 417, 17 N. E. 714. **Ky.**—*Civ. Code*, §295; *Mason, Gooch & Hoge Co. v. Mechanics' Lien & Trust Co.*, 118 Ky. 707, 82 S. W. 290; *Kilpatrick v. Tunstall*, 5 J. J. Marsh. 80; *Mulholland v. Troutman's Admr.*, 10

*Ky. L. Rep.* 263. **La.**—*Rivet v. George M. Murrell P. & M. Co.*, 121 La. 201, 46 So. 210, 126 Am. St. Rep. 320; *Borron v. Sollibellos*, 28 La. Ann. 355; *Rowly v. Kemp*, 2 La. Ann. 360; *Landry v. L'Eglise*, 3 La. 219. **Tex.**—*Vern. Sayles' Tex. Civ. St.*, 1914, art. 4667; *Fall v. Ratliff*, 10 Tex. 291; *Perrin v. Stevens* (Tex. Civ. App.), 29 S. W. 927; *Citizens Nat. Bank v. Interior L. & I. Co.*, 14 Tex. Civ. App. 301, 37 S. W. 447.

[a] **Damages for Delay.**—(1) A statute allowing damages on the dissolution of an injunction for purposes of delay where the collection of money has been enjoined has reference to injunctions to restrain the collection of money, obtained by the judgment debtor or some one who is a party to the proceeding. The rendition of a judgment for the amount of the judgment at law against an owner of property and his sureties seeking to enjoin a sale under execution against another is erroneous. *Carlin v. Hudson*, 12 Tex. 202, 62 Am. Dec. 521, *affirmed* in *Griffin v. Chadwick*, 44 Tex. 409, *overruling* *Gault v. Goldthwaite*, 34 Tex. 104. (2) But in *Perrin v. Stevens* (Tex. Civ. App.), 29 S. W. 927, it was held proper to award the statutory ten per cent. damages against the sureties on an injunction bond on dissolving an injunction against selling the wife's personal property on an execution against the husband.

[b] A suit for an injunction to restrain the sale of certain property until all property of an inferior degree has been exhausted is a suit to restrain the collection of money. *Kendrick v. Rice*, 16 Tex. 254.

[c] **Damages cannot be assessed for**

decree,<sup>83</sup> and in some states, under certain circumstances a decree may be rendered for the amount of the judgment.<sup>84</sup>

n. *Appeal*.—The general rules applicable to appeals from decrees are applicable to this proceeding.<sup>85</sup> Where an injunction against property seized under the writ is perpetuated in part only, the creditor does not deprive himself from appealing therefrom by proceeding against the property as to which the injunction is dissolved.<sup>86</sup> When the sheriff is merely a formal party to the suit, he need not be made a party to the appeal.<sup>87</sup>

o. *Costs*.—Costs are subject to the discretion of the court.<sup>88</sup>

**the prevention of the sale of particular property**, under a statute authorizing assessment of damages for the staying of proceedings on the judgment. *Stanley v. Bonham*, 52 Ark. 354, 12 S. W. 706.

[d] **In Ohio** the statute provides for a decree for the full amount of the judgment only where it has been temporarily completely enjoined; if the dissolved injunction prohibited the enforcement against specific property only, the decree should be for the value of the property not exceeding the amount of the judgment, unless defendant has satisfied his judgment out of other property. *Teaff v. Hewitt*, 1 Ohio St. 511, 544, 59 Am. Dec. 634. See *Hillyer v. Richards*, 13 Ohio 135; *Portsmouth & Columbus Tp. Co. v. Byington*, 12 Ohio 114.

[e] **Where the creditor has not been delayed an instant**, a judgment for damages should not be awarded. *Kilpatrick v. Tunstall*, 5 J. J. Marsh. (Ky.) 80.

[f] **This remedy is exclusive of all other remedies**. *Mason, Gooch & Hoge Co. v. Mechanics' Lien & Trust Co.*, 118 Ky. 707, 82 S. W. 290; *Hayden v. Phillips*, 89 Ky. 1, 11 S. W. 951; *Crawford v. Woodworth*, 9 Bush (Ky.) 745.

83. *Clarkson v. White*, 4 J. J. Marsh. (Ky.) 529, 20 Am. Dec. 229, where the decree did not ascertain the amount of the ten per cent.

84. See *Teaff v. Hewitt*, 1 Ohio St. 511, 544, 59 Am. Dec. 634.

[a] **Where injunction against an execution upon a dormant judgment is sought**, the court may on dissolution of the injunction award a judgment for the amount of the unpaid dormant judgment. *Seymour v. Hill*, 67 Tex. 385, 3 S. W. 313; *Spiller v. Hollinger* (Tex. Civ. App.), 148 S. W. 338; *War-*

*ren v. Kohr*, 26 Tex. Civ. App. 331, 64 S. W. 62.

85. See generally the title "*Appeals*."

[a] **Jurisdiction of an appeal from an order enjoining a levy upon plaintiff's real estate** is in the supreme court in Indiana. *Wood v. Hughes* (Ind. App.), 32 N. E. 594.

[b] **A judgment restraining the collection of a fee-bill** is not a judgment for the recovery of money or property and an appeal lies although the value in controversy be less than \$200. *Shackelford v. Phillips*, 112 Ky. 563, 66 S. W. 419, 68 S. W. 441.

[c] **Title to Land**.—A judgment enjoining the sale of land under execution involves the title to land, and an appeal lies regardless of the amount of the execution. *Park v. McReynolds*, 111 Ky. 651, 64 S. W. 517.

[d] **Final Judgment**.—A judgment perpetually enjoining a particular execution but granting leave to sue out another, is final and may be appealed from. *Forbes, Brooks & Co. v. Hill*, Dall. Dig. (Tex.) 486.

[e] **An order of appeal in general terms granted on motion of the defendant embraces the plaintiff in the cause and the sureties on the injunction bond**. *Mitchell v. Lay*, 4 La. Ann. 514, the sureties are parties plaintiff in the injunction by fiction of law.

86. *Mitchell v. Lay*, 3 La. Ann. 593.

87. *Eschert v. Harrison*, Man. Unrep. Cas. (La.) 186.

88. *Schiffer v. Fort*, 1 Posey Unrep. Cas. (Tex.) 198. See generally 5 STANDARD PROC. 910.

[a] **After Quashal of Execution**. Where a plaintiff seeks an injunction and damages, and the defendant moves to quash the execution, and the execution is quashed and the injunction

p. *Abandonment or Waiver*.—A party may abandon or waive his injunction.<sup>89</sup>

q. *Effect of Injunction*.—An injunction against an execution operates, so long as it remains in force, as a supersedeas to the execution.<sup>90</sup> It is generally held to release the levy made thereunder, if one has been made,<sup>91</sup> discharge the lien created thereby,<sup>92</sup> and authorize the sheriff to return the goods to the debtor,<sup>93</sup> and this, it has been held, notwithstanding the injunction has been adjudged to be wrongfully sued out.<sup>94</sup> Some courts hold otherwise, however, as to a temporary injunction.<sup>95</sup>

dissolved, costs should not be awarded against the plaintiff. *Dearborn v. Phillips*, 21 Tex. 449.

[b] **The costs of a suit to enjoin execution on a dormant judgment** will be taxed against the judgment creditor, although it appears that the judgment was not paid and a judgment was rendered against the debtor for its amount. *Spiller v. Hollinger* (Tex. Civ. App.), 148 S. W. 338.

89. *Beard v. Gresham*, 5 La. Ann. 160; *Duckett v. Dalrymple*, 1 Rich. L. (S. C.) 143.

[a] **By Giving Forthcoming Bond**. Where a party obtains an injunction because of a clerical error in the advertisement and the sheriff readvertises the property properly and the party executes a forthcoming bond for the property, he thereby abandons his injunction. *Beard v. Gresham*, 5 La. Ann. 160.

90. *Buffandeau v. Edmondson*, 17 Cal. 436, 79 Am. Dec. 139; *Lockbridge v. Biggerstaff*, 2 Duv. (Ky.) 281, 87 Am. Dec. 498; *Keith v. Wilson*, 3 Mete. (Ky.) 201. But see *Boyle v. Zacharie*, 6 Pet. (U. S.) 648, 658, 8 L. ed. 432.

[a] **An injunction against an order of sale of specific property** suspends the operation of the process until the determination of the injunction suit. *Seligson & Co. v. Collins*, 64 Tex. 314.

[b] **A forthcoming bond is not forfeited** for failure to deliver the property on the day named if the execution is enjoined at that time. *Hull v. Bloss*, 27 W. Va. 654.

[c] **Writs of venditioni exponas** issued during the pendency of an injunction against the collection of the execution are without effect. *Newlin v. Murray*, 63 N. C. 566.

91. *Ky.*—*Lockridge v. Biggerstaff*, 2 Duv. 281, 87 Am. Dec. 498; *Keith v. Wilson*, 3 Mete. 201; *Eldridge v. Cham-*

*bers*, 8 B. Mon. 411. *S. C.*—*Mitchell v. Anderson*, 1 Hill 69, 26 Am. Dec. 158. *Tenn.*—*Telford v. Cox*, 15 Lea 298; *Overton v. Perkins*, Mart. & Yerg. 367. *Tex.*—*Turley v. Brewster*, 33 Tex. 188.

[a] This is true whether the injunction is sued out by the debtor or by a third person. *Telford v. Cox*, 15 Lea (Tenn.) 298.

[b] **When an officer returns an execution levied and stopped by injunction**, the return of itself imports a cessation of the levy and a release of the property. *Keith v. Wilson*, 3 Mete. (Ky.) 201; *Eldridge v. Chambers*, 8 B. Mon. (Ky.) 411; *Ela v. Welch*, 9 Wis. 395.

92. *Ky.*—*Lockridge v. Biggerstaff*, 2 Duv. 281, 87 Am. Dec. 498; *Keith v. Wilson*, 3 Mete. 201; *Eldridge v. Chambers*, 8 B. Mon. 411; *Mason v. Holmes*, 4 Bibb 263. *Tenn.*—*Rocco v. Parczyk*, 9 Lea 328; *Overton v. Perkins*, Mart. & Yerg. 367. See *Conway v. Jett*, 3 Yerg. 481, 24 Am. Dec. 590, holding the release of the lien depends upon the security for the debt. If none is given the principle of the text does not apply. *Tex.*—*Snow v. Nash*, 50 Tex. 216.

93. *Ohio.*—*Bisbee's Lessee v. Hall*, 3 Ohio 449. *Tenn.*—*Rocco v. Parczyk*, 9 Lea 328. *Tex.*—*Turley v. Brewster*, 33 Tex. 188.

[a] **The reason** is that it would ruin both the debtor and creditor if the sheriff should be required to hold the goods until the termination of the suit in chancery. *Telford v. Cox*, 15 Lea (Tenn.) 298.

94. *Lockridge v. Biggerstaff*, 2 Duv. (Ky.) 281, 87 Am. Dec. 498; *Keith v. Wilson*, 3 Mete. (Ky.) 201.

95. *La.*—*Lamoree v. Succession of Cox*, 32 La. Ann. 246. *Md.*—See *Anderson v. Tydings*, 8 Md. 427, 443, 63

An injunction preventing the sale of a particular piece of property does not prevent the execution of the judgment against other property.<sup>96</sup> The enforcement of an execution upon a forfeited forthcoming bond is not inhibited by an injunction against an execution upon a judgment at law.<sup>97</sup> And an injunction restraining a particular execution does not prevent suing out an alias and enforcing it.<sup>98</sup>

The sheriff has no more authority or justification for proceeding in violation of the injunction than if he acts after the execution has been quashed.<sup>99</sup> But it has been held that a sale in violation of a preliminary injunction restraining the enforcement of a judgment is not void.<sup>1</sup> A judgment at law is not merged in an injunction bond given in an injunction suit against enforcing an execution issued thereon.<sup>2</sup>

On the dissolution of the injunction the rights of the plaintiff stand

Am. Dec. 708. **Minn.**—Knox v. Randall, 24 Minn. 479.

[a] **It is the duty of a sheriff**, on service of a temporary injunction on him, "to note that fact on the execution, and desist from all further proceedings under it, retaining, however, his levy; and if, at the end of sixty days from the receipt of the execution by him, no notice of the dissolution of the injunction reached him, then he should have returned the same, detailing the facts in his return; but if, during the life of the execution, it had been relieved from the injunction, then the sheriff should have advertised the property again under his original levy, and have proceeded to sell in the ordinary way." An adjournment of the sale pending the injunction is irregular although by chance it was to a day which accorded with the vacation of the injunction. *Pettingill v. Moss*, 3 Minn. 222, 74 Am. Dec. 747. To similar effect, *Cochrane v. Bank of United States*, 11 Rob. (La.) 64.

[b] **No further notice of seizure** is necessary on the dissolution where the property was under valid seizure when the execution was enjoined. *McMicken v. Morgan*, 9 La. Ann. 208.

[c] **Where the return day expires pending the injunction**, a levy cannot be made thereafter on dissolution of the injunction. *Dugat v. Babin*, 8 Mart. N. S. (La.) 391.

96. **Ala.**—Halsey v. Murray, 112 Ala. 185, 196, 20 So. 575. **Ark.**—Stanley v. Bonham, 52 Ark. 354, 12 S. W. 706. **Ind.**—Shanklin v. Sims, 110 Ind.

143, 11 N. E. 32; *State Bank v. Macy*, 4 Ind. 362. **Ia.**—Hardin v. White, 63 Iowa 633, 16 N. W. 580, 19 N. W. 822; *Lockwood v. Kitteringham*, 42 Iowa 257. **Tex.**—Seligson & Co. v. Collins, 64 Tex. 314; *Fannin County Bank v. Lowenstein* (Tex. Civ. App.), 54 S. W. 316.

97. *Davis v. Dixon's Admr.*, 1 How. (Miss.) 64, 26 Am. Dec. 695.

98. *Byrne, Vance & Co. v. Mithoff*, 24 La. Ann. 297.

[a] **But a new seizure is necessary.** *Cochrane v. Bank of United States*, 11 Rob. (La.) 64.

99. *Buffandeau v. Edmondson*, 17 Cal. 436, 79 Am. Dec. 139; *Citizens' Bank v. Webre*, 44 La. Ann. 1081, 11 So. 706.

[a] **Violation of Spirit of Injunction.**—Where three days before the expiration of an execution, a party brought suit to enjoin the enforcement of a fraudulent judgment, praying an injunction against proceeding further in the collection of the execution issued on the said judgment, a decree rendered in conformity with the prayer, disregarding its strict letter, enjoins the enforcement of the judgment and any act of the sheriff in enforcing the judgment is a violation of the spirit of the injunction. *Campbell v. Tarbell*, 55 Vt. 455.

[b] **Sheriff Is Mere Trespasser.** *Buffandeau v. Edmondson*, 17 Cal. 436, 79 Am. Dec. 139; *Turner v. Gatewood*, 8 B. Mon. (Ky.) 613.

1. *Bagley v. Ward*, 37 Cal. 121, 138, 99 Am. Dec. 256.

2. *Austin v. Townes*, 10 Tex. 24.

upon the same grounds they did at the granting thereof.<sup>3</sup>

F. EQUITABLE RELIEF AGAINST JUDGMENT.—Relief in equity against the judgment itself is fully treated elsewhere in this work.<sup>4</sup>

G. AUDITA QUERELA.—The use of audita querela as a method of obtaining relief against an execution will be found treated in another article.<sup>5</sup>

H. BILL TO QUIET TITLE.—Under some circumstances relief against an execution may be secured by means of a bill to quiet title.<sup>6</sup>

I. TRESPASS TO TRY TITLE.—Relief against execution in actions in the nature of trespass to try title will be treated elsewhere in the work.<sup>7</sup>

3. *Duckett v. Dalrymple*, 1 Rich. L. (S. C.) 143; *Gibbes v. Mitchell*, 2 Bay (S. C.) 120; *Overton v. Perkins*, Mart. & Yerg. (Tenn.) 367. But see *Launtz v. Gross*, 16 Ill. App. 329.

[a] **Dissolution After Sale Under Junior Execution.**—(1) When an injunction against a senior execution is dissolved before sale under a junior execution, the senior execution is entitled to be first paid out of the proceeds of the sale. *Duckett v. Dalrymple*, 1 Rich. L. (S. C.) 143. (2) But if the sale is made while the senior execution is enjoined, the proceeds must be applied to the junior execution. *Mitchell v. Anderson*, 1 Hill (S. C.) 69, 26 Am. Dec. 158. But see *Lynn v. Gridley*, Walk. (Miss.) 548, 12 Am. Dec. 591 holding (3) a sale under a junior execution while a senior execution is enjoined does not affect the lien acquired by the senior execution, and when the injunction is dissolved, the property is liable to a levy under the senior execution.

[b] The subsequent reinstatement of the injunction does not relate back and render an execution issued in the interim irregular. *Young v. Davis*, 1 Mon. (Ky.) 152.

4. See 15 STANDARD PROC. 256, et seq.

5. See the title "Audita Querela."

6. See generally the title, "Quieting Title," and *Rucker v. Dooley*, 49 Ill. 377; *Stout v. Cook*, 37 Ill. 283. But see *Wells v. Bower*, 126 Ind. 115, 25 N. E. 603.

[a] A bill to remove a cloud on title does not operate to put a complainant in possession of property; hence a bill seeking to set aside an execution sale will not, on demurrer, be allowed to stand as a bill to remove a cloud, since an action of ejectment would still be necessary, and two suits cannot be allowed where one would suffice. *McCudden v. Wheeler & Wilson Mfg. Co.*, 23 R. I. 528, 51 Atl. 48.

7. See the title "Trespass To Try Title."

# JUDGMENTS AND DECREES, REVIVAL OF

By the Editorial Staff.

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### CROSS-REFERENCES:

Judgments;	Revivor;
Judgments and Decrees,	Scire Facias.
Enforcement of;	

For forms, see 9 STANDARD PROC. 747, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. NECESSITY FOR.**—Where a judgment has become dormant through the failure of the owner thereof to take out execution thereon within the period limited for issuing the same as of course, the same must be revived before an execution will issue thereon;<sup>1</sup> but a dormant judgment being evidence of the validity, character and amount of the creditor's claim, and res judicata as to all these matters, an action may be maintained thereon, where no lien is sought to be enforced thereby, without the necessity of revival.<sup>2</sup> In many jurisdictions no execution can issue upon a judgment after the death of the plaintiff therein until the judgment has been revived in favor of the

1. See the following: **U. S.**—*Johnson v. Glover*, 2 Cranch C. C. 678, 13 Fed. Cas. No. 7,385; *Jackson v. Bank of United States*, 2 Cranch C. C. 1, 13 Fed. Cas. No. 7,131. **Ala.**—*McCall v. Rickarby*, 85 Ala. 152, 4 So. 414; *Jewett v. Hoogland*, 30 Ala. 716; *Van Cleave v. Haworth*, 5 Ala. 188. **Ark.**—*Hanley v. Carneal*, 14 Ark. 524; *Bracken v. Wood*, 12 Ark. 605. **Ill.**—*Mellwain v. Karstens*, 152 Ill. 135, 38 N. E. 555; *Weis v. Tiernan*, 91 Ill. 27. **Ia.**—*Denegre v. Haun*, 13 Iowa 240. **Miss.**—*Bacon v. Red*, 27 Miss. 469. **N. J.**—*Seely v. Norris*, 3 N. J. L. 624. **Tex.**—*North v. Swing*, 24 Tex. 193. **Wash.**—*Hewitt v. Root*, 31 Wash. 312, 71 Pac. 1021; *Hardin v. Day*, 29 Wash. 664, 70 Pac. 118. See also 15 STANDARD PROC. 752, et seq.

**Effect of supersedeas or stay**, see 15 STANDARD PROC. 756, et seq.

2. **Ga.**—*Lockwood v. Barefield*, 7 Ga. 393. **Me.**—*Noble v. Merrill*, 48 Me. 140. **N. J.**—*State v. Hamilton*, 16 N. J. L. 153. **Ohio.**—*Goodin v. McArthur*, 7 Ohio Dec. 611, 4 Wkly. L. Bul. 213. **R. I.**—*Arkansas City First Nat. Bank v. Hazie*, 56 Atl. 1032. **S. C.**—*Lawton*

legal representatives of the deceased,<sup>3</sup> though in other states the rigor of the common-law rule has been relaxed.<sup>4</sup> So also, the death of the judgment debtor prior to the issuance of execution suspends the right to issue the same until the judgment is revived against the personal representatives or the heirs or devisees of the debtor,<sup>5</sup> though, in the absence of a statute to the contrary, if the execution is in the hands of the sheriff prior to the debtor's death, the levy and sale may be completed without a revival of the judgment.<sup>6</sup> Upon the death of a part only of the defendants, execution may nevertheless issue without a revivor, though it can be enforced only against the survivors;<sup>7</sup> it

*v. Perry*, 40 S. C. 255, 18 S. E. 861.

3. See the following: **Ala.**—Cottingham *v. Smith*, 152 Ala. 664, 44 So. 864. **Kan.**—Emrich *v. Heilbrun*, 74 Kan. 282, 86 Pac. 145; Mawhinney *v. Doane*, 40 Kan. 681, 20 Pac. 488. **N. J.** Harwood *v. Murphy*, 13 N. J. L. 193. **N. D.**—Daisy Roller Mills *v. Ward*, 6 N. D. 317, 70 N. W. 271. **Tenn.**—Rhodes *v. Crutchfield*, 7 Lea 518; Gregory *v. Chadwell*, 3 Coldw. 390.

See also 15 STANDARD PROC. 764, et seq.

4. See the following: **Cal.**—Sherwin *v. Southern Pac. Co.*, 168 Cal. 722, 145 Pac. 92. **Ga.**—Hatcher *v. Lord*, 115 Ga. 619, 41 S. E. 1007, 61 L. R. A. 353. **Miss.**—Hughes *v. Wilkinson's Lessee*, 37 Miss. 482; Ammons *v. Whitehead*, 31 Miss. 99. **Mo.**—Gaston *v. White*, 46 Mo. 486; Simmons *v. Heman*, 17 Mo. App. 444. **Pa.**—Berryhill *v. Wells*, 5 Binn. 56.

See also 15 STANDARD PROC. 765, et seq.

5. See the following: **Ala.**—Collier *v. Windham*, 27 Ala. 291, 62 Am. Dec. 767. **Ark.**—Cunningham *v. Burk*, 45 Ark. 267. **Ill.**—Meyer *v. Mintonye*, 106 Ill. 414; Coran & Co. *v. Pittenger*, 92 Ill. 241; Scammon *v. Swartwout*, 35 Ill. 326; Turney *v. Young*, 22 Ill. 253. **Ind.** State *v. Michaels*, 8 Blackf. 436. **Ky.** Partin *v. American Assn.*, 156 Ky. 323, 160 S. W. 1057; Huston *v. Duncan*, 1 Bush 205; Calloway *v. Eubank*, 4 J. J. Marsh. 280. **Md.**—Polk *v. Pendleton*, 31 Md. 118. **Miss.**—Andrews *v. Anderson*, 16 So. 346; Faison *v. Johnson*, 70 Miss. 214, 12 So. 152; Smith *v. Winston*, 2 How. 601; Hubert *v. Williams*, Walk. 175; Wilson *v. Kirkland*, Walk. 155; Hicks *v. Murphy*, Walk. 66. **Mo.** Finley *v. Caldwell*, 1 Mo. 512. **N. Y.** Ullman-Einstein Co. *v. Crimmins*, 166 App. Div. 731, 152 N. Y. Supp. 251. **N. C.**—Barfield *v. Barfield*, 113 N. C.

230, 18 S. E. 505; Aycock *v. Harrison*, 71 N. C. 432; Jordan *v. Pool*, 28 N. C. 288; Wood *v. Harrison*, 18 N. C. 356; Den *v. McCullough*, 4 N. C. 684. **Ohio.** Cartney's Lessee *v. Reed*, 5 Ohio 221. **Pa.**—McMurray's Admr. *v. Hopper*, 43 Pa. 468; Colborn *v. Trimpey*, 36 Pa. 463; Bomberger *v. Raymond*, 12 Pa. Co. Ct. 460; Davey's Estate, 9 Pa. Co. Ct. 125. **Tenn.**—Dunham *v. Harvey*, 111 Tenn. 620, 69 S. W. 772; Harman *v. Hann*, 6 Baxt. 90; Ashworth *v. Demier*, 1 Baxt. 323; Overton *v. Perkins*, 10 Yerg. 328; Gwin *v. Latimer*, 4 Yerg. 22. **Tex.**—Cain *v. Woodward*, 74 Tex. 549, 12 S. W. 319. **W. Va.** Maxwell *v. Leeson*, 50 W. Va. 361, 40 S. E. 420, 88 Am. St. Rep. 875.

See also 15 STANDARD PROC. 767, et seq.

6. See the following: **Ind.**—Blumenthal *v. Tibbits*, 160 Ind. 70, 66 N. E. 159. **Md.**—Hanson *v. Barnes' Lessee*, 3 Gill & J. 359, 22 Am. Dec. 322. **Mass.** Grovenor *v. Gold*, 9 Mass. 209, 214. **Miss.** Thompson *v. Ross*, 26 Miss. 198. **N. J.** Wait's Exr. *v. Savage* (N. J. Eq.), 15 Atl. 225, 13 Cent. Rep. 348. **N. C.** Parish *v. Turner*, 27 N. C. 279; McCarrson's Admr. *v. Richardson*, 18 N. C. 561. **Pa.**—Deering *v. Wisler*, 21 Pa. Co. Ct. 156; Davey's Estate, 9 Pa. Co. Ct. 125. **Va.**—Trevillian's Exrs. *v. Guerrant*, 31 Gratt. (72 Va.) 525. **Eng.** Horton *v. Ruesby*, Comb. 33, 90 Eng. Reprint 326; Parkes *v. Mosse*, Cro. Eliz. 181, 78 Eng. Reprint 437; Vincent *v. Dale*, 1 Dyer 76b, 73 Eng. Reprint 163.

See also 15 STANDARD PROC. 770, et seq.

7. See the following: **U. S.**—Erwin *v. Dundas*, 4 How. 58, 11 L. ed. 875. **Ala.**—Thompson *v. Bondurant*, 15 Ala. 346, 50 Am. Dec. 136. **Ga.**—Brown *v. Barnes*, 99 Ga. 1, 26 S. E. 86. **Ind.** Carnahan *v. Brown*, 6 Blackf. 93. **Ky.**

must be revived before it can be enforced against the estate of the deceased.<sup>8</sup> Where a judgment is recovered by several, and one or more of them dies, execution may be issued in favor of the survivors without a revivor.<sup>9</sup>

Where an execution has issued but was not productive of full satisfaction of the judgment, the judgment may be revived.<sup>10</sup>

**II. WHAT JUDGMENTS MAY BE REVIVED.**—A void judgment will not be revived.<sup>11</sup> But if the judgment or decree be a subsisting and valid one,<sup>12</sup> which was originally enforceable by an execu-

People's Bank of Kentucky's Assignee *v.* Barbour, 124 Ky. 539, 99 S. W. 608; *Fleece v. Goodrum*, 1 Duv. 306; *Daviess v. Womack*, 8 B. Mon. 383; *Mitchell's Heirs v. Smith's Heirs*, 1 Litt. 243; *Johnston v. Lynch*, 3 Bibb 334. **Miss.** *Bowen v. Bonner*, 45 Miss. 10; *Wade v. Watt*, 41 Miss. 248; *Davis v. Helm*, 3 Smed. & M. 17. **Mo.**—*Hardin v. McCanse*, 53 Mo. 255. **N. Y.**—*Day v. Rice*, 19 Wend. 644; *Lucas v. Johnson*, 6 How. Pr. 121. **Tenn.**—*Cheatham v. Brien*, 3 Head 552; *Cabiness v. Garrett*, 1 Yerg. 491. **Tex.**—*Chandler v. Hudson*, 11 Tex. 32. **W. Va.**—*Holt v. Lynch*, 18 W. Va. 567.

See also 15 STANDARD PROC. 774.

**8.** See the following: **N. Y.**—*Woodcock v. Bennet*, 1 Cow. 711, 13 Am. Dec. 568. **Pa.**—*Com. v. Vanderslice*, 8 Serg. & R. 452. **Tenn.**—*Reams v. McNail*, 9 Humph. 542; *Overton v. Perkins*, 10 Yerg. 328. **Eng.**—*Trethewy v. Ackland*, 2 Wms. Saund. 48, 51, note 4, 85 Eng. Reprint 649; *Smarte v. Edsun*, 1 Lev. 30, 83 Eng. Reprint 282.

See also 15 STANDARD PROC. 774.

[a] The surviving defendant cannot complain of the procedure to revive a judgment rendered necessary by the death of a joint defendant. *Crawford v. Eastman*, 150 Ill. App. 241.

**9.** See 15 STANDARD PROC. 767.

**10.** *Stille v. Wood*, 1 N. J. L. 118; *Stewart v. Peterson*, 63 Pa. 230.

**11.** **Ala.**—*Cottingham v. Smith*, 152 Ala. 664, 44 So. 864. **Ga.**—*Bell v. Verdel*, 140 Ga. 768, 79 S. E. 849; *Cheek v. Taylor*, 22 Ga. 127. **Ill.**—*Butler v. Nohe*, 98 Ill. App. 624. **La.**—*In re Fourth Drainage District*, 37 La. Ann. 916; *Conery v. Rotchford*, 34 La. Ann. 520; *Laurent v. Beelman*, 30 La. Ann. 363. **Mo.**—*Phelps v. Hawkins*, 6 Mo. 197. **Neb.**—*Minnesota Thresher Mfg. Co. v. L'Heureux*, 82 Neb. 692, 118 N. W. 565 (it is impossible to impart any vitality to a void judgment by re-

vivor proceedings); *Enewold v. Olsen*, 39 Neb. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573. **Pa.**—*Hartle v. Long*, 5 Pa. 491.

[a] A judgment which has been reversed cannot be revived. *Mills v. Conner*, 1 Blackf. (Ind.) 7.

[b] Where no entry appears of record attesting the rendition of a judgment, in a summary proceeding, there is no basis upon which proceedings for revival can be predicated. *Brown v. Coward*, 3 Hill (S. C.) 4.

**12.** **U. S.**—*Davis v. Davis*, 174 Fed. 786, 98 C. C. A. 494; *Lafayette v. Wonderly*, 92 Fed. 313, 34 C. C. A. 360; *Wonderly v. Lafayette County*, 74 Fed. 702. **Ark.**—*Trapnall v. Richardson*, 13 Ark. 543, 58 Am. Dec. 338; *Fowler v. Thurmond*, 13 Ark. 259; *Hubbard v. Bolls*, 7 Ark. 442. **Cal.**—*Doehla v. Phillips*, 151 Cal. 488, 91 Pac. 330. **Ga.**—*Hagins v. Blitch*, 6 Ga. App. 839, 65 S. E. 1082. **Md.**—*Lambson v. Moffett*, 61 Md. 426. **Neb.**—*Young v. City of Broken Bow*, 94 Neb. 470, 143 N. W. 742. **N. J.**—*Stille v. Wood*, 1 N. J. L. 118. **N. Y.**—*Harmon v. Dedrick*, 3 Barb. 192. **Pa.**—*Stewart v. Peterson*, 63 Pa. 230; *Masser v. Dewart*, 46 Pa. 534; *Boyer v. Rees*, 4 Watts (Pa.) 201. **Tenn.**—*Rogers v. Hollingsworth*, 95 Tenn. 357, 32 S. W. 197. **Va.**—*Serles v. Cromer*, 83 Va. 426, 13 S. E. 859; *Richardson's Admr. v. Prince George Justices*, 11 Gratt. (52 Va.) 190.

[a] A judgment which has been paid or satisfied cannot be revived. *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685, 79 N. W. 616.

[b] A judgment for alimony may be revived after the death of the plaintiff. *Chumos v. Chumos*, 93 Kan. 33, 143 Pac. 420.

[c] A judgment for slander is still a subsisting obligation after the defendant has been discharged in bankruptcy, and may be revived. *Parker*

tion,<sup>13</sup> or is subject to revival under the statute,<sup>14</sup> it may be revived.<sup>15</sup>

**III. GROUNDS FOR REVIVAL.**—Where property is sold which was not subject to the execution,<sup>16</sup> or where a purchaser of property under an execution sale fails to recover possession because of irregularities in the sale,<sup>17</sup> or where the creditor gets nothing by a sale under his execution, on account of the failure of the debtor's title,<sup>18</sup> or where the judgment has become dormant,<sup>19</sup> or has lost its lien, or is about to lose it,<sup>20</sup> or has been satisfied by an unauthorized set-off,<sup>21</sup> it is sufficient ground for the revival of the judgment.

**IV. JURISDICTION OF PROCEEDINGS TO REVIVE.**—Generally a judgment can be revived only in the court in which it was rendered.<sup>22</sup>

*v. Bratton*, 120 Md. 428, 87 Atl. 756.

13. *Ala.*—*Turner v. Dupree*, 19 Ala. 198. *Ga.*—*Horton v. Clark*, 40 Ga. 412.

*Me.*—*Kennebec Purchase v. Davis*, 1 Greenl. 309.

14. *Lafayette v. Wonderly*, 92 Fed. 313, 34 C. C. A. 360.

15. *Ala.*—*Sharp v. Herrin*, 32 Ala. 502. *Ark.*—*Cunningham v. Burk*, 45

Ark. 267; *Eddins v. Graddy*, 28 Ark. 500. *Ill.*—*Albin v. People*, 46 Ill. 372.

*Ky.*—*Hughes v. Shreve*, 3 Mete. 547. *Miss.*—*Torrence v. Kerr*, 27 Miss. 786;

*McCoy v. Nichols*, 4 How. 31. *S. C.* *State Bank v. McRae*, 2 Speers 639.

16. *Merqure v. O'Donnell*, 139 Cal. 6, 72 Pac. 337, 96 Am. St. Rep. 91;

*Cross v. Zane*, 47 Cal. 602; *Utah National Bank of Ogden v. Beardsley*, 10 Utah 404, 37 Pac. 586.

17. *Ritter v. Henshaw*, 7 Iowa 97; *Utah National Bank of Ogden v. Beardsley*, 10 Utah 404, 37 Pac. 586. *Compare Cunningham v. Doran*, 18 Ill. 385.

18. *Cantwell v. McPherson*, 3 Idaho 321, 29 Pac. 102; *Edde v. Cowan*, 1 Sneed (Tenn.) 290.

19. *Masterson v. Cundiff*, 58 Tex. 472; *Dewitt v. Jones*, 17 Tex. 620.

20. *Masterson v. Cundiff*, 58 Tex. 472.

21. *McRoberts v. Lyon*, 79 Mich. 25, 44 N. W. 160.

22. *Ala.*—*Griffin v. Spence*, 69 Ala. 393; *Barron v. Pagles*, 6 Ala. 422. *Ark.*

*Blackwell v. State*, 3 Ark. 320. *Conn.* *Jarvis v. Rathburn*, Kirby 220. *Ga.*

*Funderburk v. Smith*, 74 Ga. 515; *Dickinson v. Allison*, 10 Ga. 557. *Ill.*

*Challener v. Niles*, 78 Ill. 78. *Ind.* *Thompson v. Parker*, 83 Ind. 96; *Conner v. Neff*, 2 Ind. App. 364, 27 N. E.

615. *Ia.*—*Carnes v. Grandall*, 4 Iowa

151. *Kan.*—*Berkley v. Tootle*, 62 Kan. 701, 64 Pac. 620. *La.*—*Chapman v. Nelson*, 31 La. Ann. 341; *New Orleans*

*Canal & Bkg. Co. v. Pike*, 28 La. Ann. 896; *Watt & Co. v. Hendry*, 23 La.

Ann. 594. *Me.*—*State v. Brown*, 41 Me. 535; *Vallance v. Sawyer*, 4 Me. 62;

*Mitchell v. Osgood*, 4 Greenl. 124. *Mass.* *Osgood v. Thurston*, 23 Pick. 110. *Mich.*

*McRoberts v. Lyon*, 79 Mich. 25, 44 N. W. 160. *Mo.*—*Wolz v. Venard*, 253

Mo. 67, 161 S. W. 760; *Wilson v. Tiernan*, 3 Mo. 577. *Neb.*—*J. I. Case*

*Thresh. Mach. Co. v. Edmisten*, 85 Neb. 272, 122 N. W. 891; *Moline, Milburn*

*& Stoddard Co. v. Van Boskirk*, 78 Neb. 728, 111 N. W. 605; *Hunter v.*

*Leahy*, 18 Neb. 80, 24 N. W. 680. *N. H.*—*State v. Kinne*, 39 N. H. 129.

*N. J.*—*Tindall v. Carson*, 16 N. J. L. 94; *Boylan v. Anderson*, 3 N. J. L.

529. *N. Y.*—*McGill v. Perrigo*, 9 Johns. 259. *N. C.*—*Griffis v. McNeill*,

61 N. C. 175. *Ohio.*—*Taylor v. Bonte*, 5 Ohio Dec. 137, 3 Am. L. Rec. 220.

*Pa.*—*McMurray's Admr. v. Hopper*, 43 Pa. 468; *In re Dougherty's Est.*, 9

*Watts & S.* 189, 42 Am. Dec. 326. *S. C.* *Grimke's Exrs. v. Mayrant*, 2 Brev.

202. *Tenn.*—*McIntosh v. Paul*, 6 Lea

45. *Tex.*—*Schmidtke v. Miller*, 71 Tex. 103, 8 S. W. 638; *Masterson v. Cundiff*,

58 Tex. 472; *Perkins v. Hume*, 10 Tex. 50; *Carothers v. Lange* (Tex. Civ.

App.), 55 S. W. 580; *City Nat. Bank v. Swink* (Tex. Civ. App.), 49 S. W.

130. *Vt.*—*Gibson v. Davis*, 22 Vt. 374; *Carlton v. Young*, 1 Aik. 332.

[a] A writ of scire facias (1) to revive a judgment must issue from the court wherein the judgment was rendered (*Ark.*—*Fowler v. Thurmond*, 13

Ark. 259. *Ill.*—*Challener v. Niles*, 78 Ill. 78. *Ia.*—*Mudge v. Livermore*, 148

**Judgments of Inferior Courts.**—Judgments of justices of the peace and other inferior courts may be revived by superior courts to which they are transferred by transcript,<sup>23</sup> even where they have become dormant before transfer.<sup>24</sup>

**V. PARTIES TO PROCEEDINGS TO REVIVE.**—A. IN WHOSE FAVOR JUDGMENT REVIVED.—The judgment plaintiff,<sup>25</sup> or his attorney of record,<sup>26</sup> or trustee in bankruptcy,<sup>27</sup> or administrator or personal representative, in case of his death,<sup>28</sup> may maintain proceedings for the revival of a judgment, as may a surety,<sup>29</sup> or joint defendant,<sup>30</sup> who has paid the judgment.

In the absence of a statute authorizing the assignee of a judgment to bring proceedings for its revival in his own name,<sup>31</sup> such proceedings must be brought in the name of the judgment plaintiff.<sup>32</sup>

Iowa 472, 123 N. W. 199. **N. Y.**—Hammond v. Harris, 2 How. Pr. 115. **N. C.** Lee v. Eure, 82 N. C. 428. **Pa.**—White v. Guthrie, 2 Pa. Co. Ct. 7), (2) unless transferred from an inferior to a higher court. Lubker v. Grand Detour Plow Co., 53 Neb. 111, 73 N. W. 457; Miller v. Fees, 3 Pa. L. J. 243, 2 Clark 27.

[b] **Where a county court is abolished**, and seven years later another court is created by special act of the legislature, without provision for succession to the former, a judgment of the former cannot be revived by the latter. Kinard v. Mangham, 135 Ga. 25, 68 S. E. 788.

23. **D. C.**—Green v. Mann, 19 App. Cas. 243. **Ga.**—Kinard v. Mangham, 135 Ga. 25, 68 S. E. 788. **Neb.**—Garrison v. Aultman, 20 Neb. 311, 30 N. W. 61; Dennis v. Omaha Nat. Bank, 19 Neb. 675, 28 N. W. 512. **Pa.**—Smith v. Wehrly, 157 Pa. 407, 27 Atl. 700; Brannan v. Kelley, 8 Serg. & R. 479; Reichenbach v. Arnold, 4 Pa. L. J. 325, 2 Clark 527. **Tex.**—Ende v. Spencer, 38 Tex. 114.

24. Furer v. Holmes, 73 Neb. 393, 102 N. W. 764.

25. Copes v. Fultz, 1 Smed. & M. (Miss.) 623; Kincaid v. Cunningham, 118 Pa. 501, 12 Atl. 410.

[a] **A public officer**, in whose name a judgment has been rendered, must prosecute proceedings for its revival, and not the municipality. Calais v. Bradford, 51 Me. 414.

26. Martinez v. Vives, 32 La. Ann. 305, having a lien on the judgment for his services in procuring the same.

27. Brown v. Wygant, 163 U. S. 618, 16 Sup. Ct. 1159, 41 L. ed. 284.

28. **Ala.**—Baker v. Ingersoll, 37 Ala.

503. **Ill.**—Challenor v. Niles, 78 Ill. 78; Durham v. Heaton, 28 Ill. 264, 81 Am. Dec. 275. **Kan.**—Chumos v. Chumos, 93 Kan. 33, 143 Pac. 420. **N. D.** Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271. **Pa.**—McKinney v. Mehaffey, 7 Watts & S. 276.

[a] Proceeding to revive cannot be brought in the name of the judgment creditor after his death. Goreth v. Shipherd, 92 App. Div. 611, 86 N. Y. Supp. 849.

29. Peters v. McWilliams, 36 Ohio St. 155; Baily v. Brownfield, 20 Pa. 41.

30. Huckaby v. Sasser, 69 Ga. 603.

[a] **A surviving partner** (1) may, in his own name, revive a judgment rendered in favor of the partnership. Linn v. Downing, 216 Ill. 64, 74 N. E. 729, affirming 116 Ill. App. 454. (2) It is otherwise, however, where his name does not appear in the action or judgment record as a partner or party to the suit. Boyd v. Platner, 5 Mont. 226, 2 Pac. 346.

31. **Ia.**—Wright v. Parks, 10 Iowa 342. **Mo.**—Reyburn v. Handlan, 165 Mo. App. 412, 147 S. W. 846. **Mont.** Haupt v. Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698. **Neb.**—Brunke v. Gruben, 84 Neb. 14, 120 N. W. 435. **Pa.**—In re Ernst, 164 Pa. 87, 30 Atl. 371.

32. **Ark.**—Brearly v. Peay, 23 Ark. 172. **Ga.**—Macon v. Bibb County Academy, 7 Ga. 204. **Ind.**—Forbes v. Tiffany, 4 Ind. 204. **La.**—Marbury v. Pace, 30 La. Ann. 1330; Watt & Co. v. Hendry, 23 La. Ann. 594. **Mich.** McRoberts v. Lyon, 79 Mich. 25, 44 N. W. 160. **Mo.**—Goddard v. Delaney, 181 Mo. 564, 80 S. W. 886; Bick v. Tan-

Revival may be had in the name of the real party in interest, however, if the judgment creditor is dead.<sup>33</sup>

**B. AGAINST WHOM REVIVED.—1. Generally.**—It is necessary that all parties against whom a judgment was rendered shall be named as parties in a proceeding for its revival.<sup>34</sup> And if a party is dead, his personal representatives should be made parties defendant,<sup>35</sup> as should also heirs or devisees taking realty sought to be bound by the judgment.<sup>36</sup> It is otherwise, however, where there is personal estate to satisfy the judgment debt.<sup>37</sup>

It is not necessary to make a naked trustee a party to such proceedings.<sup>38</sup>

**Terre-Tenants.**—In a proceeding to revive a judgment so as to enforce its lien against land held by a terre-tenant, he should be made a party thereto.<sup>39</sup>

zey, 181 Mo. 515, 80 S. W. 902; Strother v. Hilliker, 120 Mo. App. 165, 96 S. W. 482. **Ohio.**—Welsh v. Childs, 17 Ohio St. 319. **Tex.**—Bludworth v. Poole, 21 Tex. Civ. App. 551, 53 S. W. 717. **W. Va.**—Wells v. Graham, 39 W. Va. 605, 20 S. E. 576.

33. Moline, Milburn & Stoddard Co. v. Van Boskirk, 78 Neb. 728, 111 N. W. 605.

[a] **The equitable owner** of a judgment may bring proceedings for its revival. Clark v. Digges, 5 Gill (Md.) 109.

34. **U. S.**—Grantland v. Memphis, 12 Fed. 287. **Cal.**—Osborn v. Wainwright, 52 Cal. 312. **Ga.**—Funderburk v. Smith, 74 Ga. 515. **Pa.**—Messmore v. Williamson, 189 Pa. 73, 41 Atl. 1110, 69 Am. St. Rep. 791; Conyngham v. Walter, 95 Pa. 85; Callahan v. Fahey, 10 Pa. Co. Ct. 488; Heller v. Jones' Lessee, 4 Bin. 61. **Tenn.**—Wessell v. Gross (Tenn. Ch. App.), 57 S. W. 372.

35. See the following: **U. S.**—United States v. Houston, 48 Fed. 207. **Ala.**—Fitzpatrick v. Edgar, 5 Ala. 499. **Ark.**—Powell v. Macon, 40 Ark. 541. **Del.**—Wilson v. Furey, 3 Penne. 278, 51 Atl. 875. **Ga.**—Wright v. Harris, 24 Ga. 415. **Ill.**—Cunningham v. Doran, 18 Ill. 385. **Ind.**—Graves v. Skeels, 6 Ind. 107. **Kan.**—Halsey v. Van Vliet, 27 Kan. 474. **Md.**—Tiers v. Codd, 87 Md. 447, 39 Atl. 1044. **Pa.**—Messmore v. Williamson, 189 Pa. 73, 41 Atl. 1110, 69 Am. St. Rep. 791; Grover v. Boon, 124 Pa. 399, 16 Atl. 885; Middleton's Exrs. v. Middleton, 106 Pa. 252; McMillan v. Red, 4 Watts & S. 237; Specht v. Sipe, 15 Pa. Super. 207; Brown v. Webb, 1 Watts 411; Righter v. Rittenhouse, 3 Rawle 273. **S. C.**—Cheraw, etc. R.

Co. v. Marshall, 40 S. C. 59, 18 S. E. 247; Leitner v. Metz, 32 S. C. 383, 10 S. E. 1082. **Can.**—Robinson v. Chisholm, 27 Nova Scotia 74.

See also *infra*, V, B, 3, note 44.

[a] **A judgment may be revived against the personal representative alone**, for purpose of lien and execution. Middleton's Exrs. v. Middleton, 106 Pa. 252.

36. **U. S.**—Walden v. Craig, 14 Pet. 147, 10 L. ed. 393. **Ala.**—Ogden v. Smith, 14 Ala. 428; Fitzpatrick v. Edgar, 5 Ala. 499. **Del.**—Wilson v. Furey, 3 Penne. 278, 51 Atl. 875. **Ill.**—Reynolds v. Henderson, 7 Ill. 110. **Ind.**—Graves v. Skeels, 6 Ind. 107. **Md.**—Tessier v. Wyse, 3 Bland 28. **Miss.**—Langston v. Abney, 43 Miss. 161. **Mo.**—Stewart v. Gibson, 71 Mo. App. 232; Clifton v. Anderson, 40 Mo. App. 616. **Ohio.**—Douglas v. Waddle, 8 Ohio 209; Miami Exporting Co. v. Halley's Heirs, 7 Ohio (pt. 1) 11. **Pa.**—Collins v. Phillips, 236 Pa. 386, 84 Atl. 854; Messmore v. Williamson, 189 Pa. 73, 41 Atl. 1110, 69 Am. St. Rep. 791; Appeal of Williamson, 1 Monag. 241, 17 Atl. 8; McMurray's Admr. v. Hopper, 43 Pa. 468; Kessler's Appeal, 32 Pa. 390; Hauck v. Gundaker, 21 Pa. Co. Ct. 12; Gray's Estate, 3 Del. Co. 325.

[a] **Where the judgment became a lien on the lands of the defendant before his death**, it is not necessary to bring in the heirs. Colenburg v. Venter, 173 Pa. 113, 33 Atl. 1046.

37. Strong v. Lee, 44 How. Pr. (N. Y.) 60.

38. Bowers v. Harner, 3 Phila. (Pa.) 146.

39. **Del.**—Wilson v. Furey, 3 Penne. 278, 51 Atl. 875. **Ind.**—Hill v. Sutton,

**2. Executors and Administrators.**—In the event the original judgment debtor is dead, the action or proceedings for the revival of the judgment should be brought against his personal representatives,<sup>40</sup> unless the subject-matter of the judgment is land over which the executor or administrator has no control.<sup>41</sup>

**3. Joint Defendants.**—In a proceeding to revive a judgment recovered against joint defendants, all of such defendants must be made parties thereto,<sup>42</sup> unless there is statutory authority to the contrary.<sup>43</sup> In the event one of the joint defendants is dead, it is proper to make his personal representatives,<sup>44</sup> or heirs at law and terre-

47 Ind. 592. **Ia.**—Von Puhl v. Rucker, 6 Iowa 187. **Md.**—Wright v. Ryland, 92 Md. 645, 48 Atl. 163, 49 Atl. 1009, 53 L. R. A. 702; Tiers v. Codd, 87 Md. 447, 39 Atl. 1044. See Murphy's Lessee v. Cord, 12 Gill & J. 182. **N. Y.**—Campbell v. Rawdon, 18 N. Y. 412; Morton's Exrs. v. Croghan's Terre-Tenants, 20 Johns. 106. **Pa.**—Uhler v. Moses, 200 Pa. 498, 50 Atl. 231 (*reversing* 10 Pa. Super. 194); Landon v. Brown, 160 Pa. 538, 28 Atl. 921; Long v. McConnell, 158 Pa. 573, 28 Atl. 233; Meinweiser v. Hains, 110 Pa. 468, 2 Atl. 431; Kindt's Appeal, 102 Pa. 441; Porter v. Hitchcock, 98 Pa. 625; McCray v. Clark, 82 Pa. 457; Nyman's Appeal, 71 Pa. 447; Sames' Appeal, 26 Pa. 184; Nicholas v. Phelps, 15 Pa. 36; Geiger v. Hill, 1 Pa. 509; Roberts v. Williams, 5 Whart. 170, 34 Am. Dec. 549; Lusk v. Davidson, 3 Penr. & W. 229; Baum v. Custer, 10 Sad. 199, 13 Atl. 771; Stevenson v. Black, 1 Sad. 117, 1 Atl. 312; Barrell v. Adams, 26 Pa. Super. 635; Suter v. Findley, 5 Pa. Super. 163; Com. v. Rogers, 4 Clark 208; Duncan v. Flynn, 9 Pa. Co. Ct. 321; Day v. Willy, 3 Brewst. 43. **Tex.**—Robertson v. Coates, 65 Tex. 37.

*Contra.*—**U. S.**—Jackson v. Bank of United States, 5 Cranch C. C. 1, 13 Fed. Cas. No. 7,131. **Ky.**—Williams v. Fowler, 3 Mon. 316; Lunsford v. Turner, 5 J. J. Marsh. 104, 20 Am. Dec. 248; Thompson v. Dougherty, 3 J. J. Marsh. 564. **W. Va.**—Maxwell v. Leeson, 50 W. Va. 361, 40 S. E. 420, 88 Am. St. Rep. 875.

[a] Not necessary to join terre-tenants unless the original defendant is dead. Jackson v. Shaffer, 11 Johns. (N. Y.) 513.

40. **Ark.**—Powell v. Macon, 40 Ark. 541. **Ga.**—Wright v. Harris, 24 Ga. 415. **Kan.**—Halsey v. Van Vliet, 27

411; Righter v. Rittenhouse, 3 Rawle 273. **S. C.**—Cheraw, etc. R. Co. v. Marshall, 40 S. C. 59, 18 S. E. 247; Leitner v. Metz, 32 S. C. 383, 10 S. E. 1082.

41. Walden v. Craig, 14 Pet. (U. S.) 147, 10 L. ed. 393; Tessier v. Wyse, 3 Bland (Md.) 28. *Compare* Stewart v. Gibson, 71 Mo. App. 232.

42. **U. S.**—Walden v. Craig, 14 Pet. 147, 10 L. ed. 393. **Ark.**—Boling v. Fowler, 14 Ark. 27. **D. C.**—Simpson v. Minnix, 30 App. Cas. 582. **Ky.**—Murray's Admr. v. Baker, 5 B. Mon. 172. **Miss.**—McAfee v. Patterson, 2 Smed. & M. 593. **Neb.**—Fox v. Abbott, 12 Neb. 328, 11 N. W. 303. **Pa.**—Grenell v. Sharp, 4 Whart. 344. **Tex.**—Carson v. Moore, 23 Tex. 450; Rowland v. Harris (Tex. Civ. App.) 34 S. W. 295. **Eng.**—Sainsbury v. Pringle, 10 B. & C. 751, 21 E. C. L. 317; Panton v. Hall, 2 Salk. 598, 91 Eng. Reprint 507.

*Contra*, Vredenburg v. Snyder, 6 Iowa 39.

[a] Plaintiff is confined to the record, unless the loss of a part thereof is shown, in showing who were defendants. Lyle v. Bradford, 7 Mon. (Ky.) 111.

43. Greer v. State Bank, 10 Ark. 455; Richardson v. Painter, 80 Kan. 574, 102 Pac. 1099, 133 Am. St. Rep. 224. But see Hanson v. Jacks, 22 Ala. 549.

44. **U. S.**—United States v. Houston, 48 Fed. 207. **Kan.**—Richardson v. Painter, 80 Kan. 574, 102 Pac. 1099. **Ky.**—Gray's Admr. v. McDowell, 5 T. B. Mon. 501; Murray's Admr. v. Baker, 5 B. Mon. 172; Mitchell's Heirs v. Smith's Heirs, 1 Litt. 243. **Ohio.**—Zanesville Canal & Mfg. Co. v. Admr. of Granger, 7 Ohio 165. **Pa.**—Dowling v. McGregor, 91 Pa. 410; Com. v. Mateer, 16 Serg. & R. 416; Callahan v. Fahey, 10 Pa. Co. Ct. 488. **Tex.**—Hen-

tenants.<sup>45</sup> parties defendant with the surviving defendants, or the creditor may elect to proceed against the estate of the decedent alone.<sup>46</sup> or only against the surviving joint defendants.<sup>47</sup> If the judgment is both joint and several, it may be revived against one only.<sup>48</sup>

**VI. ACTIONS OR PROCEEDINGS FOR REVIVAL.** — A. GENERALLY. — The common law right to bring an action of debt on a judgment may usually be exercised independently of any other remedy for the revival of judgments.<sup>49</sup> Various remedies are provided by the statutes for the revival of judgments,<sup>50</sup> such as a separate<sup>51</sup> action

derson *v.* Vanhook, 24 Tex. 358; Rowland *v.* Harris (Tex. Civ. App.), 34 S. W. 295.

*Contra*, Stoner *v.* Stroman, 9 Watts & S. (Pa.) 85.

45. Ark.—Bolinger *v.* Fowler, 14 Ark. 27. Del.—Hallowell *v.* Brown, 8 Houst. 500, 32 Atl. 392. Ill.—Eastman *v.* Crawford, 126 Ill. App. 320. Ky. Calloway's Heirs *v.* Eubank, 4 J. J. Marsh. 280; Griffith's Heirs *v.* Wilson, 1 J. J. Marsh. 209.

46. Ark.—Finn *v.* Crabtree, 12 Ark. 597. Del.—Burton *v.* Rodney, 5 Harr. 441. Ga.—Wright *v.* Harris, 24 Ga. 415. W. Va.—Greathouse *v.* Morrison, 68 W. Va. 714, 70 S. E. 710.

47. U. S.—United States *v.* Houston, 48 Fed. 207. Ark.—Hubbard *v.* Bolls, 7 Ark. 442. Cal.—Doehla *v.* Phillips, 151 Cal. 488, 91 Pac. 330. Kan.—Richardson *v.* Painter, 80 Kan. 574, 102 Pac. 1099. Ky.—Huey's Admr. *v.* Redden's Heirs, 3 Dana 488. La.—Hammett *v.* Sprowl, 31 La. Ann. 325. Mo.—Glidden-Felt Mfg. Co. *v.* Robinson, 163 Mo. App. 488, 143 S. W. 1111. W. Va.—Greathouse *v.* Morrison, 68 W. Va. 714, 70 S. E. 710.

48. Patterson *v.* Walton, 119 N. C. 500, 26 S. E. 43.

49. Idaho.—Bashor *v.* Beloit, 20 Idaho 592, 119 Pac. 55. Ia.—McGlassen *v.* Wright, 10 Iowa 591; Carnes *v.* Crandall, 10 Iowa 377; Haven *v.* Baldwin, 5 Iowa 503. Kan.—Baker *v.* Hummer, 31 Kan. 325, 2 Pac. 808. La.—Pillet *v.* Edgar, 4 Rob. 724. Mo.—Bick *v.* Vaughn, 140 Mo. App. 595, 120 S. W. 618. Mont.—Haupt *v.* Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698. Neb.—Young *v.* City of Broken Bow, 94 Neb. 470, 143 N. W. 742. N. D.—Union Nat. Bank *v.* Ryan, 23 N. D. 482, 137 N. W. 449, Ann. Cas. 1914D, 741. Tex.—Tarlton *v.* Weir, 1 White & W. Civ. Cas., §142.

[a] Such is proper remedy where

judgment is against one or more of several defendants. Ky.—Coleman *v.* Edwards, 2 Bibb 595. Tex.—Carson *v.* Moore, 23 Tex. 450. Va.—Preston *v.* National Exch. Bank, 97 Va. 222, 33 S. E. 546.

Scire facias as concurrent remedy, see *infra*, VI, B, 1.

50. See generally the statutes

51. See generally the statutes, and the following: U. S.—Shainwald *v.* Lewis, 46 Fed. 839; Mitchell & Rammeburg Furniture Co. *v.* Sampson, 45 Fed. 111. Ala.—Reynolds *v.* Crook, 95 Ala. 570, 11 So. 412. Colo.—La Fitte *v.* Salisbury, 43 Colo. 248, 95 Pac. 1065. Ga.—Code, 1911, §5973; Hagins *v.* Blitch, 6 Ga. App. 839, 65 S. E. 1082. Idaho.—Bashor *v.* Beloit, 20 Idaho 592, 119 Pac. 55. Ind.—Bruce *v.* Osgood, 154 Ind. 375, 56 N. E. 25; Cox *v.* Stout, 85 Ind. 422; Faulkner *v.* Larrabee, 76 Ind. 154; Wyant *v.* Wyant, 38 Ind. 48; Flynn *v.* Northam, 44 Ind. App. 333, 89 N. E. 326. Kan.—Reeves *v.* Long, 63 Kan. 700, 66 Pac. 1030. La.—Bertron *v.* Stewart, 43 La. Ann. 1171, 10 So. 295; Burbridge *v.* Chinn, 34 La. Ann. 681; Levy *v.* Calhoun, 34 La. Ann. 413; Patrick's Succession, 30 La. Ann. 1071; Smith *v.* Palfrey, 28 La. Ann. 615; Drogre *v.* Moreau, 21 La. Ann. 639; Reynolds *v.* Horn, 4 La. Ann. 187; Weiller *v.* Blanks, 1 McGloin 296; Joyce *v.* Kearney, McGloin 243. Me.—Piscataquis *v.* Kingsbury, 73 Me. 326. Mont.—Haupt *v.* Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698. Neb.—Young *v.* City of Broken Bow, 94 Neb. 470, 143 N. W. 742; Clark *v.* Commercial Nat. Bank, 68 Neb. 764, 94 N. W. 958. N. Y.—Wallace *v.* Swinton, 64 N. Y. 188; Strang *v.* Lee, 2 Thomp. & C. 441; Goreth *v.* Shipherd, 92 App. Div. 611, 86 N. Y. Supp. 849. N. C. Jeffreys *v.* Yarborough, 16 N. C. 506. N. D.—Merchants' Nat. Bank *v.* Braithwaite, 7 N. D. 358, 75 N. W. 244, 66

for that purpose, a bill of revivor or supplemental petition,<sup>52</sup> a motion to revive, made upon proper notice to the adverse party,<sup>53</sup> an affidavit,<sup>54</sup> a suggestion,<sup>55</sup> a summons to show cause why the judgment should not be revived or enforced,<sup>56</sup> a writ of scire facias,<sup>57</sup> or some other proceeding invoking judicial action, whereby the adverse party is put upon notice and given an opportunity to resist the application.<sup>58</sup>

In a court of chancery, a decree may, in the absence of statute to the contrary, be revived by a bill of revivor.<sup>59</sup>

Am. St. Rep. 653. **Okl.**—Wilson v. McCornack, 10 Okla. 180, 61 Pac. 1068. **Tex.**—Bridge v. Samuelson, 73 Tex. 522, 11 S. W. 539; Carson v. Moore, 23 Tex. 450; Huston v. Deen, 19 Tex. 236. **Utah.**—Davidson v. Hunter, 22 Utah 117, 61 Pac. 556. **Wash.**—Meikle v. Cloquet, 44 Wash. 513, 87 Pac. 841; Sears v. Kilbourne, 28 Wash. 194, 68 Pac. 450. **Wis.**—Ingraham v. Champion, 84 Wis. 235, 54 N. W. 398. **Can.** Caspar v. Keachie, 41 U. C. Q. B. 599. [a] Action necessary in the case of a foreign judgment, or where the judgment debtor is dead. Beckham's Succession, 16 La. Ann. 352.

52. See generally the statutes, and the following: **Cal.**—Doehla v. Phillips, 151 Cal. 488, 91 Pac. 330. **Idaho.** Bashor v. Beloit, 20 Idaho 592, 119 Pac. 55. **Neb.**—Moline, Milburn & Stoddard Co. v. Van Boskirk, 78 Neb. 728, 111 N. W. 605; Keith v. Bruder, 77 Neb. 215, 109 N. W. 172. **Okl.** Noyes v. French, 20 Okla. 515, 94 Pac. 546.

53. See generally the statutes, and the following: **Cal.**—Doehla v. Phillips, 151 Cal. 488, 91 Pac. 330; Hitchcock v. Caruthers, 100 Cal. 100, 34 Pac. 627; Cortez v. San Francisco Superior Ct., 86 Cal. 274, 24 Pac. 1011, 21 Am. St. Rep. 37. **Idaho.**—Bashor v. Beloit, 20 Idaho 592, 119 Pac. 55. **Kan.**—Schultz v. American Clock Co., 39 Kan. 334, 18 Pac. 221; Gruble v. Wood, 27 Kan. 535; Alford v. Hoag, 8 Kan. App. 141, 54 Pac. 1105; Selders v. Boyle, 5 Kan. App. 451, 49 Pac. 320. **Miss.**—Chew v. Peale, 12 Smed. & M. 700. **Neb.**—St. Paul Harvester Co. v. Mahs, 82 Neb. 336, 117 N. W. 702. **N. C.**—J. S. Martin & Co. v. Briscoe, 143 N. C. 353, 55 S. E. 782, motion upon affidavit and notice. **Ohio.**—Neracher v. Geier, 12 Ohio Cir. Ct. 259, 4 Ohio Cir. Dec. 559.

54. See generally the statutes and Union Nat. Bank v. Ryan, 23 N. D.

482, 137 N. W. 449, Ann. Cas. 1914D, 741.

55. Dibble v. Norton, 44 Miss. 158. [a] An administrator de bonis non may, under a Mississippi statute, upon the death, resignation or removal of any executor or administrator, by proper suggestion to the court of the death of his predecessor have any judgment recovered by such predecessor revived in his own name as successor without a scire facias proceeding therefor. Dibble v. Norton, 44 Miss. 158.

56. See generally the statutes, and the following: **Neb.**—Garrison v. Aultman, 20 Neb. 311, 30 N. W. 61. **N. Y.** Mills v. Thursby, 12 How. Pr. 385, 2 Abb. Pr. 432. **S. C.**—Ex parte Graham, 54 S. C. 163, 32 S. E. 67; Witherpoon v. Twitty, 43 S. C. 348, 21 S. E. 256; Rowland v. Shockley, 43 S. C. 246, 21 S. E. 21; Lawton v. Perry, 40 S. C. 255, 18 S. E. 861; Leitner v. Metz, 32 S. C. 383, 10 S. E. 1082; Adams v. Richardson, 32 S. C. 139, 10 S. E. 931; McDowall v. Reed, 28 S. C. 466, 6 S. E. 300; Cash v. Lyle, 2 Brev. (S. C.) 183.

57. See *infra*, VI, B.

58. **U. S.**—Brockway v. Oswego, 40 Fed. 612; Devereaux v. Brownsville, 29 Fed. 742. **Ga.**—Welch v. Butler, 24 Ga. 445. **Ill.**—Ludwig v. Huek, 45 Ill. App. 651. **Kan.**—Kothman v. Skaggs, 29 Kan. 5. **N. Y.**—Lyons Nat. Bank v. Schuler, 115 App. Div. 859, 101 N. Y. Supp. 62. **Okl.**—Neal v. Le Breton, 14 Okla. 538, 78 Pac. 376. **Can.**—Lefurgey v. Harrington, 36 Nova Scotia 88.

[a] A decree for the sale of lands will revive a judgment. Anderson v. Baughman, 69 S. C. 38, 48 S. E. 38.

59. **Ill.**—Cunningham v. Doran, 18 Ill. 385. **Ky.**—Logan v. Cloyd, 1 A. K. Marsh. 201. **N. C.**—Jeffreys v. Yarrowborough, 16 N. C. 506. **Ohio.**—Curtis v. Hawa, 14 Ohio 185.

**Joinder.**—A proceeding to correct a judgment may be joined with one to revive it.<sup>60</sup>

**B. SCIRE FACIAS TO REVIVE.**<sup>61</sup>—**1. Generally.**—In many jurisdictions, the proper method of reviving a judgment is by writ of scire facias to the adverse party to show cause why the judgment should not be revived and its lien continued.<sup>62</sup> This remedy is generally available for the revival of judgments in the federal courts.<sup>63</sup> Such proceeding is regarded as a continuation of the original action, rather than in the nature of a new suit.<sup>64</sup>

60. *Taylor v. Doom*, 43 Tex. Civ. App. 59, 95 S. W. 4. See also *infra*, V, B, 1, note 65.

61. As to scire facias generally, see the title "**Scire Facias.**"

62. See generally the statutes, and the following: **U. S.**—*Davis v. Davis*, 174 Fed. 786, 98 C. C. A. 494; *Collin County Nat. Bank v. Hughes*, 152 Fed. 414, 81 C. C. A. 556; *Wonderly v. Lafayette County*, 74 Fed. 702; *Offutt v. Henderson*, 2 Cranch C. C. 553, 18 Fed. Cas. No. 10,451. **Ark.**—*Waldstein v. Williams*, 101 Ark. 404, 142 S. W. 834, 37 L. R. A. (N. S.) 1162. **D. C.**—*Collins v. McBlair*, 29 App. Cas. 354. **Fla.**—*Union Bank v. Powell's Heirs*, 3 Fla. 175, 52 Am. Dec. 367. **Ga.**—*Atwood v. Hirsch Bros.*, 123 Ga. 734, 51 S. E. 742; *Hagins v. Blitch*, 6 Ga. App. 839, 65 S. E. 1082. **Ill.**—*Bank of Eau Claire v. Reed*, 232 Ill. 238, 83 N. E. 820. **Ia.**—*Carnes v. Crandall*, 4 Iowa 151. **Me.**—*Kennebec Purchase v. Davis*, 1 Greenl. 309. **Md.**—*Brooks v. Preston*, 106 Md. 693, 68 Atl. 294. **Mo.**—*Garner v. Hays*, 3 Mo. 436; *Glidden-Felt Mfg. Co. v. Robinson*, 163 Mo. App. 488, 143 S. W. 1111; *Bick v. Dixon*, 148 Mo. App. 703, 129 S. W. 254 (only made in Missouri); *Bick v. Vaughn*, 140 Mo. App. 595, 120 S. W. 618; *Holt v. Mansfield*, 83 Mo. App. 191; *Armstrong v. Crooks*, 83 Mo. App. 141. **N. C.**—*Kingsbury v. Hughes*, 61 N. C. 328; *Lewis v. Fagan*, 13 N. C. 298. **Pa.**—*In re Miller's Estate*, 243 Pa. 328, 90 Atl. 77; *Keystone Brewing Co. v. Schermer*, 241 Pa. 361, 88 Atl. 657; *City Bldg., etc. Assn. v. Nickey*, 21 Pa. Co. Ct. 226. **Tenn.**—*Keith v. Metcalf*, 2 Swan 74. **Tex.**—*Collin County Nat. Bank v. Hughes* (Tex. Civ. App.), 154 S. W. 1181; *Delaune v. Beaumont Irr. Co.* (Tex. Civ. App.), 136 S. W. 518; *Coleman v. Zapp* (Tex. Civ. App.), 135 S. W. 730. **Va.**

*White's Admr. v. Palmer*, 110 Va. 490, 66 S. E. 44.

63. *Davis v. Davis*, 174 Fed. 786, 98 C. C. A. 494; *Collin County Nat. Bank v. Hughes*, 152 Fed. 414, 81 C. C. A. 556. See generally the title "**Scire Facias.**"

64. **U. S.**—*Davis v. Packard*, 7 Pet. 276, 8 L. ed. 684; *Fitzhugh v. Blake*, 2 Cranch C. C. 37, 9 Fed. Cas. No. 4,840; *Davis v. Davis*, 174 Fed. 786, 98 C. C. A. 494; *Collin County Nat. Bank v. Hughes*, 152 Fed. 414, 81 C. C. A. 556; *Lafayette v. Wonderly*, 92 Fed. 313, 34 C. C. A. 360; *Hatch v. Eustis*, 1 Gall. 160, 11 Fed. Cas. No. 6,207; *Fitzhugh v. Blake*, 2 Cranch C. C. 37, 9 Fed. Cas. No. 4,840. **Ala.**—*Baker v. Ingersoll*, 37 Ala. 503; *Hanson v. Jacks*, 22 Ala. 549. **Ark.**—*Waldstein v. Williams*, 101 Ark. 404, 142 S. W. 834, 37 L. R. A. (N. S.) 1162; *Calhoun v. Adams*, 43 Ark. 238; *Hanly v. Adams*, 15 Ark. 232; *Blackwell v. State*, 3 Ark. 320. **Conn.**—*Ensworth v. Davenport*, 9 Conn. 390. **Fla.**—*Brown v. Harley*, 2 Fla. 159. **Ga.**—*Funderburk v. Smith*, 74 Ga. 515; *Dickinson v. Allison*, 10 Ga. 557; *Chapman v. Taliaferro*, 1 Ga. App. 235, 58 S. E. 128. **Haw.**—*Punilama v. Mele*, 16 Hawaii 48. **Ill.**—*Smith v. Stevens*, 133 Ill. 183, 24 N. E. 511; *Challenor v. Niles*, 78 Ill. 78; *People v. Compher*, 14 Ill. 447. *Compare* *Gibbons v. Goodrich*, 3 Ill. App. 590, holding that scire facias is an action within the meaning of the statute of limitations. **Ia.**—*Denegre v. Haun*, 13 Iowa 240. **Me.**—*Adams v. Rowe*, 11 Me. 89, 25 Am. Dec. 266. **Md.**—*Brooks v. Preston*, 106 Md. 693, 68 Atl. 294; *Kirkland v. Krebs*, 34 Md. 93; *Bridges v. Adams*, 32 Md. 577; *Huston v. Ditto*, 20 Md. 305. **Mass.**—*Gray v. Thrasher*, 104 Mass. 373; *Comstock v. Holbrook*, 16 Gray 111. **Miss.**—*Vick v. Chewing's Heirs*, 31 Miss. 201; *Douthit v. State*, 30 Miss. 133. **Mo.**—*Peak v. Peak*, 181 S. W. 394;

The remedy by scire facias may be pursued concurrently with other remedies.<sup>65</sup> It may be issued while the right of execution exists.<sup>66</sup>

**2. How Writ Obtained.**—A writ of scire facias to revive a judgment may issue upon praecipe or motion, which is not treated as a petition, nor subject to the rules of pleading applicable thereto,<sup>67</sup> or upon the parol application of the judgment creditor, to the clerk of the court having custody of the record, in vacation,<sup>68</sup> and no order of the court is necessary to authorize its issue,<sup>69</sup> except in a few states where, after a judgment has reached a certain age, leave of court must be first obtained upon an application supported<sup>70</sup> by an

*Sutton v. Cole*, 155 Mo. 206, 55 S. W. 1052 (*overruling* *Milsap v. Wildman*, 5 Mo. 425); *Ellis v. Jones*, 51 Mo. 180; *Humphreys v. Lundy*, 37 Mo. 320; *State v. Randolph*, 22 Mo. 474; *Glidden-Felt Mfg. Co. v. Robinson*, 163 Mo. App. 488, 143 S. W. 1111; *Bick v. Vaughn*, 140 Mo. App. 595, 120 S. W. 618; *Long v. Thormond*, 83 Mo. App. 227, 231; *Kratz v. Preston*, 52 Mo. App. 251. **Neb.** *Moline, Milburn & Stoddard Co. v. Van Boskirk*, 78 Neb. 728, 111 N. W. 605; *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170, 80 N. W. 484; *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365. **N. Y.** *Dickey v. Craig*, 5 Paige 283; *McGill v. Perrigo*, 9 Johns. 259. **Ohio.**—*Wolf v. Pounsford*, 4 Ohio 397. **Pa.**—*Eldred v. Hazlett's Heirs*, 38 Pa. 16; *Irwin v. Nixon's Heirs*, 11 Pa. 419, 51 Am. Dec. 559. **S. C.**—*Ingram v. Belk*, 2 Strobb. 207, 47 Am. Dec. 591. **Tex.**—*Schmidtke v. Miller*, 71 Tex. 103, 8 S. W. 638; *Masterson v. Cundiff*, 58 Tex. 472; *Hopkins v. Howard*, 12 Tex. 7; *Perkins v. Hume*, 10 Tex. 50; *Collin County Nat. Bank v. Hughes* (Tex. Civ. App.), 154 S. W. 1181; *Delaune v. Beaumont Irr. Co.* (Tex. Civ. App.), 136 S. W. 518; *Coleman v. Zapp* (Tex. Civ. App.), 135 S. W. 730. **Vt.**—*State Treasurer v. Foster*, 7 Vt. 52. **Va.**—*White's Admr. v. Palmer*, 110 Va. 490, 66 S. E. 44; *Lavell v. McCurdy's Exrs.*, 77 Va. 763.

*Contra*, *Greenway v. Dare*, 6 N. J. L. 305; *Bilbo v. Alden*, 4 Heisk. (Tenn.) 31; *Bank of the State v. Vance's Admr.*, 9 Yerg. (Tenn.) 471, *modifying* *Carter v. Carriger's Admr.*, 3 Yerg. (Tenn.) 411, 24 Am. Dec. 585. See generally the title "Scire Facias."

[a] Scire facias to revive a judgment may be regarded as a suit thereon, when it is not the proper mode of revival. *Hanson v. Jacks*, 22 Ala 549.

**65. U. S.**—*Lafayette v. Wonderly*, 92 Fed. 313, 34 C. C. A. 360, with action of debt. **Ark.**—*Brearily v. Peay*, 23 Ark. 172. **Mo.**—*Garner v. Hays*, 3 Mo. 436. **Tex.**—*Houston v. Emery*, 76 Tex. 282, 13 S. W. 264.

[a] Notice of a motion to amend the judgment may be united with a scire facias to revive the same judgment. *Glass v. Glass*, 24 Ala. 468.

**66. U. S.**—*Brown v. Chesapeake, etc. Canal Co.*, 4 Fed. 770, 14 Hughes 584. **Ala.**—*Ogden v. Smith*, 4 Ala. 428. **Ga.**—*Fuleher v. Mandell*, 83 Ga. 715, 10 S. E. 582. **Md.**—*Lambson v. Moffett*, 61 Md. 426. **Miss.**—*Vick v. Chewing*, 31 Miss. 201. **Mo.**—*Goddard v. Delaney*, 181 Mo. 564, 80 S. W. 886.

**67. Reyburn v. Handlan**, 165 Mo. App. 412, 147 S. W. 846; *Bick v. Vaughn*, 140 Mo. App. 595, 120 S. W. 618. **68. Ga.**—*Hill & Co. v. Neal*, 52 Ga. 618.

**92. Ky.**—*Edwards v. Coleman*, 2 A. K. Marsh. 249. **Pa.**—*Chambers v. Carson*, 2 Whart. 365; *Lesley v. Nones*, 7 Serg. & R. 410.

**69. Ga.**—*Hill & Co. v. Neal*, 52 Ga. 618. **92. Ky.**—*Edwards v. Coleman*, 2 A. K. Marsh. 249. **Pa.**—*Chambers v. Carson*, 2 Whart. (Pa.) 365; *Lesley v. Nones*, 7 Serg. & R. 410.

**70. Del.**—*Buker v. Carroll*, 1 Penne. 112, 39 Atl. 784. **Mo.**—*Kincaid v. Griffith*, 64 Mo. App. 673. **Neb.**—*Furer v. Holmes*, 73 Neb. 393, 102 N. W. 764. **N. J.**—*Pears v. Bache*, 1 N. J. L. 206. **N. Y.**—*State Bank v. Eden*, 17 Johns. 105; *Lansing v. Lyons*, 9 Johns. 84. **N. C.**—*Hinton v. Oliver*, 19 N. C. 519. **Tenn.**—*Whitworth v. Thompson*, 8 Lea 480; *Keith v. Metcalf*, 2 Swan 74.

[a] Where affidavit is required to revive a judgment after the lapse of twenty years, the objection to revival without affidavit may be cured by

affidavit that the judgment remains unsatisfied, unless this procedure is avoided by agreement of the parties.<sup>71</sup>

**3. Form and Sufficiency of Writ.**<sup>72</sup> — a. *Generally.* — A scire facias to revive a judgment, being a judicial writ, must pursue the nature of the judgment.<sup>73</sup> It should show the court from which it issues,<sup>74</sup> and to which it is made returnable;<sup>75</sup> name the court wherein the judgment sought to be revived was rendered,<sup>76</sup> and the term thereof;<sup>77</sup> describe the parties to be charged;<sup>78</sup> accurately set forth and describe the judgment upon which it is founded,<sup>79</sup> as to amount and date of recovery,<sup>80</sup> the parties named therein,<sup>81</sup> and state the

amendment. *Fogg v. Gibbs*, 8 Baxt. (Tenn.) 464.

**71.** *Lyon v. Cleveland*, 170 Pa. 611, 33 Atl. 143, 50 Am. St. Rep. 782, 30 L. R. A. 400; *Landon v. Brown*, 160 Pa. 538, 28 Atl. 921.

[a] Consent to the revival of a judgment will operate to estop the defendant from afterwards objecting to, or defending against such revival. *McLain v. Parker*, 88 Kan. 717, 129 Pac. 1140.

[b] **Amicable Scire Facias.** — In Pennsylvania the practice permits a judgment to be revived by a written consent thereto, or agreement, in the nature of a writ of scire facias with confession of the judgment set out, signed by the person to be bound by the revival, which must be docketed, but requires no judicial action to give it the force and effect of a judgment of revival on scire facias proceedings. *Lyon v. Cleveland*, 170 Pa. 611, 33 Atl. 143, 50 Am. St. Rep. 782, 30 L. R. A. 400; *Landon v. Brown*, 160 Pa. 538, 28 Atl. 921; *Yeager's Appeal*, 129 Pa. 268, 18 Atl. 137; *Nyman's Appeal*, 71 Pa. 447; *Edwards' Appeal*, 66 Pa. 89; *Diese v. Fackler*, 58 Pa. 109; *In re Sames' Appeal*, 26 Pa. 184; *Reed's Appeal*, 7 Pa. 65; *McCleary's Appeal*, 1 Watts & S. 299; *Stark v. Overfield*, 1 C. Pl. 36; *Armstrong v. Barrowcliff*, 1 C. Pl. 31; *Campbell's Appeal*, 22 Pa. Super. 432; *Dreifus v. Denmark*, 11 Phila. 612; *Railroad Co. v. Mercer*, 11 Phila. 226.

**72.** See generally the title "**Scire Facias.**"

**73.** *Ark.* — *Calhoun v. Adams*, 43 Ark. 238. *Tex.* — *Carson v. Moore*, 23 Tex. 450. *Va.* — *White's Admr. v. Palmer*, 110 Va. 490, 66 S. E. 44.

**74.** *Anthony v. Humphries*, 9 Ark. 176.

**Jurisdiction of proceedings to revive,** see *supra*, IV.

**75.** *Anthony v. Humphries*, 9 Ark. 176.

**76.** *Ala.* — *Duncan v. Hargrove*, 18 Ala. 77. *Ky.* — *Wood v. Coghill*, 7 Mon. 601; *Coleman v. Edwards*, 4 Bibb 347. *Pa.* — *Miller v. Fees*, 3 Pa. L. J. 243, 2 Clark 27.

**77.** *Coleman v. Edwards*, 4 Bibb (Ky.) 347; *Wood v. Coghill*, 7 Mon. (Ky.) 601.

**78.** *Pickett v. Pickett*, 1 How. (Miss.) 267; *Dougherty v. Hurt's Heirs*, 6 Humph. (Tenn.) 430.

**Parties to proceedings to revive,** see *supra*, V.

**79.** *U. S.* — *Green v. Watkins*, 6 Wheat. (U. S.) 260, 5 L. ed. 256. *Ala.* — *Toulmin v. Bennett*, 3 Stew. & P. 220. *Ky.* — *Ward v. Prather's Admr.*, 1 J. J. Marsh. 4. *Md.* — *McKnew v. Duvall*, 45 Md. 501; *Warfield v. Brewer*, 4 Gill 265. *N. C.* — *Barrow v. Arrenton*, 23 N. C. 223. *Ohio* — *Wolf v. Pounsford*, 4 Ohio 397. *Pa.* — *Landon v. Brown*, 160 Pa. 538, 28 Atl. 921; *Nichter v. Cummings*, 60 Pa. 441; *Arrison v. Com.*, 1 Watts 374. *S. C.* — *Cash v. Lyle*, 2 Brev. 183. *Tex.* — *Carson v. Moore*, 23 Tex. 450; *Davidson v. State*, 20 Tex. 649; *Delaune v. Beaumont Irr. Co.* (Tex. Civ. App.), 136 S. W. 518. *Utah* — *Davidson v. Hunter*, 22 Utah 117, 61 Pac. 556.

**What judgments may be revived,** see *supra*, II.

**80.** *U. S.* — *Brown v. Chesapeake, etc. Canal Co.*, 4 Fed. 770, 4 Hughes 584. *Ala.* — *Barron v. Tart*, 19 Ala. 78. *Ark.* — *Bolinger v. Fowler*, 14 Ark. 27. *Ohio* — *Wolf v. Pounsford*, 4 Ohio 397. *Pa.* — *Deitrich's Appeal*, 107 Pa. 174; *Park v. Webb*, 3 Phila. 32. *S. C.* — *Porter v. Brisbane*, 1 Brev. 456. *Va.* — *White's Admr. v. Palmer*, 110 Va. 490, 66 S. E. 44.

**81.** *Ind.* — *Allen v. Chadsey*, 1 Ind.

demand against which defendant is cited to show cause,<sup>82</sup> without substantial variance from the judgment to be revived.<sup>83</sup>

The writ must state facts sufficient to show grounds for its issuance,<sup>84</sup> and show plaintiff's right of recovery against the parties sought to be charged with the lien of the judgment,<sup>85</sup> in the manner of a declaration, that the defendants may properly plead thereto.<sup>86</sup> Where these are heirs or terre-tenants, the lands sought to be subjected to the lien of the judgment should be particularly described in the writ.<sup>87</sup>

b. *Amendment of Writ.*—A variance in the writ of scire facias which is merely formal, or an irregularity which does not affect the

399, 1 Smith 200. **Pa.**—Deitrich's Appeal, 107 Pa. 174. **Va.**—White's Admr. v. Palmer, 110 Va. 490, 66 S. E. 44; Richardson v. Prince George Justices, 11 Gratt. (52 Va.) 190.

82. **Ala.**—Glass v. Glass, 24 Ala. 468. **D. C.**—Starkweather v. West End Nat. Bank, 21 App. Cas. 281. **Pa.**—In re Cake, 186 Pa. 412, 40 Atl. 568; Cornelius v. Junior, 5 Phila. 171. **Tenn.**—Frierson v. Harris, 5 Coldw. 146, 94 Am. Dec. 220.

83. **Neb.**—Lubker v. Grand Detour Plow Co., 53 Neb. 111, 73 N. W. 457. **Pa.**—In re Dougherty's Est., 9 Watts & S. 189, 42 Am. Dec. 326. **Tex.**—De-laune v. Beaumont Irr. Co. (Tex. Civ. App.), 136 S. W. 518.

84. **Ala.**—Miller v. Shackelford, 16 Ala. 95. **Ark.**—Hicks v. State, 3 Ark. 313. **Fla.**—Union Bank v. Powell's Heirs, 3 Fla. 175, 52 Am. Dec. 367; Brown v. Harley, 2 Fla. 159. **Ill.**—Wilson v. School Trustees, 138 Ill. 285, 27 N. E. 1103; Smith v. Stevens, 133 Ill. 183, 24 N. E. 511; Albin v. People, 46 Ill. 372. **Ind.**—Davidson v. Alvord, 3 Ind. 1; Graham v. Smith, 1 Blackf. 414; Lasselle v. Godfroy, 1 Blackf. 297. **Ky.**—Wood v. Coghill, 7 Mon. 601; Dozier v. Gore, 1 Litt. 163; Huey's Admr. v. Redden's Heirs, 3 Dana 488; Griffith's Heirs v. Wilson, 1 J. J. Marsh. 209. **Md.**—Nesbit v. Manro, 11 Gill & J. 261; Warfield v. Brewer, 4 Gill 265. **Mo.**—Bick v. Vaughn, 140 Mo. App. 595, 120 S. W. 618. **Ohio.**—Hough's Lessee v. Norton, 9 Ohio 45; Weaver v. Reese, 6 Ohio 418; Union Bank v. Meigs' Admx., 5 Ohio 312; Wolf v. Pounsford, 4 Ohio 397; McVickar v. Ludlow's Heirs, 2 Ohio 246. **Pa.**—Hummel v. Lilly, 188 Pa. 463, 41 Atl. 613, 68 Am. St. Rep. 879. **Tex.**—Waller v. Huff, 9 Tex. 530; Henry v. Red Water

Lumb. Co., 46 Tex. Civ. App. 179, 102 S. W. 749. **Va.**—Gedney v. Com., 14 Gratt. (55 Va.) 318; Evans v. Free-land, 3 Munf. (17 Va.) 119.

Grounds for revival, see *supra*, III.

85. **U. S.**—Wonderly v. Lafayette County, 74 Fed. 702. **Ill.**—Wilson v. School Trustees, 144 Ill. 29, 33 N. E. 194; Smith v. Stevens, 133 Ill. 183, 24 N. E. 511. **Ind.**—Walker v. Hood, 5 Blackf. 266; Graham v. Smith, 1 Blackf. 414. **Ky.**—Huey's Admr. v. Redden's Heirs, 3 Dana 488. **Md.**—Warfield v. Brewer, 4 Gill 265. **Pa.**—McKinney v. Mehaffey, 7 Watts & S. 276; Campbell's Estate, 22 Pa. Super. 432. **S. C.**—Whiting v. Pritchard, 1 Rich. L. 304. **Tenn.**—Carson v. Richardson, 3 Hayw. 231; Keith v. Metcalf, 2 Swan 74. **Tex.**—Henry v. Red Water Lumb. Co., 46 Tex. Civ. App. 179, 102 S. W. 749. **Vt.**—Gibson v. Davis, 22 Vt. 374. **Va.**—Rogers v. Denham, 2 Gratt. (43 Va.) 200.

86. **U. S.**—Winder v. Caldwell, 14 How. (U. S.) 434, 14 L. ed. 487; Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253. **Ind.**—Lasselle v. Godfroy, 1 Blackf. 297. **Mich.**—McRoberts v. Lyon, 79 Mich. 25, 44 N. W. 160. **Va.**—Gedney v. Com., 14 Gratt. (55 Va.) 318.

[a] It should be sufficiently certain to enable the court to give judgment. Pickett v. Pickett, 1 How. (Miss.) 267.

That writ serves purpose of declaration, see *infra*, VI, B, 5.

87. **Ala.**—Ogden v. Smith, 14 Ala. 428. **Md.**—Bish v. Williar, 59 Md. 382. **Ohio.**—Union Bank v. Meigs' Admx., 5 Ohio 312. **S. C.**—Whiting v. Pritchard, 1 Rich. L. 304.

Compare Commercial Bank v. Kendall, 13 Smed. & M. (Miss.) 278.

jurisdiction, is not a fatal defect, and if not waived, may be amended in conformity with the judgment.<sup>88</sup>

4. **Service and Return of Writ.**<sup>89</sup> — The writ of scire facias must be served upon all persons sought to be bound by the proceedings,<sup>90</sup> to make the judgment rendered therein binding upon them;<sup>91</sup> a failure of service upon the defendant,<sup>92</sup> or a joint defendant,<sup>93</sup> will invalidate the judgment of revival.<sup>94</sup>

Personal service must be had where the defendant is within the jurisdiction,<sup>95</sup> as in the case of a summons;<sup>96</sup> but constructive service

See the title "**Scire Facias**," in a later volume of this work.

88. **U. S.**—*Wonderly v. Lafayette County*, 74 Fed. 702. **Ark.**—*Ward v. Sturdivant*, 96 Ark. 434, 132 S. W. 204; *Anthony v. Humphries*, 11 Ark. 663. **D. C.**—*Starkweather v. West End Nat. Bank*, 21 App. Cas. 281. **Ga.**—*Shepherd v. Ryan*, 53 Ga. 563. **Ind.**—*Davidson v. Alvord*, 3 Ind. 1, amendment permitted at any time before judgment. **Ky.**—*Patrick v. Woods*, 3 Bibb 232; *Constantine v. Major*, 6 J. J. Marsh. 621; *Thompson v. Dougherty*, 3 J. J. Marsh. 564. **Md.**—*Garey v. Sangston*, 64 Md. 31, 20 Atl. 1034. **Miss.**—*Locke v. Brady*, 30 Miss. 21. **Mo.**—*Reyburn v. Handlan*, 165 Mo. App. 412, 147 S. W. 846. **N. C.**—*Williams v. Lee*, 4 N. C. 578. **Pa.**—*Campbell's Appeal*, 118 Pa. 128, 12 Atl. 299; *McMurray's Admrs. v. Hopper*, 43 Pa. 463; *Dickerson's Appeal*, 7 Pa. 255; *In re Dougherty's Est.*, 9 Watts & S. 189, 42 Am. Dec. 326; *Maus v. Maus*, 5 Watts 315. **S. C.**—*Smith v. Brisbane*, 2 Bay 557. **Tenn.**—*Whitworth v. Thompson*, 8 Lea 480; *Bryant v. Smith*, 7 Coldw. 113. **Tex.**—*Polnac v. State*, 46 Tex. Crim. 70, 80 S. W. 381; *Henry v. Red Water Lumb. Co.*, 46 Tex. Civ. App. 179, 102 S. W. 749; *Smith v. Boatman Sav. Bank*, 1 Tex. Civ. App. 115, 20 S. W. 1119.

[a] The writ may be amended as to amount, when correct in every other particular. *Schmidt v. Zeigler*, 30 Pa. Super. 104.

89. **Service of process generally**, see the title "**Service of Process and Papers**."

90. **Ark.**—*Greer v. State Bank*, 10 Ark. 455. **Ga.**—*Phillips v. Wait*, 106 Ga. 589, 32 S. E. 842; *Donaldson v. Dodd*, 79 Ga. 763, 4 S. E. 157. **Pa.**—*White v. Harden*, 154 Pa. 387, 26 Atl. 312; *Dickerson's Appeal*, 7 Pa. 255; *In re Dohner*, 1 Pa. 101. **Tenn.**—*Crutch-*

*field v. Stewart*, 10 Yerg. 237; *Roberts v. Busby*, 3 Hayw. 299.

**Parties to proceedings to revive**, see *supra*, V.

91. **Ga.**—*Donaldson v. Dodd*, 79 Ga. 763, 4 S. E. 157. **Kan.**—*Selders v. Boyle*, 5 Kan. App. 451, 49 Pac. 320; *Gruble v. Wood*, 27 Kan. 535. **Vt.**—*Betts v. Johnson*, 68 Vt. 549, 35 Atl. 489; *Rice v. Talmadge*, 20 Vt. 378.

92. *Owens v. Henry*, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. ed. 837; *Planters' Bank v. Chester*, 11 Humph. (Tenn.) 578; *Simmons v. Wood*, 6 Yerg. (Tenn.) 518.

93. **Ga.**—*Funderburk v. Smith*, 74 Ga. 515. **Ill.**—*Eastman v. Crawford*, 126 Ill. App. 320. **Ky.**—*Case v. Day*, 9 B. Mon. 47; *Lynch v. Sanders*, 9 Dana 59; *Williams v. Fowler*, 3 Mon. 316. **Va.**—*Early v. Clarkson's Admr.*, 7 Leigh (34 Va.) 83.

94. **Issuance of alias and pluries writs upon failure of service**, see *infra*, VI, B, 9.

95. **Ga.**—*Phillips v. Wait*, 106 Ga. 589, 32 S. E. 842; *Dickinson v. Allison*, 10 Ga. 557, personal service by the sheriff. **Ia.**—*Mudge v. Livermore*, 148 Iowa 472, 123 N. W. 199. **Kan.**—*Mendenhall v. Robinson*, 56 Kan. 633, 44 Pac. 610. **N. Y.**—*Feeter v. McCombs*, 1 Wend. 19. **Vt.**—*Betts v. Johnson*, 68 Vt. 549, 35 Atl. 489.

[a] **Service of writ by leaving a copy at the most notorious place of abode of the defendant was held to be insufficient in** *Atwood v. Hirsch Bros.*, 123 Ga. 734, 51 S. E. 742.

96. **Ga.**—*Phillips v. Wait*, 106 Ga. 589, 32 S. E. 842. **Kan.**—*Gruble v. Wood*, 27 Kan. 535. **Mo.**—*Andrews v. Buckbee*, 77 Mo. 428. **Okla.**—*Wilson v. McCornack*, 10 Okla. 180, 61 Pac. 1068. **Pa.**—*Buchanan v. Specht*, 1 Phila. 252.

See generally the title "**Service of Process and Papers**."

may be had upon a non-resident defendant.<sup>97</sup> At common law, two returns of nihil habet are equivalent to personal service of the writ.<sup>98</sup>

**Return.**<sup>99</sup> — The facts of the service should be set out in the officer's return thereof as fully and accurately as may be done.<sup>1</sup> The return may be corrected so as to make it conform to the truth.<sup>2</sup>

**5. Pleadings.** — a. *Generally.* — In a proceeding to revive a judgment, the writ of scire facias serves the double purpose of a declaration and a summons;<sup>3</sup> a petition or declaration to revive is unnecessary.<sup>4</sup>

97. **U. S.**—Crawford *v.* Foster, 84 Fed. 939, 28 C. C. A. 576, 56 U. S. App. 231. See Mitchell & Rammelsburg Furniture Co. *v.* Sampson, 45 Fed. 111. **Ark.**—Waldstein *v.* Williams, 101 Ark. 404, 142 S. W. 834, 37 L. R. A. (N. S.) 1162. **Ind.**—Walker *v.* Hood, 5 Blackf. 266. **Ia.**—Mudge *v.* Livermore, 148 Iowa 472, 123 N. W. 199. **Kan.**—Ow *v.* Dalhoff, 90 Kan. 329, 133 Pac. 569; Hartz *v.* Fitts, 89 Kan. 751, 132 Pac. 1187. **Mass.**—Comstock *v.* Holbrook, 16 Gray 111. **S. C.**—Treasurers *v.* Tarrant, 1 Hill 7.

[a] **Defendant Removing From Jurisdiction.**—Service by publication is good against a defendant who was personally served in the original action, where he has, during the interim, moved from the jurisdiction. Collin County Nat. Bank *v.* Hughes (Tex. Civ. App.), 154 S. W. 1181.

[b] **A curator ad hoc** may be appointed in Louisiana upon whom service may be had, where defendant resides in another state. Bertron *v.* Stewart, 43 La. Ann. 1171, 10 So. 295.

98. **U. S.**—Brown *v.* Wygant, 163 U. S. 618, 16 Sup. Ct. 1159, 41 L. ed. 284; Davis *v.* Davis, 164 Fed. 281. **Fla.**—Barrow *v.* Bailey, 5 Fla. 9. **Ill.** Choate *v.* People, 19 Ill. 63; Sans *v.* People, 8 Ill. 327. **Mo.**—Kratz *v.* Preston, 52 Mo. App. 251. **N. Y.**—Cumming *v.* Eden, 1 Cow. 70. **Ohio.**—Dunlevy *v.* Ross, Wright 287. **Pa.**—Miner *v.* Graham, 24 Pa. 491; Chambers *v.* Carson, 2 Whart. 9; Warder *v.* Tainter, 4 Watts 270. **Eng.**—Bromley *v.* Littleton, Yelv. 112, 80 Eng. Reprint 76.

99. See generally the title "Returns."

1. **Ky.**—Bruce *v.* Colgan, 2 Litt. 284. **Md.**—Thomas *v.* Farmers' Bank, 46 Md. 43. **Pa.**—Chahoon *v.* Hollenback, 16 Serg. & R. 425, 16 Am. Dec. 587. **S. C.**—Ingram *v.* Belk, 2 Strobb. 207, 47 Am. Dec. 591.

2. **U. S.**—Mandeville *v.* McDonald, 3 Cranch C. C. 631, 16 Fed. Cas. No. 9,013. **Md.**—Berry *v.* Griffith, 2 Har. & G. 337, 18 Am. Dec. 309. **Tex.**—Polnac *v.* State, 46 Tex. Crim. 70, 80 S. W. 381.

3. **Ark.**—Calhoun *v.* Adams, 43 Ark. 238. **Ill.**—Farris *v.* People, 58 Ill. 26. **Md.**—Bish *v.* Williar, 59 Md. 382; Bowie *v.* Neale, 41 Md. 124; Nesbit *v.* Manro, 11 Gill & J. 261. **Tenn.**—State *v.* Robinson, 8 Yerg. 370. **Va.**—White's Admr. *v.* Palmer, 110 Va. 490, 66 S. E. 44.

**Form and sufficiency of writ of scire facias,** see *supra*, VI, B, 3.

4. **Ark.**—Calhoun *v.* Adams, 43 Ark. 238. **Fla.**—Brown *v.* Harley, 2 Fla. 159. **Mo.**—Garner *v.* Hays, 3 Mo. 436; Bick *v.* Vaughn, 140 Mo. App. 595, 120 S. W. 618; Merchants' Mut. Ins. Co. *v.* Hill, 17 Mo. App. 590. **Tex.**—Hopkins *v.* Howard, 12 Tex. 7; Polnac *v.* State, 46 Tex. Crim. 70, 80 S. W. 381, judgment revived on mere motion. **Va.** White's Admr. *v.* Palmer, 110 Va. 490, 66 S. E. 44 (writ of scire facias is the only pleading in the proceeding); McVeigh *v.* Bank of Old Dominion, 76 Va. 267; Williamson *v.* Crawford, 7 Gratt. (48 Va.) 202, last two cases hold that neither a declaration nor rule to plead are necessary. **Eng.**—Blake *v.* Dode-mead, 2 Str. 775, 93 Eng. Reprint 840.

[a] **It is entirely proper** that a petition should be filed; but is not a pleading any more than a petition for a habeas corpus or a mandamus is a pleading. It is like the petition in proceedings by habeas corpus, merely a suggestion to the court of the facts upon which the petitioner predicates his right to have the scire facias issue. Such a suggestion may be made *ore tenus*. It is in no sense a pleading, or the foundation of an action. Merchants' Mut. Ins. Co. *v.* Hill, 17 Mo. App. 590.

b. *Plea or Answer and Defenses Raised Thereby.*—While a proceeding by scire facias to revive a judgment is, according to the weight of authority, a continuation of the former proceeding,<sup>5</sup> it partakes sufficiently of the nature of an original action to entitle the defendant to appear and plead thereto.<sup>6</sup> Indeed, a defendant is bound to plead all matters of defense that he has just as he would in an ordinary suit.<sup>7</sup>

A defendant may plead nul tiel record.<sup>8</sup> He may also plead<sup>9</sup> pay-

5. See *supra*, VI, B, 1.

6. See the following: **Ark.**—Hubbard v. Bolls, 7 Ark. 442. **Ill.**—Reed v. Waterbury Nat. Bank, 135 Ill. App. 165. **Md.**—Brooks v. Preston, 106 Md. 693, 68 Atl. 294; Gott v. State, 44 Md. 319. **Mo.**—Glidden-Felt Mfg. Co. v. Robinson, 163 Mo. App. 488, 143 S. W. 1111; Bick v. Vaughn, 140 Mo. App. 595, 120 S. W. 618; Long v. Thormond, 83 Mo. App. 227, 231; Armstrong v. Crooks, 83 Mo. App. 141.

[a] The plea is to the writ of scire facias, and not to the petition therefor. Glidden-Felt Mfg. Co. v. Robinson, 163 Mo. App. 488, 143 S. W. 1111.

7. Ward v. Sturdivant, 96 Ark. 434, 132 S. W. 204.

8. See the following: **U. S.**—Bergen v. Williams, 4 McLean 125, 3 Fed. Cas. No. 1,340. **D. C.**—Harper v. Cunningham, 8 App. Cas. 430. **Ga.**—Hagins v. Blitch, 6 Ga. App. 839, 65 S. E. 1082. **Ill.**—Bank of Eau Claire v. Reed, 232 Ill. 238, 83 N. E. 820; Waterbury Nat. Bank v. Reed, 231 Ill. 246, 83 N. E. 188; Greene v. Schwing, 187 Ill. App. 635; Reed v. Bank of Eau Claire, 136 Ill. App. 378; Reed v. Waterbury Nat. Bank, 135 Ill. App. 165. **Md.**—Hager v. Cochran, 66 Md. 253, 7 Atl. 462. **Mo.**—George v. Middough, 62 Mo. 549; Jeffries v. Wright, 51 Mo. 215; Watkins v. State, 7 Mo. 334; Glidden-Felt Mfg. Co. v. Robinson, 163 Mo. App. 488, 143 S. W. 1111. **Neb.**—St. Paul Harvester Co. v. Mahs, 82 Neb. 336, 117 N. W. 702; Enewold v. Olsen, 39 Neb. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573. **Ore.**—McCracken v. Swartz, 5 Ore. 62. **Pa.**—Dowling v. McGregor, 91 Pa. 410.

See generally the title "Nul Tiel Record."

[a] Under such a plea, the defendant may show (1) that the judgment is void for want of jurisdiction, when apparent from the record. **U. S.**—Board of Comrs. of Hertford County v. Tome,

153 Fed. 81, 82 C. C. A. 215; King v. Davis, 137 Fed. 198. **Ark.**—Anthony v. Humphries, 9 Ark. 176. **Del.**—Frankel v. Satterfield, 9 Houst. 201, 19 Atl. 898. **D. C.**—Harper v. Cunningham, 8 App. Cas. 430. **Ga.**—Bell v. Verdel, 140 Ga. 768, 79 S. E. 849; Austell v. Langston, 133 Ga. 738, 66 S. E. 917; Thomas v. Towns, 66 Ga. 78. **Ill.**—Reed v. Bank of Eau Claire, 136 Ill. App. 378. **La.**—*In re* Board of Admrs. Fourth Drainage District, 37 La. Ann. 916. **Neb.**—St. Paul Harvester Co. v. Mahs, 82 Neb. 336, 117 N. W. 702; Wittstruck v. Temple, 58 Neb. 16, 78 N. W. 456; Enewold v. Olsen, 39 Neb. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573. **Ohio.**—Meyer v. Zane, 3 Ohio 305. **Pa.**—Barber v. Chandler, 17 Pa. 48, 55 Am. Dec. 533. **Tex.**—Ulmer v. Frankland (Tex. Civ. App.), 27 S. W. 766. (2) And may take advantage of a fatal variance between the writ and the judgment to be revived, but not of variance which is merely formal. See the following: **Ala.**—Duncan v. Hargrove, 22 Ala. 150; Barrow v. Pagles, 6 Ala. 462. **Mo.**—Glidden-Felt Mfg. Co. v. Robinson, 163 Mo. 488, 143 S. W. 1111. **N. J.**—Phillips v. Hunt, 1 N. J. L. 137. **Pa.**—Peterson v. Lothrop, 34 Pa. 223; *In re* Dougherty's Estate, 9 Watts & S. 189, 42 Am. Dec. 326; Hersch v. Groff, 2 Watts & S. 449; Walker v. Pennell, 15 Serg. & R. 68; Miller v. Fees, 3 Pa. L. J. 243, 2 Clark 27. **Tex.**—Booth v. Pickett, 53 Tex. 436. (3) That the judgment was interlocutory and not final may be shown under such plea also. Clark v. Digges, 5 Gill (Md.) 109. See also the title "Nul Tiel Record."

9. See the following: **Del.**—De Ford v. Green, 1 Marv. 316, 40 Atl. 1120. **Fla.**—Dickerson v. Campbell, 47 Fla. 147, 35 So. 986, 110 Am. St. Rep. 116. **Ill.**—Bank of Eau Claire v. Reed, 232 Ill. 238, 83 N. E. 820; Greene v. Schwing, 187 Ill. App. 635. **La.**—Hay-

ment of the judgment. He cannot plead *nil debit*, however.<sup>10</sup> But while the defendant is limited to these two pleas on the general issue,<sup>11</sup> he may interpose certain special pleas or defenses.<sup>12</sup> But he cannot plead matters which were only appropriate defenses in a proceeding to open the original judgment,<sup>13</sup> or which might have been pleaded

den *v. Sheriff*, 43 La. Ann. 385, 8 So. 919. **Md.**—*Blackburn v. Beall*, 21 Md. 208. **Neb.**—*St. Paul Harvester Co. v. Mahs*, 82 Neb. 336, 117 N. W. 702; *McCormick v. Carey*, 62 Neb. 494, 87 N. W. 172. **N. C.**—*Ballard v. Averitt*, 1 N. C. 147, 3 N. C. 110. **Ohio.**—*Ross v. Gilmore*, 3 Ohio 63; *Nestlerode v. Foster*, 8 Ohio Cir. Ct. 70, 4 Ohio Cir. Dec. 385. **Ore.**—*McCracken v. Swartz*, 5 Ore. 62. **Pa.**—*Smith v. Coray*, 196 Pa. 602, 46 Atl. 855; *Phillips v. Beatty*, 135 Pa. 431, 19 Atl. 1020; *Dowling v. McGregor*, 91 Pa. 410; *Curry v. Morrison*, 40 Pa. Super. 301; *Philadelphia v. Peyton*, 25 Pa. Super. 350. **Tenn.**—*Cowan v. Shields*, 1 Overt. 64.

See generally the title "Payment."

[a] Under this plea the defendant may show (1) any satisfaction or release of the judgment. **Ark.**—*Calvert v. Stone*, 10 Ark. 491. **D. C.**—*Starkweather v. West End Nat. Bank*, 21 App. Cas. 281. **Ill.**—*Greene v. Schwing*, 187 Ill. App. 635. **Md.**—*Booth v. Campbell*, 15 Md. 569. **N. J.**—*Earle's Admr. v. Earle*, 20 N. J. L. 347. **N. Y.**—*Velie v. Myers*, 14 Johns. 162. **Pa.**—*Smith v. Coray*, 196 Pa. 602, 46 Atl. 855. See also 11 ENCY. OF EV. 652. (2) Or an accord and satisfaction. *McCullough v. Franklin Coal Co.*, 21 Md. 256; *Steltzer v. Steltzer*, 10 Pa. Super. 310. (3) Advantage may also be taken of the presumption of payment arising from lapse of time. **Ark.**—*Ringgold v. Randolph*, 16 Ark. 212. **Del.**—*De Ford v. Green*, 1 Marv. 316, 40 Atl. 1120. **Neb.**—*Wittstruck v. Temple*, 58 Neb. 16, 78 N. W. 456. **Pa.**—*Van Loon v. Smith*, 103 Pa. 238; *Steltzer v. Steltzer*, 10 Pa. Super. 310; *Green v. Plattsburg*, 13 Pa. Co. Ct. 335.

10. *Bergen v. Williams*, 4 McLean 125, 3 Fed. Cas. No. 1,340.

11. **Ill.**—*Bank of Eau Claire v. Reed*, 232 Ill. 238, 83 N. E. 820; *Reed v. Waterbury Nat. Bank*, 135 Ill. App. 165. **Neb.**—*St. Paul Harvester Co. v. Mahs*, 82 Neb. 336, 117 N. W. 702. **Ore.**—*McCracken v. Swartz*, 5 Ore. 62. **Pa.**—*Dowling v. McGregor*, 91 Pa. 410.

[a] Defendant cannot plead general denial of each and every allegation of

the writ not admitted in his answer. *Wonderly v. Lafayette County*, 77 Fed. 665.

12. See *McLeod v. Williams*, 122 N. C. 451, 30 S. E. 129, and generally the cases *infra*, this section.

[a] **Statute of Limitations.**—**U. S.** *Offutt v. Henderson*, 2 Cranch C. C. 553, 18 Fed. Cas. No. 10,451. **Md.**—*Jones v. George*, 80 Md. 294, 30 Atl. 635; *Beanes v. Hamilton*, 3 Gill 275. **N. M.**—*Browne v. Chavez*, 9 N. M. 316, 54 Pac. 234. **N. C.**—*Lytle v. Lytle*, 94 N. C. 683; *McDonald v. Dickson*, 85 N. C. 248.

See generally the title "Limitation of Actions."

[b] The plaintiff's incapacity to maintain the proceeding may be pleaded. *Brown v. Delafield*, 1 App. Cas. (D. C.) 232.

[c] **Abatement by Death of a Defendant.**—Where the officer's return discloses the fact that one or more of the defendants is dead, a plea in abatement is the proper method of taking advantage of this fact; and the plaintiff may join issue on this plea and have the facts ascertained by a jury. *Walden v. Craig*, 14 Pet. (U. S.) 147, 10 L. ed. 393. As to pleas of abatement generally, see 1 STANDARD PROC. 25, et seq.

[d] **Where Judgment Entered Upon Power of Attorney To Confess Same.** In a proceeding to revive a judgment which was entered upon a power of attorney to confess judgment, a plea is sufficient which states that the defendant had never been served with process, had never authorized anyone to appear for him, or had never authorized anyone to empower anyone else to appear for him and confess judgment, and had never waived service of process or submitted himself to the jurisdiction of the court. *Harper v. Cunningham*, 8 App. Cas. (D. C.) 430.

[e] **Pendency of an action of debt on the judgment cannot be set up as a defense.** *Lafayette v. Wonderly*, 92 Fed. 313, 34 C. C. A. 360.

13. *Schmidt v. Zeigler*, 30 Pa. Super. 104.

to a former scire facias,<sup>14</sup> or matters which he might have pleaded in the original action in which the judgment was obtained;<sup>15</sup> nor can he plead an assignment of the judgment.<sup>16</sup>

14. *Wilson v. Hurst*, Pet. C. C. 441, 30 Fed. Cas. No. 17,809.

15. See the following: **U. S.**—*Dickson v. Wilkinson*, 3 How. 57, 11 L. ed. 491; *United States v. Thompson*, Gilp. 614, 28 Fed. Cas. No. 16,487; *Penn v. Klyne*, Pet. C. C. 446, 19 Fed. Cas. No. 10,936. **Ala.**—*Betancourt v. Eberlin*, 71 Ala. 461; *Duncan v. Hargrove*, 22 Ala. 150; *Miller v. Shackelford*, 16 Ala. 95. **Conn.**—*Bradford v. Bradford*, 5 Conn. 127; *Robbins v. Bacon*, 1 Root 548; *Hubbard v. Manning*, Kirby 256. **D. C.**—*Willett v. Otterback*, 9 Mackey 324; *Loeber v. Moore*, 9 Mackey 1. **Ga.**—*Camp v. Baker*, 40 Ga. 148; *Weaver v. Webb*, 3 Ga. App. 726, 60 S. E. 367. **Ill.**—*Bank of Eau Claire v. Reed*, 232 Ill. 238, 83 N. E. 820; *Reed v. Waterbury Nat. Bank*, 135 Ill. App. 165. **Ia.**—*Vredenburg v. Snyder*, 6 Iowa 39. **Ky.**—*Harpending v. Wylie*, 13 Bush 158. **La.**—*McCutchen v. Askew*, 34 La. Ann. 340; *McStea v. Rotchford*, Brown & Co., 29 La. Ann. 69; *Carondelet Canal & Nav. Co. v. De St. Romes*, 23 La. Ann. 437. **Me.**—*Smith v. Eaton*, 36 Me. 298, 58 Am. Dec. 746. **Md.**—*Moore v. Garrettson*, 6 Md. 444; *Kemp v. Cook*, 6 Md. 305. **Mass.**—*Stephens v. Howe*, 127 Mass. 164; *Thayer v. Tyler*, 10 Gray 164; *Springfield Card Mfg. Co. v. West*, 1 Cush. 388; *Sigourney v. Stockwell*, 4 Mete. 518. **Miss.**—*Roberts v. Weiler*, 55 Miss. 249; *Pollard v. Eckford*, 50 Miss. 631; *Bowen v. Bonner*, 45 Miss. 10; *Langston v. Abney*, 43 Miss. 161; *Anderson v. Williams*, 24 Miss. 684; *Mathews v. Mosby*, 13 Smed. & M. 422. **Mo.**—*Riley v. McCord*, 24 Mo. 265; *Watkins v. State*, 7 Mo. 334; *Glidden-Felt Mfg. Co. v. Robinson*, 163 Mo. App. 488, 143 S. W. 1111. **Neb.**—*American Freehold Land Mortg. Co. v. Smith*, 84 Neb. 237, 120 N. W. 1113; *St. Paul Harvester Co. v. Mahs*, 82 Neb. 336, 117 N. W. 702; *Stover v. Stark*, 61 Neb. 374, 85 N. W. 286, 87 Am. St. Rep. 460; *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170, 80 N. W. 484; *Enewold v. Olsen*, 39 Neb. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573; *Wright v.*

*Sweet*, 10 Neb. 190, 4 N. W. 1043; *Gillette v. Morrison*, 7 Neb. 263. **N. Y.**—*McFarland v. Irwin*, 8 Johns. 77. **N. C.**—*Ferebee v. Doxey*, 28 N. C. 448. **Ohio.**—*Nestlerode v. Foster*, 8 Ohio Cir. Ct. 70, 4 Ohio Cir. Dec. 385. **Ore.**—*McCracken v. Swartz*, 5 Ore. 62, 65. **Pa.**—*Keystone Brewing Co. v. Schermer*, 241 Pa. 361, 88 Atl. 657; *Weber v. Detwiller*, 5 Sad. 555, 8 Atl. 910; *Pittsburgh, etc. R. Co. v. Marshall*, 85 Pa. 187; *Weaver v. Wible*, 72 Pa. 469; *Carr v. Townsend's Exrs.*, 63 Pa. 202; *McVeagh v. Little*, 7 Pa. 279; *Davidson v. Thornton*, 7 Pa. 128; *Alden v. Bogart*, 2 Grant Cas. 400; *Curry v. Morrison*, 40 Pa. Super. 301; *Bickel v. Cleaver*, 13 Pa. Co. Ct. 314; *Cardesa v. Humes*, 5 Serg. & R. 65; *Mulligan v. Devlin*, 12 Pa. Co. Ct. 465; *Wurzberger v. Carroll*, 8 Kulp 266; *Johns v. Reinhart*, 10 Lane. Bar 105. **S. C.**—*Koon v. Ivey*, 8 Rich. L. 37; *Lynch's Exrs. v. Inglis's Exrs.*, 1 Bay 449. **Tenn.**—*Bell v. Williams*, 4 Sneed 196; *Love v. Allison*, 2 Tenn. Ch. 111. **Tex.**—*Baxter v. Dear*, 24 Tex. 17, 76 Am. Dec. 89; *Gatesville City Nat. Bank v. Swink* (Tex. Civ. App.), 49 S. W. 130. **Va.**—*May v. North Carolina State Bank*, 2 Rob. 56, 40 Am. Dec. 726. **W. Va.**—*Maxwell v. Leeson*, 50 W. Va. 361, 40 S. E. 420, 88 Am. St. Rep. 875. **Eng.**—*Baylis v. Hayward*, 4 Ad. & El. 256, 1 Har. & W. 609, 5 L. J. K. B. 52, 5 N. & M. 613, 31 E. C. L. 127, 111 Eng. Reprint 783; *Cook v. Jones*, 2 Cowp. 727, 98 Eng. Reprint 1330; *Allens v. Andrews*, Cro. Eliz. 283, 78 Eng. Reprint 538; *Thomas v. Williams*, 3 Dowl. P. C. 655.

[a] **Coverture, or other disability of defendant**, cannot be set up as a defense. *Lauer v. Ketner*, 162 Pa. 265, 29 Atl. 908, 42 Am. St. Rep. 833; *Taylor v. Harris*, 21 Tex. 438.

[b] **A plea of false return of service in the original action**, cannot be set up in a scire facias to revive. *Reed v. Waterbury Nat. Bank*, 135 Ill. App. 165.

16. *Greene v. Schwing*, 187 Ill. App. 635.

The personal representative can only plead, as a general rule, what his testate or intestate could have pleaded.<sup>17</sup> But an executor or administrator may plead that the assets have been fully administered,<sup>18</sup> or that he has no assets belonging to the defendant's estate,<sup>19</sup> or that there are prior liens against them,<sup>20</sup> or that he has not accounted,<sup>21</sup> or that he has not been legally appointed.<sup>22</sup>

An heir may generally make any defense that might have been made by the executor or administrator.<sup>23</sup> He may plead an assignment of the obligation sued on to one of the heirs, after death of the defendant, and the consequent extinction of the remedy at law;<sup>24</sup> and he may plead that no lands have descended.<sup>25</sup>

A terre-tenant may plead that the land has been discharged from the lien of the judgment, or that it was never a lien upon his land;<sup>26</sup> and that there are other terre-tenants in the same county not summoned.<sup>27</sup>

An affidavit of defense is required under the practice of some states.<sup>28</sup>

c. *Replication*.<sup>29</sup>—Where a good plea or answer is filed by the defendant, it is necessary that a replication shall be filed by the plaintiff, joining issue thereon.<sup>30</sup>

**Right of assignee to revive judgment**, see *supra*, V, A.

17. McKnight v. Craig's Admr., 6 Cranch (U. S.) 183, 3 L. ed. 193.

[a] A plea by an executor that there are terre-tenants will not oblige plaintiff to sue out a scire facias against them. Wilson v. Watson, Pet. C. C. 269, 30 Fed. Cas. No. 17,847.

18. Fulcher v. Mandell, 83 Ga. 715, 10 S. E. 582; Tanner v. Freeland, 1 Har. & M. 34.

19. Fulcher v. Mandell, 83 Ga. 715, 10 S. E. 582.

[a] A plea of puis darrein continuance that since the issuance of the scire facias the estate has been declared insolvent, is a good defense by a personal representative. Hatch v. Eustis, 1 Gall. 160, 11 Fed. Cas. No. 6,207; Burk's Admr. v. Jones, 13 Ala. 167.

20. Fulcher v. Mandell, 83 Ga. 715, 10 S. E. 582.

21. Clark v. Sexton's Exrs., 23 Wend. (N. Y.) 477.

22. Coffin v. Cottle, 9 Pick. (Mass.) 287.

23. As to defenses which personal representatives may make, see *supra*, this section.

[a] That the estate has been declared insolvent, is no answer to a scire facias issued against an heir at law. Commercial Bank v. Kendall, 13 Smed. & M. (Miss.) 278.

24. Sneed v. Mayfield's Heirs, Cooke (Tenn.) 60.

25. Wilkinson v. Allen, 11 Ala. 128; Reynolds v. Dishon, 3 Ill. App. 173.

26. Hammond v. McClure, 9 Sad. 597, 14 Atl. 412; Colwell v. Easley, 83 Pa. 31; Silverthorn v. Townsend, 37 Pa. 263.

27. Mandeville v. McDonald, 3 Cranch C. C. 631, 16 Fed. Cas. No. 9,013.

28. Loeber v. Moore, 9 Mackey (D. C.) 1; Oil City v. Hartwell, 164 Pa. 348, 30 Atl. 268; Smith v. Smith, 135 Pa. 48, 21 Atl. 168; Hitchcock v. Washburn, 9 Pa. Dist. 272; Gamon v. McCappin, 2 Pa. Dist. 363; Tracy v. Tracy, 18 Pa. Co. Ct. 398; Kinports v. Kinports, 1 Pa. Co. Ct. 610; Railroad Co. v. Slemmer, 6 W. N. C. (Pa.) 451.

**Affidavits of defense**, see generally the title "Affidavits of Merits and Defense."

[a] A plea or affidavit of defense by a terre-tenant that he has never held, and does not hold, any real property which he derived either directly or indirectly from the defendant is sufficient. Hanhauser v. Pennsylvania & N. E. R. Co., 222 Pa. 244, 71 Atl. 5.

29. See generally the title "Replication and Reply."

30. Ala.—Wilkinson v. Allen, 11 Ala. 128. Ark.—Humphries v. Anthony,

6. **Trial of Issue.**—While the plea of nul tiel record is triable on the disclosures of the record itself,<sup>31</sup> the issue of fact raised by the plea of payment is one for the jury to determine.<sup>32</sup>

7. **Judgment.**—The form and sufficiency of the judgment to be entered in a proceeding to revive a judgment is treated elsewhere in this title.<sup>33</sup>

8. **Quashal of Writ.**—A motion to quash a writ of seire facias will be sustained for disability or defect of parties,<sup>34</sup> for failure to state a valid ground for the writ,<sup>35</sup> or for lack of an affidavit showing that the judgment remains unpaid, when that is a legal requisite to the issuance of the writ.<sup>36</sup>

9. **Alias and Pluries Writs.**—The judgment creditor may procure an alias or pluries writ of seire facias to be issued upon a failure of service of the first writ as to all,<sup>37</sup> or any of the defendants,<sup>38</sup> or where it is found necessary to bring in additional parties,<sup>39</sup> or where the plaintiff has suffered a nonsuit on the first writ.<sup>40</sup> Where the plaintiff sues out a writ of seire facias to revive a judgment, but does not proceed thereunder within the required time, there must be a new writ.<sup>41</sup>

Where a new judgment is rendered on the revival, each successive writ must be based upon the judgment of revival immediately preceding it.<sup>42</sup>

12 Ark. 136. **Va.**—Day v. Pickett, 4 Munf. (18 Va.) 104.

[a] **A replication which does not deny the plea of nul tiel record is bad on a general demurrer thereto.** Kennerly v. Walker, 1 McMull. (S. C.) 117.

31. Reed v. Bank of Eau Claire, 136 Ill. App. 378 (defendant is not entitled to a jury); Clark v. Digges, 5 Gill (Md.) 109. See generally the title "Nul Tiel Record."

32. Hartman v. Alden, 34 N. J. L. 518; Slusher v. Washington County, 27 Pa. 205; Lesley v. Nones, 7 Serg. & R. (Pa.) 410.

[a] **The verdict of the jury may be set aside in a proper case.** Wilson v. Wilson, 137 Pa. 269, 20 Atl. 644.

33. See *infra*, VII.

34. Cumming v. Eden, 1 Cow. (N. Y.) 70; Moyer v. McNulty, 22 Pa. Co. Ct. 153; McCabe v. United States, 4 Watts (Pa.) 325.

35. Evans v. Freeland, 3 Munf. (17 Va.) 119.

**Grounds for revival, see *supra*, III.**

36. Lansing v. Lyons, 9 Johns. (N. Y.) 84.

[a] **A plea to the merits is a waiver of objection to a failure to file an affidavit that the debt remains unpaid.**

Hinton v. Oliver, 19 N. C. 519.

37. Cumming v. Eden, 1 Cow. (N. Y.) 70; Davidson v. Thornton, 7 Pa. 128; Root v. Frear, 11 Pa. Co. Ct. 342.

**Service and return of writ, see *supra*, VI, B, 4.**

**Grounds for issuance of writ generally, see *supra*, III.**

38. **U. S.**—Baker v. French, 2 Cranch C. C. 539, 2 Fed. Cas. No. 767. **Md.**—Bowie v. Neale, 41 Md. 124. **Pa.**—Zerns v. Watson, 11 Pa. 260.

39. Borden v. Thorpe, 35 N. C. 298; Hughes v. Torrance, 111 Pa. 611, 4 Atl. 825; Kirby v. Cash, 93 Pa. 505; Lichty v. Hochstetler, 91 Pa. 444; Silverthorn v. Townsend, 37 Pa. 263; Little v. Smyser, 10 Pa. 381; Salmon v. Bachman, 8 Pa. Co. Ct. 144; Roberts v. Williams, 5 Whart. (Pa.) 170, 34 Am. Dec. 549.

40. Punilama v. Mele, 16 Hawaii 48; Trice v. Turrentine, 35 N. C. 212.

41. Dutton v. Parish, 34 App. Cas. (D. C.) 393; Collins v. McBlair, 29 App. Cas. (D. C.) 354.

42. Custer v. Dettlerer, 3 Watts & S. (Pa.) 28; Collingwood v. Carson, 2 Watts & S. (Pa.) 220; Collin County Nat. Bank v. Hughes (Tex. Civ. App.), 154 S. W. 1181.

**VII. JUDGMENTS OF REVIVAL.**<sup>43</sup> — A. GENERALLY.<sup>44</sup> — The proper judgment to be entered in a proceeding to revive a judgment is that the plaintiff have execution for the judgment mentioned and costs,<sup>45</sup> although the courts of some states have gone to the extent of entering an entirely new judgment for the present amount due, including both principal and accrued interest on the original judgment.<sup>46</sup> A judgment rendered in such proceeding against the personal representative of the original defendant must be limited to the assets of the decedent debtor;<sup>47</sup> and if it be against the heirs or tenants, it must be limited to the lands descended or held, as the case may be, and not a personal judgment.<sup>48</sup>

The judgment of revival must identify with certainty<sup>49</sup> the judgment

43. As to judgments generally, see the title "Judgments."

44. For form of judgment of revival on scire facias, see *Ward v. Sturdivant*, 96 Ark. 434, 132 S. W. 204.

45. U. S.—*Owens v. McCloskey*, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. ed. 837. Ark.—*Hanly v. Adams*, 15 Ark. 232. Fla.—*Brown v. Harley*, 2 Fla. 159. Ga.—*Phillips v. Wait*, 105 Ga. 848, 32 S. E. 647. Ill.—*Waterbury Nat. Bank v. Reed*, 231 Ill. 246, 83 N. E. 188; *Reed v. Bank of Eau Claire*, 136 Ill. App. 378. Ind.—*Talbott v. Rudisill*, 5 Ind. 240. Ia.—*Bertram v. Waterman*, 18 Iowa 529; *Denegre v. Haun*, 13 Iowa 240. Ky.—*Hunter's Admrs. v. Miller's Admr.*, 6 B. Mon. 612; *Murray's Admr. v. Baker*, 5 B. Mon. 172; *Patrick v. Newel*, 1 Bibb 323. Miss.—*Locke v. Brady*, 30 Miss. 21. Mo.—*Humphreys v. Lundy*, 37 Mo. 320; *Trimble v. Elkin*, 88 Mo. App. 229; *Sappington v. Lenz*, 53 Mo. App. 44. Mont.—*Haupt v. Burton*, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698. N. J.—*Tindall v. Carson*, 16 N. J. L. 94. N. C.—*J. S. Martin & Son v. Briseoe*, 143 N. C. 353, 55 S. E. 782. Tenn.—*Rogers v. Hollingsworth*, 95 Tenn. 357, 32 S. W. 197. Tex.—*Houston v. Emery*, 76 Tex. 282, 13 S. W. 264; *Waller v. Huff*, 9 Tex. 530; *Camp v. Gainer*, 8 Tex. 372; *Collin County Nat. Bank v. Hughes* (Tex. Civ. App.), 154 S. W. 1181; *Delaune v. Beaumont Irr. Co.* (Tex. Civ. App.), 136 S. W. 518; *Taylor v. Doom*, 43 Tex. Civ. App. 59, 95 S. W. 4; *Bludworth v. Poole*, 21 Tex. Civ. App. 551, 53 S. W. 717. Va.—*White's Admr. v. Palmer*, 110 Va. 490, 66 S. E. 44; *Lavell v. McCurdy*, 77 Va. 763; *Cosby v. Bell*, 6 Munf. (20 Va.) 282.

[a] A judgment erroneously granting a new judgment for a sum of money only, and awarding execution also, is void only in so far as it awards the new judgment for money. *White's Admr. v. Palmer*, 110 Va. 490, 66 S. E. 44.

[b] "No damages are recoverable in scire facias for delay of execution." *Vredenburgh v. Snyder*, 6 Iowa 39.

46. Pa.—*Kistler v. Mosser*, 140 Pa. 367, 21 Atl. 357; *Fogelsville Loan, etc. Assn's. Appeal*, 89 Pa. 293; *Duff v. Wynkoop*, 74 Pa. 300; *Gasche v. Peterman*, 3 Watts & S. 351; *Berryhill v. Wells*, 5 Binn. 56. S. C.—*Gregory v. Perry*, 71 S. C. 246, 50 S. E. 787. Tex.—*Coleman v. Zapp*, 151 S. W. 1040; *Collin County Nat. Bank v. Hughes* (Tex. Civ. App.), 154 S. W. 1181. Vt.—*Slayton v. Smilie*, 66 Vt. 197, 28 Atl. 871.

[a] When revived by one owning a limited interest therein, the judgment should be for the amount only of such interest. *Peterson v. Lothrop*, 34 Pa. 223.

47. *Wilmer v. Trumbo*, 121 Md. 445, 88 Atl. 259.

48. Ind.—*Graves v. Skeels*, 6 Ind. 107. Pa.—*Kinports v. Kinports*, 1 Pa. Co. Ct. 610. Tenn.—*Butterworth v. Brown*, 7 Yerg. 467.

49. Ga.—*Sheftall v. Clay*, Charl. 227. N. C.—*Roberson v. Woollard*, 28 N. C. 90; *Bonner v. Tier*, 14 N. C. 533; *White v. Albertson*, 14 N. C. 241, 22 Am. Dec. 719. Pa.—*In re Ernst*, 164 Pa. 87, 30 Atl. 371; *In re McCleary's Appeal*, 1 Watts & S. 299. Tex.—*Carson v. Moore*, 23 Tex. 450. W. Va.—*Zumbro v. Stump*, 38 W. Va. 325, 18 S. E. 443.

thereby revived, and accurately name the parties to the judgment.<sup>50</sup>

B. BY DEFAULT OR CONFESSION.<sup>51</sup>—Under the common law rule, two returns of nihil habet vests the court with jurisdiction of the defendant,<sup>52</sup> and judgment by default may be entered against him on the scire facias.<sup>53</sup>

**Effect Where Defendant Removed From State.**—A judgment by default on returns of nihil, reviving a judgment against a defendant who has ceased to reside in the state, will not support an action against him in another state, or suspend the operation of the statutes of limitation therein.<sup>54</sup> So, where a defendant, who has been duly served, fails to appear or plead, judgment may be entered on the scire facias.<sup>55</sup> A default judgment may be opened, however, upon a proper proceeding therefor, showing a meritorious defense.<sup>56</sup>

**Judgment by Confession.**—A judgment of revival in a scire facias proceeding may be entered against the defendant upon confession thereof.<sup>57</sup>

[a] **A variance in the judgment of revivor from the original judgment** is binding on the parties, but cannot impair the rights of existing judgment creditors, where such variance is not sufficient to defeat the lien of the judgment. *Early v. Zeiders*, 137 Pa. 457, 20 Atl. 805.

50. **Ga.**—*Sheftall v. Clay*, Charl. 227. **Pa.**—*In re Ernst*, 164 Pa. 87, 30 Atl. 371. **W. Va.**—*Zumbro v. Stump*, 38 W. Va. 325, 18 S. E. 443.

**Parties to proceedings to revive**, see *supra*, V.

51. **As to judgments by confession**, see generally 14 STANDARD PROC. 791, et seq.

**As to judgments by default**, see generally 14 STANDARD PROC. 854, et seq.

52. See *supra*, VI, B, 4.

53. **U. S.**—*Brown v. Wygant*, 163 U. S. 618, 16 Sup. Ct. 1159, 41 L. ed. 284. **Fla.**—*Barrow v. Bailey*, 5 Fla. 9. **Ill.**—*Choate v. People*, 19 Ill. 63; *Sans v. People*, 8 Ill. 327. **Ind.**—*Walker v. Hood*, 5 Blackf. 266. **Ky.**—*Calloway's Heirs v. Eubank*, 4 J. J. Marsh. 280. **Mo.**—*Kratz v. Preston*, 52 Mo. App. 251. **N. Y.**—*Cumming v. Eden*, 1 Cow. 70. **Ohio.**—*Dunlevy v. Ross*, Wright 287. **Pa.**—*Chambers v. Carson*, 2 Whart. 9; *Warder v. Tainter*, 4 Watts 270; *Compher v. Anawalt*, 2 Watts 490; *Miner v. Graham*, 24 Pa. 491. **S. C.**—*Ingram v. Belk*, 2 Strobb. 207, 47 Am. Dec. 591. **Eng.** *Andrews v. Harper*, 8 Mod. 227, 88 Eng. Reprint 163; *Bromley v. Littleton*, Yelv. 112, 80 Eng. Reprint 76;

*Randal v. Wale*, Cro. Jac. 59, 79 Eng. Reprint 50; *Barret v. Cleydon*, 2 Dyer 168a, 73 Eng. Reprint 368.

*Contra*, *Boyd v. Armstrong's Heirs*, 1 Yerg. (Tenn.) 40.

54. **U. S.**—*Owens v. Henry*, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. ed. 837. **Ill.**—*Small v. Roberts*, 43 Ill. App. 577. **Kan.**—*Rice v. Moore*, 48 Kan. 590, 30 Pac. 10, 30 Am. St. Rep. 318, 16 L. R. A. 198. **Neb.**—*Hepler v. Davis*, 32 Neb. 556, 49 N. W. 458, 29 Am. St. Rep. 457, 13 L. R. A. 565. **Vt.**—*Betts v. Johnson*, 68 Vt. 549, 35 Atl. 489.

55. **Ind.**—*Comparet v. Hanna*, 34 Ind. 74. **Ky.**—*Holder v. Com.*, 3 A. K. Marsh. 407. **N. J.**—*Forest v. Price*, 37 N. J. L. 177. **N. Y.**—*Whitney v. Camp*, 3 Johns. 86. **Pa.**—*Middleton's Exrs. v. Middleton*, 106 Pa. 252; *Roberts v. Williams*, 5 Whart. 170, 34 Am. Dec. 549; *Chew v. Griffith*, 1 Ashm. 18. **S. C.**—*Lanier v. Smyth*, 2 Bailey 359. **Va.**—*Williamson v. Crawford*, 7 Gratt. (48 Va.) 202.

56. **Fla.**—*Barrow v. Bailey*, 5 Fla. 9. **Md.**—*Jones v. George*, 80 Md. 294, 30 Atl. 635; *Starr v. Heckart*, 32 Md. 267. **Mo.**—*Kratz v. Preston*, 52 Mo. App. 251. **Pa.**—*Green v. Plattsburg*, 13 Pa. Co. Ct. 335; *Maitland v. Landis*, 1 Pa. Co. Ct. 144.

**Opening and vacating judgments**, see generally 15 STANDARD PROC. 151, et seq.

57. *Miller's Estate*, 136 Pa. 349, 20 Atl. 565; *In re Reed's Appeal*, 7 Pa. 65; *Dickerson & Haven's Appeal*, 7 Pa. 255; *Jones v. Doe*, 6 Munf. (20 Va.) 105.

**VIII. OPERATION AND EFFECT OF REVIVAL.**—The revival of a judgment adds nothing to its validity, and affords no remedy for amendment or correction of any material defect therein,<sup>58</sup> except in a few states, where a judgment of revival is regarded as a new judgment on the debt.<sup>59</sup> Nor does it operate as a bar to an action of debt on the original judgment,<sup>60</sup> except where a proceeding to revive is a substitute for an action of debt on the judgment.<sup>61</sup> But a revival of a judgment is a bar to all defenses to the original judgment which might have been urged against it prior to the revival.<sup>62</sup> It has the effect of continuing the lien of the original judgment on real property beyond the statutory period when it would otherwise expire,<sup>63</sup> by

[a] **Administrator may confess judgment** against the estate of his decedent in a scire facias proceeding to revive a judgment obtained in the lifetime of decedent. *Bennett v. Fulmer*, 49 Pa. 155.

[b] **A confession by two defendants on different dates** is good. *Weikel v. Long*, 55 Pa. 238.

[c] **Effect of Consent to Revival.** A defendant who has consented to a revival of a judgment, after the death of the plaintiff cannot object to the validity of the revival because not made in the name of the proper representative. *McLain v. Parker*, 88 Kan. 717, 129 Pac. 1140.

58. *Cal.*—*Doehla v. Phillips*, 151 Cal. 488, 91 Pac. 330. *Ga.*—*Vanderberg v. Threlkeld*, 61 Ga. 16. *Ind.*—*Flynn v. Northam*, 44 Ind. App. 333, 89 N. E. 326. *La.*—*Weiller v. Blanks*, *McGloin* 296. *N. C.*—*Hatcher v. Faison*, 142 N. C. 364, 55 S. E. 284. *S. C.*—*Arnold v. House*, 12 S. C. 600. *Tenn.*—*Carter v. Carriger's Admr.*, 3 Yerg. 411, 24 Am. Dec. 585. *Tex.*—*Roberts v. Landrum*, 20 Tex. 471; *McFadden v. Lockhart*, 7 Tex. 573.

**Amendment of judgments**, see 15 STANDARD PROC. 98, et seq.

[a] **The amount of the original judgment cannot be increased by a judgment of revival.** *Taylor v. Doom*, 43 Tex. Civ. App. 59, 95 S. W. 4.

59. *Duff v. Wynkoop*, 74 Pa. 300; *Buehler v. Buffington*, 43 Pa. 278; *Lyons v. Burns*, 20 Phila. (Pa.) 412; *Brier v. Traders' Nat. Bank*, 24 Wash. 695, 64 Pa. 831.

[a] **Where a new judgment is entered** (1) in a proceeding to revive, which is independent of the original judgment, it goes further than a mere reinstatement of the original judgment, and cures its defects (*Duff v. Wyn-*

*koop*, 74 Pa. 300; *Buehler v. Buffington*, 43 Pa. 278; *Custer v. Detterer*, 3 Watts & S. [Pa.] 28), (2) unless such revival was procured by fraud (*Monroe v. Monroe*, 9 W. N. C. [Pa.] 8), (3) or seeks to revive a judgment which has been reversed. *Eldred v. Hazlett's Heirs*, 38 Pa. 16.

60. See the following: *Lafayette v. Wonderly*, 92 Fed. 313, 34 C. C. A. 360; *Wonderly v. Lafayette County*, 77 Fed. 665; *Holton v. Guinn*, 76 Fed. 96, 101; *Carter v. Colman*, 34 N. C. 274. See also *supra*, VI, A, note 49.

61. *Duff v. Wynkoop*, 74 Pa. 300; *Withers v. Haines*, 2 Pa. 435; *Hayes v. Lentz*, 15 Montg. Co. (Pa.) 39.

**Proceeding to revive as substitute for action of debt**, see *supra*, VI, A.

62. *U. S.*—*Snyder v. Brachen*, 5 Biss. 60, 22 Fed. Cas. No. 13,153. *Ala.*—*Martin v. Tally*, 72 Ala. 23. *Ark.*—*Ward v. Sturdivant*, 96 Ark. 434, 132 S. W. 204. *Colo.*—*La Fitte v. Salisbury*, 43 Colo. 248, 95 Pac. 1065. *Ga.*—*Helms v. Marshall*, 121 Ga. 769, 49 S. E. 733; *Dunn v. Brodgen*, 68 Ga. 63; *Thomas v. Towns*, 66 Ga. 78; *Foster v. Reid*, 57 Ga. 609; *Chapman v. Taliaferro*, 1 Ga. App. 235, 58 S. E. 128. *Ill.*—*Linn v. Downing*, 116 Ill. App. 454. *Md.*—*Doub v. Mason*, 2 Md. 380. *Ohio.*—*Doe v. Pendleton*, 15 Ohio 735. *Pa.*—*Rutherford v. Boyer*, 84 Pa. 347. *S. C.*—*Babb v. Sullivan*, 43 S. C. 436, 21 S. E. 277; *Witherspoon v. Twitty*, 43 S. C. 348, 21 S. E. 256.

**Former judgment as merger or bar**, see 15 STANDARD PROC. 485, et seq.

63. See the following: *Ark.*—*Waldstein v. Williams*, 101 Ark. 404, 142 S. W. 834, 37 L. R. A. (N. S.) 1162. *Mo.*—*Schneider v. Maney*, 242 Mo. 36, 145 S. W. 823. *Neb.*—*Tierney v. Evans*, 92 Neb. 330, 138 N. W. 140. *Ohio.*—*Eshelman v. Van Nover*, 89 Ohio St.

reinstating the original judgment in all its powers and conditions, which the change of parties, lapse of time, or other causes, may have rendered inoperative,<sup>64</sup> subject, however, to the rights of third parties which attached or were acquired during the interim between the lapse of the lien and revival of the judgment.<sup>65</sup>

**IX. REVIEW OF PROCEEDINGS FOR REVIVAL.**<sup>66</sup> — On a review, by an appellate court, of revival proceedings, the validity of the original judgment will not be considered.<sup>67</sup> Nor will the judgment of revival be disturbed unless some error or abuse of discretion is shown.<sup>68</sup> But a judgment of revival rendered on a writ of scire facias, which was improperly issued, may be vacated, and the writ quashed, on a review thereof by the appellate court, upon the motion of the defendant.<sup>69</sup> Where the judgment on scire facias merely revives the original judgment, a reversal of the latter annuls the former.<sup>70</sup>

48, 105 N. E. 70. **Pa.**—Yeager's Appeal, 129 Pa. 268, 18 Atl. 137; Cope's Appeal, 96 Pa. 294; Dean's Appeal, 35 Pa. 405; *In re Topley's Appeal*, 13 Pa. 424; *In re Reed's Appeal*, 7 Pa. 65; Philadelphia Fire, etc. Co.'s Appeal, 2 Pa. 263; *In re Dougherty's Estate*, 9 Watts & S. 189, 42 Am. Dec. 326; Westmoreland Bank v. Rainey, 1 Watts 26; Vitry v. Dauci, 3 Rawle 9; *In re Ahl's Estate*, 6 Pa. Dist. 393; Bank v. Kauffman, 2 Leg. Rec. 33; Harrisburg v. Aughinbaugh, 2 Dauph. Co. Rep. 245; Carson v. Ford, 6 Pa. Super. 17. **W. Va.**—Maxwell v. Leeson, 50 W. Va. 361, 40 S. E. 420, 88 Am. St. Rep. 875.

See also *supra*, I.

64. **Ark.**—Waldstein v. Williams, 101 Ark. 404, 142 S. W. 834, 37 L. R. A. 1162. **Kan.**—Manley v. Mayer, 68 Kan. 377, 75 Pac. 550. **Md.**—Huston v. Ditto, 20 Md. 305. **Neb.**—Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365.

65. **Del.**—Cohen v. Tuff, 4 Boyce 188, 86 Atl. 833 (*affirming* 3 Boyce 404, 84 Atl. 946). **Neb.**—Halmes v. Dovey, 64 Neb. 122, 89 N. W. 631, operates as a lien only on real estate which judgment debtor owned when judgment is revived. **Wis.**—McKenna v. Van Blarcom, 109 Wis. 271, 85 N. W. 322, 83 Am. St. Rep. 895.

[a] A bona fide purchaser, during

the lapse of the lien, is protected by statute from a revival of the same. Cohen v. Tuff, 4 Boyce (Del.) 188, 86 Atl. 833, *affirming* 3 Boyce (Del.) 404, 84 Atl. 946.

[b] A mortgage recorded after lapse of the lien and before revival of the judgment has priority over the lien of the new judgment. McKenna v. Van Blarcom, 109 Wis. 271, 85 N. W. 322, 83 Am. St. Rep. 895.

[c] Where a judgment has not been entered upon the lien docket, it will not be continued by scire facias as against subsequent creditors who have had no actual notice thereof. Stephen's Exrs. Appeal, 38 Pa. 9.

66. Review generally, see the titles "Appeals;" "Review;" "Writ of Error."

67. Schuyler v. McCrae, 16 N. J. L. 248; Stille v. Wood, 1 N. J. L. 224.

68. Knight v. Bunker, 7 Ohio St. 77; Buchanan v. King's Heirs, 22 Gratt. (63 Va.) 414.

69. **D. C.**—Crumbaugh v. Otterback, 8 Mackey 1. **Md.**—American Surety Co. of New York v. Spice, 119 Md. 1, 85 Atl. 1031. **Miss.**—Locke v. Brady, 30 Miss. 21.

70. Mills v. Conner, 1 Blackf. (Ind.) 7; Eldred v. Hazlett's Heirs, 38 Pa. 16.

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For forms, see 9 STANDARD PROC. 748, et seq., and the index to this work.

For further references and cross-references, see the index to this work.

**I. BY PAYMENT.—A. TO WHOM MADE.—1. Judgment Plaintiff.**—Payment of a judgment in order to constitute a satisfaction thereof must usually be made to the party for whom the judgment was rendered,<sup>1</sup> or to his duly authorized agent,<sup>2</sup> or to his attorney of record.<sup>3</sup> If two or more plaintiffs share in the judgment, payment to them all jointly, or to either of them, in the absence of notice from either of them to the contrary, will discharge the defendant from liability.<sup>4</sup>

1. See the following: **U. S.**—Wills v. Chandler, 2 Fed. 273, 1 McCrary 276. **Ala.**—Henderson v. Planters' & Merchants' Bank, 178 Ala. 420, 59 So. 493; McGehee v. Gindrot, 20 Ala. 95. **Ga.**—Roland v. Roland, 139 Ga. 825, 78 S. E. 249; Georgia R. & Banking Co. v. Tice, 124 Ga. 459, 52 S. E. 916. **Ky.**—Davis v. Gott, 130 Ky. 486, 113 S. W. 826. **Pa.**—Young v. Steim, 29 Pa. Super. 205.

2. **Ala.**—Henderson v. Planters' & Merchants' Bank, 178 Ala. 420, 59 So. 493. **Idaho.**—Vermont Loan & Tr. Co. v. McGregor, 6 Idaho 134, 53 Pac. 399. **Mich.**—Kallander v. Neidhold, 112 Mich. 329, 70 N. W. 892, 4 Det. Leg. N. 55. **N. C.**—See Bartlett v. Yates, 52 N. C. 615, holding that a parol assignment of a judgment constitutes the assignee an agent for plaintiff, authorized to receive payment and discharge the judgment. **Pa.**—Miller v. Preston, 154 Pa. 63, 25 Atl. 1041, affirming 30 W. N. C. 240. **Vt.**—Selinas v. Lee, 73 Vt. 363, 51 Atl. 5.

[a] The judgment debtor must ascertain the authority of the agent; payment to one without authority is

at his risk. Guiles v. Murray, 22 Pa. Co. Ct. 99; Cowden v. Bechlar, 6 Pa. Co. Ct. 8.

[b] Payments made to a collection agency after notice that it was not authorized to receive such payments do not operate to discharge or satisfy the judgment. Stults v. Nelson, Cheesman & Co., 49 Ind. App. 208, 97 N. E. 21.

[c] Payment to the county treasurer of the amount of a judgment recovered by the county, operates to satisfy the judgment. Shelly v. Lash, 14 Minn. 498.

3. Payment to attorney of record as satisfaction of judgment, see *infra*, I, A, 2.

4. **Ark.**—Mt. Nebo, etc. Coal Co. v. Martin, 86 Ark. 608, 111 S. W. 1002, 112 S. W. 882. **Ga.**—Georgia R. & Banking Co. v. Tice, 124 Ga. 459, 52 S. E. 916. **Ky.**—Davis v. Gott, 130 Ky. 486, 113 S. W. 826. **Neb.**—American F. Ins. Co. v. Landfare, 56 Neb. 482, 76 N. W. 1068. **N. Y.**—People et rel. Immerman v. Devlin, 63 Misc. 363, 118 N. Y. Supp. 478. **Tenn.**—Erwin v. Rutherford, 1 Yerg. 169.

[a] Where a wife, having a separate

Where the judgment is taken in the name of a nominal plaintiff, payment may be made direct to the beneficial owner.<sup>5</sup> Payment to a nominal plaintiff does not satisfy a judgment recovered in his name expressly for the use of another.<sup>6</sup> But payment to a nominal plaintiff is sufficient where there is nothing in the record to indicate that such plaintiff is not the equitable as well as the legal owner.<sup>7</sup>

Where the judgment has been assigned, and the defendant has notice thereof, payment must be made to the assignee;<sup>8</sup> payment to the former owner of the judgment,<sup>9</sup> or his attorney of record,<sup>10</sup> will not operate as a satisfaction of the judgment. But in case of an assignment without notice, payment to the original owner is valid.<sup>11</sup>

**2. Attorney of Record.**—By virtue of a general retainer, the attorney of record for the judgment plaintiff has implied authority to

claim, permits it to be joined with that of her husband, and asserted in his name, there was no misjoinder of parties, since her husband's satisfaction of the judgment will also satisfy her claim. *Mt. Nebo, etc. Coal Co. v. Martin*, 86 Ark. 608, 111 S. W. 1002 112 S. W. 882.

[b] While one joint creditor (1) may compromise with the debtor as to his own interest (*Penn v. Edwards*, 50 Ala. 63), (2) he cannot bind his co-creditors by any compromise as to their interests. *Haggin v. Clark*, 61 Cal. 1

5. **Ill.**—*Triplett v. Scott*, 12 Ill. 137; *Germania L. Ins. Co. v. Koehler*, 59 Ill. App. 592. **Ia.**—*Matter v. Phillips*, 52 Iowa 232, 3 N. W. 49. **Me.**—*Pratt v. Dow*, 56 Me. 81. **Mich.**—*Kallander v. Neidhold*, 112 Mich. 329, 70 N. W. 892, 4 Det. Leg. N. 55. **N. Y.**—*McGregor v. Comstock*, 28 N. Y. 237.

[a] The beneficial owner has been held to be the "party who has the exclusive right to merge a claim into a judgment, and after judgment to make the money an execution." *Lacey v. Waples*, 28 La. Ann. 158.

[b] To render such a payment effectual, however, the judgment debtor must show that the person to whom the payment was made had, at the time, the right to receive payment. *Mervine v. Parker*, 18 Ala. 241; *Seymour v. Smith*, 114 N. Y. 481, 21 N. E. 1042, 11 Am. St. Rep. 683; *Brewster v. Carnes*, 103 N. Y. 556, 9 N. E. 323.

6. *Triplett v. Scott*, 12 Ill. 137.

[a] **Exception.**—Where the person for whose use the judgment is recovered is a fictitious person, the debtor may treat the nominal plaintiff as the real owner, and proceed to settle the

demand with him. *McGehee v. Gindrot*, 20 Ala. 95.

7. *Atkinson v. Cooper*, 2 Humph. (Tenn.) 361.

**Entry of satisfaction by nominal plaintiff**, see *infra*, VIII, A.

8. **U. S.**—*Wills v. Chandler*, 2 Fed. 273; *The Lulie D.*, 4 Biss. 249, 12 Fed. Cas. No. 8,602. **Ala.**—*Steele v. Thompson*, 62 Ala. 323. **Colo.**—*Stoddard v. Benton*, 6 Colo. 508. **Ill.**—*Hughes v. Trahern*, 64 Ill. 48. **Mass.**—*Dunn v. Snell*, 15 Mass. 481. **Miss.**—*Moore v. Red*, 22 So. 948. **N. Y.**—*Seymour v. Smith*, 17 Abb. N. C. 387. **Pa.**—*Noble v. Thompson Oil Co.*, 79 Pa. 354, 21 Am. Rep. 66. **Tenn.**—*Clodfelter v. Cox*, 1 Sneed 330, 60 Am. Dec. 157.

9. *Ross v. Chicago, R. I. & P. R. Co.*, 55 Iowa 691, 8 N. W. 644; *Guthrie v. Bashline*, 25 Pa. 80.

[a] A receipt for part payment of a judgment, given by a joint creditor who had previously assigned his entire interest in the judgment, and accepted by the judgment debtor with full knowledge of the facts, will not operate as a credit or satisfaction pro tanto of such judgment. *Branham v. Rose*, 2 Ind. 26. Partial payment as satisfaction or discharge of judgment, see *infra*, I, C, 2.

10. See *infra*, I, A, 2.

11. **Ala.**—*McGehee v. Gindrot*, 20 Ala. 95. **Ind.**—*Gamble v. Cummins*, 2 Blackf. 235. **Ia.**—*McCarver v. Nealey*, 1 G. Gr. 360. **N. Y.**—*Trustees of Union College v. Wheeler*, 61 N. Y. 88; *Booth v. Farmers & Mechanics' Nat. Bank*, 50 N. Y. 396, reversing 4 Lans. 301, 65 Barb. 457; *Bishop v. Garcia*, 14 Abb. Pr. (N. S.) 69.

receive payment and enter satisfaction of his client's judgment,<sup>12</sup>

12. **U. S.**—Bailey *v.* United States, 109 U. S. 432, 3 Sup. Ct. 272, 27 L. ed. 988; Chouteau *v.* United States, 95 U. S. 61, 24 L. ed. 371; Erwin *v.* Blake, 8 Pet. 18, 8 L. ed. 852; The Union Bank of Georgetown *v.* Geary, 5 Pet. 99, 8 L. ed. 60; Holker *v.* Parker, 7 Cranch 436, 3 L. ed. 396. **Ala.**—Frazier *v.* Parks' Admr's., 56 Ala. 363. **Ark.**—Conway County *v.* Little Rock, etc. Ry. Co., 39 Ark. 50; Miller *v.* Scott, 21 Ark. 396. **Colo.**—Black *v.* Drake, 2 Colo. 330. **Conn.**—Brackett *v.* Norton, 4 Conn. 517, 10 Am. Dec. 179. **Fla.**—Hendry *v.* Benlisa, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283. **Ga.**—Georgia R. & Banking Co. *v.* Tice, 124 Ga. 459, 52 S. E. 916. **Ill.**—Hurd *v.* Slaten, 43 Ill. 348. **Ind.**—State *v.* Henning, 158 Ind. 196, 63 N. E. 207; Newman *v.* Kiser, 128 Ind. 258, 26 N. E. 1006; Holliday *v.* Thomas, 90 Ind. 398. **Ia.**—Shaffer *v.* McCrackin, 90 Iowa 578, 58 N. W. 910, 48 Am. St. Rep. 465; McCarver *v.* Nealey, 1 G. Gr. 360. **Kan.**—Dolan *v.* Van Demark, 35 Kan. 304, 10 Pac. 848. **Ky.**—Davis *v.* Gott, 130 Ky. 486, 113 S. W. 826; Ely, etc. *v.* Harvey, Keith & Co., 6 Bush 620; Canterbury *v.* Com., 1 Dana 415. **Me.**—Ducett *v.* Cunningham, 39 Me. 386; Patten *v.* Fullerton, 27 Me. 58; Gray *v.* Wass, 1 Me. 257. **Md.**—Baltimore, etc. R. Co. *v.* Fitzpatrick, 36 Md. 619. **Mass.**—Bryant *v.* Rich's Grill, 216 Mass. 344, 103 N. E. 925, Ann. Cas. 1915B, 869; Heard *v.* Lodge, 20 Pick. 53, 32 Am. Dec. 197; Lewis *v.* Gamage, 1 Pick. 347; Langdon *v.* Potter, 13 Mass. 319. **Miss.**—Hiller *v.* Ivy, 37 Miss. 431; Butler *v.* Jones, 7 How. 587, 40 Am. Dec. 82. **Mo.**—Whelan *v.* Reilly, 61 Mo. 565; Carroll County *v.* Cheatham, 48 Mo. 385; State *v.* Hawkins, 28 Mo. 366; Roberts *v.* Nelson, 22 Mo. App. 28. **N. J.**—Wyckoff *v.* Bergen, 1 N. J. L. 214. **N. Y.**—Steward *v.* Biddlecum, 2 N. Y. 103; Megary *v.* Funtis, 5 Sandf. 376; Tito *v.* Seabury, 18 Misc. 283, 41 N. Y. Supp. 1041. **N. C.**—Rogers *v.* McKenzie, 81 N. C. 164. **Ohio.**—Bryans *v.* Taylor, Wright 245. **Pa.**—Miller *v.* Preston, 154 Pa. 63, 25 Atl. 1041, *affirming* 30 W. N. C. 240 (holding that payment of a judgment to the attorney of record for plaintiff, who satisfies the same on the record, and turns the money over to a person accustomed to acting as agent for plaintiff, is binding on plaintiff; especially when he waits three years, and until after the death of the attorney to deny the attorney's authority); Weist *v.* Lee, 3 Yeates 47; Bracken *v.* City, 27 Pittsb. Leg. J. (O. S.) 202, 10 Pittsb. Leg. J. (N. S.) 202; McDonald *v.* Todd, 1 Grant Cas. 17. **S. C.**—Mordecai *v.* Charleston County, 8 S. C. 100; Cone *v.* Brown, 15 Rich. L. 262; Commissioners *v.* Rose, 1 Desaus. Eq. 461, 469. **Tenn.**—Maxwell *v.* Owen, 7 Coldw. 630. **Tex.**—Cartwright's Admr. *v.* Jones' Admr., 13 Tex. 1. **Va.**—Johnson *v.* Gibbons, 27 Gratt. (68 Va.) 632; Wilkinson *v.* Holloway, 7 Leigh (34 Va.) 277; Smock *v.* Dade, 5 Rand. (26 Va.) 639, 16 Am. Dec. 780; Wilson *v.* Stokes, 4 Munf. (18 Va.) 455; Branch *v.* Burnley, 1 Call (5 Va.) 147; Hudson *v.* Johnson, 1 Wash. (1 Va.) 10. **W. Va.**—Kent, Paine & Co. *v.* Chapman, 18 W. Va. 485; Wiley *v.* Mahood, 10 W. Va. 206; Harper *v.* Harvey, 4 W. Va. 539; Yoakum *v.* Tilden, 3 W. Va. 167, 100 Am. Dec. 738. **Wis.**—Flanders *v.* Sherman, 18 Wis. 575; Clark *v.* Randall, 9 Wis. 135, 76 Am. Dec. 252.

[a] **Special Counsel.**—An attorney employed for some specific purpose, and who is not an attorney of record, has no authority to collect the amount of the judgment. Cameron *v.* Stratton, 14 Ill. App. 270.

[b] **An associate attorney** may be authorized to receive payment of a judgment. Rogers *v.* McKenzie, 81 N. C. 164.

[c] **Payment to an attorney for the state** does not operate as satisfaction of a judgment in favor of the state where a statute provides for payment to the treasurer. Peacock *v.* Pembroke, 8 Md. 348.

[d] **Payments to an attorney not of record**, and who had never represented the judgment creditor, and who had never paid over the amounts thus paid to him, were not valid, and did not bind the creditor. Morrison *v.* Hammack (Tex. Civ. App.), 152 S. W. 494.

**Payment to attorney for guardian ad litem** of an infant as satisfaction, see *infra*, I, A, 3.

**Entry of satisfaction**, see generally *infra*, VIII.

unless his authority has been revoked, and notice thereof given,<sup>13</sup> or his authority has expired by limitation of statute,<sup>14</sup> or the death of his client,<sup>15</sup> or the judgment has been assigned.<sup>16</sup> But in the absence of express authority from his client, an attorney cannot release a judgment without actual payment in full of the whole amount due thereon.<sup>17</sup>

13. **Ga.**—*Roland v. Roland*, 139 Ga. 825, 78 S. E. 249. **Ill.**—*Custer v. Agnew*, 83 Ill. 194. **Ia.**—*Shaffer v. McCrackin*, 90 Iowa 578, 58 N. W. 910, 48 Am. St. Rep. 465. **Miss.**—*Butler v. Jones*, 7 How. 587, 40 Am. Dec. 82. **W. Va.**—*Harper, Admr. v. Harvey*, 4 W. Va. 539; *Yoakum v. Tilden*, 3 W. Va. 167, 100 Am. Dec. 738, 767.

[a] **Burden of Proof.**—Where a judgment plaintiff denies the right of his attorney of record to receive payment of the judgment, the burden is on him to show that the attorney's authority was revoked before the payment, and that defendant had notice thereof. *Yoakum v. Tilden*, 3 W. Va. 167, 100 Am. Dec. 738.

14. *Chautauqua County Bank v. Risley*, 4 Denio (N. Y.) 480.

15. *Turnan v. Temke*, 84 Ill. 286; *Wood v. New York*, 44 App. Div. 299, 60 N. Y. Supp. 759, holding that an attorney of record has no authority to discharge a judgment obtained by him for his client, after the death of the latter, unless re-employed by his personal representative, notwithstanding the fact that the judgment is not entered until after the client's death, and a provision of statute that the attorney may satisfy a judgment at any time within two years after its entry.

16. **Ill.**—*Trumbull v. Nicholson*, 27 Ill. 149. **N. Y.**—*Robinson v. Brennan*, 90 N. Y. 208. **S. C.**—*Mordecai v. Charleston County*, 8 S. C. 100.

**Payment where judgment assigned**, see *supra*, I, A, 1.

17. See the following: **U. S.**—*United States v. Beebe*, 180 U. S. 343, 21 Sup. Ct. 371, 45 L. ed. 563; *Jeffries v. Mutual Life Ins. Co.*, 110 U. S. 305, 4 Sup. Ct. 8, 28 L. ed. 156; *Holker v. Parker*, 7 Cranch 436, 3 L. ed. 396; *Pierce v. Brown*, 8 Biss. 534, 19 Fed. Cas. No. 11,143. **Ala.**—*Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508. **Colo.**—*McMurray v. Marsh*, 12 Colo. App. 95, 54 Pac. 852. **Ga.**—*Phillips v. Dobbins*, 56 Ga. 617. **Ill.**—*People v. Cole*, 84 Ill. 327; *Vickery v. McClellan*, 61 Ill. 311;

*Trumbull v. Nicholson*, 27 Ill. 149; *Nolan v. Jackson*, 16 Ill. 272. **Ind.**—*Union Mutual Life Ins. Co. v. Buchanan*, 100 Ind. 63; *McCormick v. The Walter A. Wood M. & R. Mach. Co.*, 72 Ind. 518; *Combs v. Combs*, 56 Ind. App. 656, 105 N. E. 944; *Biddle v. Pierce*, 13 Ind. App. 239, 41 N. E. 475; *Repp v. Wiles*, 3 Ind. App. 167, 29 N. E. 441. **Ia.**—*Tallmon v. Tallmon*, 166 Iowa 370, 147 N. W. 746; *McCarver v. Nealey*, 1 G. Gr. 360. **Kan.**—*Rounsaville v. Hazen*, 33 Kan. 71, 5 Pac. 422; *Marbourg v. Smith*, 11 Kan. 554. **La.**—*Garthwaite v. Wentz*, 19 La. Ann. 196. **Me.**—*Wilson v. Wadleigh*, 36 Me. 496; *Jewett v. Wadleigh*, 32 Me. 110. **Md.**—*Fritchey v. Bosley*, 56 Md. 94; *Rohr v. Anderson*, 51 Md. 205; *Maddux v. Bevan*, 39 Md. 485; *Campbell v. Booth*, 8 Md. 107; *Doub v. Barnes*, 1 Md. Ch. 127. **Mass.**—*Lewis v. Gamage*, 1 Pick. 347. **Miss.**—*Parker v. McBee*, 61 Miss. 134; *Keller v. Scott*, 2 Smed. & M. 81. **Mo.**—*Spears v. Ledergerber*, 56 Mo. 465; *Roberts v. Nelson*, 22 Mo. App. 28. **Neb.**—*Smith v. Jones*, 47 Neb. 108, 66 N. W. 19, 53 Am. St. Rep. 519. **N. H.**—*Beliveau v. Amoskeag Mfg. Co.*, 68 N. H. 225, 40 Atl. 734, 73 Am. St. Rep. 577, 44 L. R. A. 167. **N. J.**—*Faughman v. Elizabeth*, 58 N. J. L. 309, 33 Atl. 212. **N. Y.**—*Beers v. Hendriessan*, 45 N. Y. 665, reversing 6 Robt. 53; *Wood v. New York*, 44 App. Div. 299, 60 N. Y. Supp. 759; *Lewis v. Woodruff*, 15 How. Pr. 539; *Benedict v. Smith*, 10 Paige Ch. 126; *Carstens v. Barnstorf*, 11 Abb. Pr. N. S. 442; *Woodford v. Rasbach*, 6 Civ. Proc. 315; *Lamman v. Elmira, C. & N. R. R. Co.*, 85 Hun 188, 32 N. Y. Supp. 579, 65 N. Y. St. 723. **Pa.**—*Whitesell v. Peck*, 165 Pa. 571, 30 Atl. 933, 35 W. N. C. 540; *Chambers v. Miller*, 7 Watts 63; *Philadelphia, etc. R. Co. v. Christman*, 4 Penny. 271; *Eby v. Lamb*, 10 Pa. Co. Ct. 209. **Tex.**—*Peters v. Lawson*, 66 Tex. 336, 17 S. W. 734; *Price v. Logue* (Tex. Civ. App.), 164 S. W. 1048. **W. Va.**—*Watt v.*

**3. Next Friend or Guardian.**—Under statutes in some states, the guardian ad litem or next friend of an infant may, upon giving proper bond or security, receive payment of a judgment in favor of the infant.<sup>18</sup> But in the absence of such statutory authority, the general rule is that neither the guardian ad litem,<sup>19</sup> nor the attorney of

Brookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811.

See 3 STANDARD PROC. 858.

[a] **Payment of a part of the amount due on a judgment under a fraudulent agreement that the debtor shall have a receipt in full, and the attorney shall retain the money so paid, will not inure to the benefit of such debtor or his surety.** Chalfants v. Martin, 25 W. Va. 394.

[b] **Where the judgment creditor ratifies an unauthorized compromise made by his attorney of record, whereby assigned notes of third persons in a less amount than the judgment are accepted as full payment thereof, it will operate as a satisfaction of the judgment.** Jones v. Ransour, 3 Ind. 327; Whitesell & Sons v. Peck, 165 Pa 571, 30 Atl. 933, 35 W. N. C. 540.

[c] **A judgment plaintiff is not bound by a discharge of his debtor from arrest on a ca. sa. by authority of plaintiff's attorney, until the money has been paid.** Simonton v. Barrell, 21 Wend. (N. Y.) 362; Kellogg v. Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335.

[d] **Attorney cannot credit amount of his own indebtedness to judgment debtor on judgment in absence of consent of judgment creditor.** Keller v. Scott, 2 Smed. & M. (Miss.) 81; Wenans v. Lindsay, 1 How. (Miss.) 577.

**Partial payment as satisfaction or discharge of judgment, see *infra*, I, C, 2.**

**Medium, mode and sufficiency of payment, see *infra*, I, C.**

**18. Ark.**—Wood v. Claiborne, 82 Ark. 514, 102 S. W. 219, 118 Am. St. Rep. 89, 11 L. R. A. (N. S.) 913; Sparkman v. Roberts, 61 Ark. 26, 31 S. W. 742. **Fla.**—Neal v. Spooner, 20 Fla. 38. **Ga.**—Oxford Knitting Mills v. Sutton, 127 Ga. 162, 56 S. E. 298. **Mich.** Baker v. Pere Marquette R. Co., 142 Mich. 497, 105 N. W. 1116, 3 L. R. A. (N. S.) 76. **Mo.**—Henderson v. Kansas City, 177 Mo. 477, 76 S. W. 1045; Jones v. Steele, 36 Mo. 324. **N. Y.**

Greenburg v. N. Y. C. & H. R. R. Co., 210 N. Y. 505, 104 N. E. 931 (*affirming* order 160 App. Div. 888, 144 N. Y. Supp. 1118); *In re Fritz*, 2 Paige 374; Heiter v. Joline, 135 App. Div. 12, 119 N. Y. Supp. 819; Wileman v. Metropolitan St. R. Co., 80 App. Div. 53, 80 N. Y. Supp. 233. **Tex.**—Gulf, C. & S. F. Ry. Co. v. Younger, 19 Tex. Civ. App. 242, 45 S. W. 1030, where judgment does not exceed \$500.

[a] **Attorney of Record.**—Under such statutes the attorney of record for the infant may also receive payment of the amount of the judgment recovered and enter satisfaction thereof. Greensburg v. New York C. & H. R. R. Co., 210 N. Y. 505, 104 N. E. 931, *affirming* order, 160 App. Div. 888, 144 N. Y. Supp. 1118.

**Right of attorney of record to receive payment of judgment generally, see *supra*, I, A, 2.**

[b] **A defendant is bound to know,** however, whether the guardian ad litem has given bond as required by statute, so as to authorize him or his attorney to receive payment and enter satisfaction of the infant's judgment. Heiter v. Joline, 135 App. Div. 13, 119 N. Y. Supp. 819.

**19. Ala.**—Collins v. Gillespy, 148 Ala. 558, 41 So. 930, 121 Am. St. Rep. 81; Glass v. Glass, 76 Ala. 368; Haynes v. Wheat, 9 Ala. 239; Smith v. Redus, 9 Ala. 99, 44 Am. Dec. 429; Isaacs v. Boyd, 5 Port. 388. **Ark.**—Biggs v. St. Louis, etc. R. Co., 91 Ark. 122, 120 S. W. 970. **Ill.**—Spring Valley Coal Co. v. Donaldson, 123 Ill. App. 196. **Ky.**—Forbes' Heirs v. Mitchell, 1 J. J. Marsh. 440. **Me.**—Bernard v. Merrill, 91 Me. 358, 40 Atl. 136. **Miss.**—Klaus v. State, 54 Miss. 644. **N. Y.**—Leopold v. Meyer, 10 Abb. Pr. 40. **S. C.**—Allen v. Roundtree, 1 Speers L. 80. **Tenn.** American Lead Pencil Co. v. Davis, 108 Tenn. 251, 66 S. W. 1129; Cody v. Roane Iron Co., 105 Tenn. 515, 58 S. W. 850; Barbee v. Williams, 4 Heisk. 522; Benton v. Pope, 5 Humph. 392; Miles v. Kaigler, 10 Yerg. 10, 30 Am. Dec. 425. **Tex.**—Galveston Oil Co. v.

record, who derives his authority through such guardian ad litem,<sup>20</sup> can receive payment of a judgment recovered by an infant, but such judgment must be paid to the general guardian,<sup>21</sup> or, if no guardian has been appointed and qualified, it may be paid into court for the benefit of the infant.<sup>22</sup> There are authorities, however, to the effect that even in the absence of statute, where no general guardian has been appointed, that payment may be made to the guardian ad litem or next friend,<sup>23</sup> or attorney of record employed by such guardian ad litem.<sup>24</sup> But when permitted to receive payment, the guardian ad

Thompson, 76 Tex. 235, 13 S. W. 60; Gulf, C. & S. F. Ry. Co. v. Younger, 19 Tex. Civ. App. 242, 45 S. W. 1030. **W. Va.**—Fletcher v. Parker, 53 W. Va. 422, 44 S. E. 422, 97 Am. St. Rep. 991; Crotty v. Eagle's Admr., 35 W. Va. 143, 13 S. E. 59.

**20. Ala.**—Collins v. Gillespy, 148 Ala. 558, 41 So. 930, 121 Am. St. Rep. 81. **Pa.**—O'Donnell v. Broad, 149 Pa. 24, 27 Atl. 305, 2 Pa. Dist. 84. **Tenn.**—Cody v. Roane Iron Co., 105 Tenn. 515, 58 S. W. 850; Barbee v. Williams, 4 Heisk. 522; Benton v. Pope, 5 Humph. 392; Miles v. Kaigler, 10 Yerg. 10, 30 Am. Dec. 425. **Tex.**—Galveston Oil Co. v. Thompson, 76 Tex. 235, 13 S. W. 60; Galveston R. Co. v. Hewitt, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32.

Compare *infra*, note 24.

**Payment to attorney of record generally**, see *supra*, I, A, 2.

**21. Ala.**—Collins v. Gillespy, 148 Ala. 558, 41 So. 930, 121 Am. St. Rep. 81; Smith v. Redus, 9 Ala. 99, 44 Am. Dec. 429. **Ark.**—Wood v. Claiborne, 82 Ark. 514, 102 S. W. 219, 118 Am. St. Rep. 89, 11 L. R. A. (N. S.) 913. **Me.**—Bernard v. Merrill, 91 Me. 358, 40 Atl. 136. **Mich.**—Sheahan v. Wayne Circuit Judge, 42 Mich. 69, 3 N. W. 259. **N. Y.**—Wuesthoff v. Germania Life Ins. Co., 107 N. Y. 580, 14 N. E. 811. **Tenn.**—American Lead Pencil Co. v. Davis, 108 Tenn. 251, 66 S. W. 1129; Cody v. Roane Iron Co., 105 Tenn. 515, 58 S. W. 850; Barbee v. Williams, 4 Heisk. 522; Benton v. Pope, 5 Humph. 392; Miles v. Kaigler, 10 Yerg. 10, 30 Am. Dec. 425. **Tex.**—Galveston Oil Co. v. Thompson, 76 Tex. 235, 13 S. W. 60; Galveston R. Co. v. Hewitt, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32; Gulf, C. & S. F. Ry. Co. v. Younger, 19 Tex. Civ. App. 242, 45 S. W. 1030. **W. Va.**—Fletcher v. Parker, 53 W. Va. 422, 44 S. E. 422, 97 Am. St. Rep. 991; Law-

son v. Kirchner, 50 W. Va. 344, 40 S. E. 344.

**22. Ala.**—Smith v. Redus, 9 Ala. 99, 44 Am. Dec. 429. **Miss.**—Klaus v. State, 54 Miss. 644. **N. Y.**—Calmbacher v. Neuman, 28 Abb. N. C. 155; Leopold v. Meyer, 10 Abb. Pr. 40; Sere v. Coit, 5 Abb. Pr. 481; Carpenter v. Schermerhorn, 2 Barb. Ch. 314. **Tenn.**—Cody v. Roane Iron Co., 105 Tenn. 515, 58 S. W. 850; Benton v. Pope, 5 Humph. 392; Miles v. Kaigler, 10 Yerg. 10, 30 Am. Dec. 425. **Tex.**—Galveston City R. Co. v. Hewitt, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32; Gulf, C. & S. F. Ry. Co. v. Styron, 66 Tex. 421, 1 S. W. 161; Gulf, C. & S. F. Ry. Co. v. Younger, 19 Tex. Civ. App. 242, 45 S. W. 1030; Austin v. Colgate (Tex. Civ. App.), 27 S. W. 896. **W. Va.**—Fletcher v. Parker, 53 W. Va. 422, 44 S. E. 422, 97 Am. St. Rep. 991.

**23. Md.**—Baltimore & O. R. Co. v. Fitzpatrick, 36 Md. 619. **Mass.**—Tripp v. Gifford, 155 Mass. 108, 29 N. E. 208, 31 Am. St. Rep. 530. **Pa.**—O'Donnell v. Broad, 2 Pa. Dist. 84, 6 Kulp 460, 149 Pa. 24, 27 Atl. 305. **Wash.**—State *ex rel.* Lane v. Ballinger, 41 Wash. 23, 82 Pac. 1018, 3 L. R. A. (N. S.) 72. **Eng.**—Morgan v. Thorne, 7 Mees. & W. 400; Collins v. Brook, 5 Hurlst. & N. 700; Collins v. Brook, 4 Hurlst. & N. 270.

**24. Md.**—Baltimore & O. R. Co. v. Fitzpatrick, 36 Md. 619. **Pa.**—Stroyd v. Pittsburg Traction Co., 15 Pa. Super. 245. **Wash.**—State *ex rel.* Lane v. Ballinger, 41 Wash. 23, 82 Pac. 1018, 3 L. R. A. (N. S.) 72, holding that general statute giving attorney right to receive money upon judgment and upon payment to acknowledge satisfaction thereof authorizes him to receive payment of judgment for infant.

Compare *supra*, note 20.

**Payment of attorney of record generally**, see *supra*, I, A, 2.

litem cannot compromise or settle such judgment, so as to bind the infant,<sup>25</sup> except under an order of the court.<sup>26</sup>

**4. Officers Authorized To Receive.**—a. *Generally.*—Payment to any officer, having authority in his official capacity to accept it, will satisfy the judgment.<sup>27</sup> Thus payment to the sheriff or constable in possession of an execution will usually satisfy or discharge the judgment;<sup>28</sup> but a payment to a sheriff who is not thus authorized to receive payment will not discharge the judgment.<sup>29</sup>

**25.** *Spring Valley Coal Co. v. Donaldson*, 123 Ill. App. 196; *Fletcher v. Parker*, 53 W. Va. 422, 44 S. E. 422, 97 Am. St. Rep. 991.

[a] An acceptance of a less sum than the whole amount of a judgment rendered in favor of an infant, and the entry of satisfaction of payment thereof of record, by the curator for his ward, will not estop the ward from impeaching the acknowledgment for want of consideration. *Winter v. K. C. Cable Ry. Co.*, 73 Mo. App. 173. Partial payment as satisfaction or discharge of judgment, see *supra*, I, C, 2.

**26.** *Minn.*—*Eidam v. Finnegan*, 48 Minn. 53, 50 N. W. 933, 16 L. R. A. 507. *N. Y.*—*Edsall v. Vandemark*, 39 Barb. 589; *Heiter v. Joline*, 135 App. Div. 13, 119 N. Y. Supp. 819. *W. Va.*—*Crotty v. Eagle's Admr.*, 35 W. Va. 143, 13 S. E. 59.

**27.** *Ala.*—*Thompson v. Wallace*, 3 Ala. 132. *Fla.*—*Hendry v. Benlisa*, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283. *Ill.*—*Loughry v. Mail*, 34 Ill. App. 523. *Ind.*—*Merritt v. Richey*, 97 Ind. 236. *Ky.*—*Davis v. Gott*, 130 Ky. 486, 113 S. W. 826. *N. Y.*—*Jackson v. Weeks*, 1 N. Y. St. 511, holding that payment of an execution in the hands of a sheriff, and the sheriff's return thereof satisfied, and an entry made on the docket by the clerk canceling the same, operates as a complete satisfaction of the judgment, and the execution creditor cannot refuse to accept the money from the sheriff, and proceed against an equity of redemption instead. *N. C.*—*Motz v. Stowe*, 83 N. C. 434; *Tarkinton v. Guyther*, 35 N. C. 100. *Pa.*—*Slusher v. Washington Co.*, 27 Pa. 205.

Payment to justice of peace as satisfaction of judgment, see the title "Justices of the Peace."

[a] **Payment To Obtain Postponement of Sale.**—Money turned over to the sheriff to the amount of the debt,

for the purpose of obtaining a postponement of the sale of real estate, will not operate as a satisfaction of the judgment. *Strange v. Donohue*, 4 Ind. 327.

**28.** *Ala.*—*Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508; *Bobo v. Thompson*, 3 Stew. & P. 385. *Del.*—*Lofland v. Jefferson*, 4 Harr. 303. *Ga.*—*Irwin v. McKee*, 25 Ga. 646. *Ind.*—*Beard v. Millikan*, 68 Ind. 231, regardless of the sheriff's failure to pay over the money to the plaintiff. *Ky.*—*Davis v. Gott*, 130 Ky. 486, 113 S. W. 826. *Miss.*—*Brooks Oil Co. v. Weatherford*, 91 Miss. 501, 44 So. 928. *Mo.*—*Nicola v. American Car & Foundry Co.*, 185 Mo. App. 285, 170 S. W. 366. *N. C.*—*Bailey v. Hester*, 101 N. C. 538, 8 S. E. 164; *Mills v. Allen*, 52 N. C. 564. *Pa.*—*Slusher v. Washington Co.*, 27 Pa. 205. *Tenn.*—*Cain v. Bryant*, 12 Heisk. 45, even where constable fails to pay money to plaintiff. *Tex.*—*Harris v. Ellis*, 30 Tex. 4, 94 Am. Dec. 296.

[a] Where an attorney's lien or assignment as to a part of the judgment is held by a third person without the knowledge of the sheriff, but the judgment debtor has notice thereof, payment to the sheriff does not effect a satisfaction of the judgment. *Nicola v. American Car & Foundry Co.*, 185 Mo. App. 285, 170 S. W. 366.

**29.** *Ala.*—*Henderson v. Planters' & Merchants' Bank*, 178 Ala. 420, 59 So. 493; *Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508; *Dean v. Governor*, 13 Ala. 526; *Bobo v. Johnson*, 3 Stew. & P. 385; *Barton v. Lockhart*, 2 Stew. & P. 109. *Del.*—*Lofland v. Jefferson*, 4 Harr. 303. *Me.*—*Wyer v. Andrews*, 13 Me. 168, 29 Am. Dec. 497. *Miss.*—*Brooks Oil Co. v. Weatherford*, 91 Miss. 501, 44 So. 928, especially where sheriff does not pay money over and creditor does not ratify such payment. *Mo.*—*Trigg v. Harris*, 49 Mo. 176. *Tex.*

b. *Clerk of Court*.—Payment to the clerk of court of the amount of a judgment does not operate as a satisfaction or discharge thereof, where the clerk is not authorized to receive such payment,<sup>30</sup> and no subsequent ratification of payment to him is made on the part of the judgment creditor.<sup>31</sup> Where by statute the clerk of court is authorized to receive payment after the judgment has been rendered, payment to him constitutes a discharge or satisfaction of the judgment.<sup>32</sup> So a payment into court, under an order therefor, of the amount of plaintiff's judgment and costs, will operate as a satisfaction, when done at the instance of plaintiff.<sup>33</sup>

Harris v. Ellis, 30 Tex. 4, 94 Am. Dec. 296. **Va.**—Chapman v. Harrison, 4 Rand. (25 Va.) 336.

[a] Where deputy sheriff is not authorized to receive payment, payment to him does not discharge defendant's liability. Bailey v. Hester, 101 N. C. 538, 8 S. E. 164.

30. See the following: **Ala.**—Governor v. Read, 38 Ala. 252; Blann v. Crocheron, 20 Ala. 320. **Fla.**—Hendry v. Benlisa, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283. **Ga.**—Chattanooga, R. & C. R. Co. v. Jackson, 86 Ga. 676, 13 S. E. 109; The Bank of Georgetown v. Ault, 31 Ga. 359. **Ill.**—Seymour v. Haines, 104 Ill. 557; Spring Valley Coal Co. v. Donaldson, 123 Ill. App. 196; Lewis v. Cockrell, 31 Ill. App. 476. **Ind.**—Blair v. Lanning, 61 Ind. 499; Hays v. Boyer, 59 Ind. 341, both cases prior to statute authorizing clerk to receive payment. **Ia.**—Hawkeye Ins. Co. v. Luckow, 76 Iowa 21, 39 N. W. 923, payment to clerk of county to which execution issued on transcript of judgment from county where judgment rendered not satisfaction. **Ky.** Chinn v. Mitchell, 2 Mete. 92; Durant v. Gabby, 2 Mete. 91. **Mont.**—Matus-evitz v. Hughes, 26 Mont. 212, 66 Pac. 939, 68 Pac. 467. **N. D.**—Milburn-Stoddard Co. v. Stickney, 14 N. D. 282, 103 N. W. 752. **Pa.**—Wells v. Baird, 3 Pa. 351; Tompkins v. Woodford, 1 Pa. 156; Baer v. Kistler, 4 Rawle 364. **S. C.**—Mazyek v. M'Ewen, 2 Bailey L. 28. **Tex.**—Texas & Pacific Ry. Co. v. Walker, 93 Tex. 611, 57 S. W. 568; City of Whitesboro v. Diamond (Tex. Civ. App.), 75 S. W. 540, payment to clerk not satisfaction unless clerk made agent to receive payment. But see Roberts v. Powell, 22 Tex. Civ. App. 211, 54 S. W. 643.

Compare Blake v. Hawkins, 19 Fed. 204.

[a] **Register in Chancery**.—In the absence of statute or an order of the court, payment to the register in chancery of the amount due on a decree is not a satisfaction thereof, unless accepted as such by the party entitled to the money. Lewis v. Kean, 102 Mich. 605, 61 N. W. 63.

31. Hendry v. Benlisa, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283.

[a] **Judgment Against One of Joint Tort-Feasors**.—A payment to the clerk of the court of a judgment recovered against one of two joint tort-feasors, sued separately, which is not accepted by the plaintiff, does not operate to satisfy the plaintiff's demands against the other joint tort-feasor, or bar the prosecution of the action against him. McDonald v. Nugen, 118 Iowa 512, 92 N. W. 675.

[b] **Ratification by attorney** insufficient unless judgment creditor assents. Tompkins v. Woodford, 1 Pa. 156.

32. Aicordi v. Robbins, 41 Ala. 541, 94 Am. Dec. 614 (where proper medium of payment taken); Governor v. Read, 38 Ala. 252 (wherein payment was made before judgment, but held by clerk until after judgment when satisfaction was entered); Bynum v. Barefoot, 75 N. C. 576.

As to medium of payment, see *infra*, I, C.

33. Montgomery v. Dresher, 97 Neb. 104, 149 N. W. 311; Henderson v. Moss, 82 Tex. 69, 18 S. W. 555.

[a] **A withdrawal of the money** so paid from the custody of the clerk, operates as a satisfaction of the judgment, which cannot be revived by a return of the money to the clerk. Portland Construction Co. v. O'Neil, 24 Ore. 54, 32 Pac. 764.

[b] But the court cannot order its clerk to receive the amount of a judgment rendered in full payment thereof

**5. Creditor of Plaintiff.**—Payment to a judgment creditor of the plaintiff under an order of court,<sup>34</sup> or process of garnishment,<sup>35</sup> will effect a discharge or satisfaction of the judgment, as will the payment by defendant of other obligations on behalf of the plaintiff to an equal or greater amount than the judgment against him.<sup>36</sup>

**B. BY WHOM MADE.—1. Joint Debtor.**—a. *Generally.* While it is undoubtedly true that where the amount due upon a judgment is paid wholly or in part by one who is not a party to nor bound by it, the judgment is extinguished or not according to the intention of the parties,<sup>37</sup> yet it is equally true that where one of several defendants against whom there is a joint judgment pays to the other party the entire sum due, the judgment becomes thereby extinguished,<sup>38</sup> whatever may be the intention of the parties to the

and to satisfy the same of record, over the protest of the plaintiff, and in violation of his right of appeal. *Mester Coal Co. v. Pope*, 155 Ill. App. 667.

34. *Gibson v. Haggerty*, 37 N. Y. 555, 558, 97 Am. Dec. 752; *Bishop v. Garcia*, 14 Abb. Pr. N. S. (N. Y.) 69.

35. *Ala.*—*Hagadon v. Campbell*, 24 Ala. 375. *Ky.*—*Brandenburgh v. Beach*, 17 Ky. L. Rep. 560, 32 S. W. 168. *La.*—*Drumm v. Sherman*, 20 La. Ann. 96.

36. *Medford v. Dorsey*, 2 Wash. C. C. 467, 16 Fed. Cas. No. 9,390; *Downey v. Forrester*, 35 Md. 117; *Neidig v. Whiteford*, 29 Md. 178.

37. See *infra*, I, B, 3.

38. *Ala.*—*Preslar v. Stallworth*, 37 Ala. 402. *D. C.*—*Flagg v. Kirk*, 9 Mackey 335. *Ga.*—*Adams v. Keeler*, 30 Ga. 86. *Idaho.*—*Vermont Loan & Tr. Co. v. McGregor*, 6 Idaho 134, 53 Pac. 399. *Ill.*—*Tompkins v. Fifth Nat. Bank of Chicago*, 53 Ill. 57; *Russell v. Hugunin*, 2 Ill. 562, 33 Am. Dec. 423. *Ind.*—*Hubble v. Berry*, 180 Ind. 513, 103 N. E. 328; *Zimmerman v. Gaumer*, 152 Ind. 552, 53 N. E. 829; *Ashcraft v. Knoblock*, 146 Ind. 169, 45 N. E. 69; *Caley v. Morgan*, 114 Ind. 350, 16 N. E. 790; *Klippel v. Shields*, 90 Ind. 81. *Ia.*—*Bones v. Aiken*, 35 Iowa 534. *Mass.*—*Cote v. New England Nav. Co.*, 213 Mass. 177, 99 N. E. 972; *National Security Bank v. Hunnewell*, 124 Mass. 260; *Holmes v. Day*, 108 Mass. 563; *Brackett v. Winslow*, 17 Mass. 153. *Mo.*—*Weston v. Clark*, 37 Mo. 568. *Neb.*—*Henry & Coatsworth Co. v. Halter*, 58 Neb. 685, 79 N. W. 616. *N. H.*—*Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207; *Davis v. Stevens*, 10

N. H. 186. *N. Y.*—*Harbeck v. Vanderbilt*, 20 N. Y. 395; *Morley v. Stevens*, 47 How. Pr. 228; *Thomas v. Rumsey*, 6 Johns. 26; *Bank of Salina v. Abbott*, 3 Denio 181; *Breslin v. Peck*, 38 Hun 623; *Booth v. Farmers', etc. Nat. Bank*, 11 Hun 258; *Gotthelf v. Krulewitch*, 153 App. Div. 746, 138 N. Y. Supp. 756; *Storz v. Boyce*, 34 Misc. 279, 69 N. Y. Supp. 612. *N. C.*—*Dunn v. Beauman*, 126 N. C. 764, 36 S. E. 174; *Hinton v. Odenheimer*, 57 N. C. 406 (partner); *Lowe v. Felton*, 52 N. C. 216; *Sherwood v. Collier*, 14 N. C. 380, 24 Am. Dec. 264. *R. I.*—*Sager v. Moy*, 15 R. I. 528, 9 Atl. 847. *S. C.*—*Fowler v. Wood*, 31 S. C. 398, 10 S. E. 93, 5 L. R. A. 721. *Tenn.*—*Anderson v. Saylors*, 3 Head 551; *Baldwin v. Merrill*, 8 Humph. 132. *Tex.*—*Faires v. Cockerell*, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528. *Vt.*—*Porter v. Gile*, 44 Vt. 520. *Can.*—*McLeod v. Fortune*, 19 U. C. Q. B. 100.

[a] Under a statute expressly limiting the judgment creditor to one satisfaction of his debt, a partner or other person liable under a judgment may avail himself of any payment in whole or in part thereof by any partner or person jointly bound with him therein. *Westheimer v. Craig*, 76 Md. 399, 25 Atl. 419; *Booth v. Farmers' & Mechanics' Nat. Bank*, 74 N. Y. 228 (holding that where one member of a co-partnership pays a judgment rendered on a firm debt, he cannot keep the judgment alive and enforce it against his partners either in his own name or that of a third person to whom he has caused it to be assigned, unless some special equity exists to entitle him to hold it as security for a sum

transaction,<sup>39</sup> and it is not in their power by any arrangement between them to keep the judgment alive for the benefit of the party making the payment.<sup>40</sup> The operation of this rule is not affected, therefore, by an assignment of the judgment to the defendant by whom it is paid, or to a third person for his use and benefit.<sup>41</sup> But the payment by one of several joint defendants of a part only of a judgment, upon an agreement of the plaintiff to hold him harmless under the judgment, will not operate to satisfy the judgment as against him.<sup>42</sup>

Where several judgments have been rendered against parties jointly and severally liable on the same obligation, payment of one of the judgments is a satisfaction of all the judgments, except as to costs.<sup>43</sup>

b. *On Negotiable Instrument.*—Similar to the rule that payment of a joint judgment by one of the defendants thereto operates as a satisfaction as to all,<sup>44</sup> is the rule that satisfaction of a judgment on a negotiable instrument upon which there is a joint liability operates

due him from his co-partners on an accounting); *Romain v. Garth*, 3 Hun (N. Y.) 214.

Payment of joint judgment against joint tort-feasors as satisfaction of judgment as to all, see *infra*, I, B, 1, c.

Release of one of several joint debtors as discharge of all, see *infra*, VII, E.

39. *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Gotthelf v. Krulewitch*, 153 App. Div. 746, 138 N. Y. Supp. 756.

40. *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Gotthelf v. Krulewitch*, 153 App. Div. 746, 138 N. Y. Supp. 756.

41. *Ind.*—*Frank v. Traylor*, 130 Ind. 145, 29 N. E. 486, 16 L. R. A. 115; *Montgomery v. Vickery*, 110 Ind. 211, 11 N. E. 38; *Shields v. Moore*, 84 Ind. 440. *Kan.*—*Worden v. Jones*, 1 Kan. App. 501, 40 Pac. 1071. *Mass.*—*Adams v. Drake*, 11 Cush. 504 (holding that payment of a judgment rendered on a joint note against several signers thereof, by one of the joint defendants, so far extinguishes the judgment that it cannot be subsequently assigned to the debtor paying it, and be levied by him on land of the other joint debtors); *Allen v. Holden*, 9 Mass. 133, 6 Am. Dec. 46. *Neb.*—*Ebel v. Stringer*, 73 Neb. 249, 102 N. W. 466; *First Nat. Bank of Plattsmouth v. Gibson*, 60 Neb. 767, 84 N. W. 259; *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685, 79 N. W. 616; *Potvin v. Meyers*, 27 Neb. 749, 44 N. W. 25. *N. Y.*—*Booth*

*v. Farmers' & Mechanics' Nat. Bank*, 74 N. Y. 228 (*affirming* 11 Hun 258); *Storz v. Boyce*, 34 Misc. 279, 69 N. Y. Supp. 612. *Tex.*—*Deleshaw v. Edelen*, 31 Tex. Civ. App. 416, 72 S. W. 413, *Smith v. Lang*, 2 Tex. Civ. App. 683, 22 S. W. 197.

*Contra*, *Brown v. White*, 29 N. J. L. 514, 80 Am. Dec. 226, *reversing* 29 N. J. L. 307.

[a] Where a judgment has been rendered against a city and other defendants jointly, the payment for an assignment of such judgment by the city does not operate to satisfy the same, where the charter provides that when a judgment shall be obtained against the city and other parties jointly liable, it shall not be collected of the city unless the other defendants are so insolvent that the same cannot be made out of them, and in that case the city shall pay only so much of the judgment as cannot be made out of the other defendants. *Campbell v. Pope*, 96 Mo. 468, 10 S. W. 187.

Assignment of judgment as satisfaction thereof, see generally *infra*, IV.

42. *Warthen v. Melton*, 132 Ga. 113, 63 S. E. 832, 131 Am. St. Rep. 184; *Powell v. Davis*, 60 Ga. 70; *Fletcher v. Wurgler*, 97 Ind. 223.

Partial payment as satisfaction or discharge of judgment, see generally *infra*, I, C, 2.

43. *First National Bank v. Indianapolis Piano Mfg. Co.*, 45 Ind. 5. See also *infra*, X.

44. See *supra*, I, B, 1, a.

as a satisfaction as to all liable thereon, whether included in the judgment or not.<sup>45</sup> But payment of a judgment on a negotiable instrument by one of the several defendants does not operate to satisfy the judgment, where such defendants are severally and not jointly liable, and the defendant paying takes an assignment of the judgment.<sup>46</sup>

c. *Joint Tortfeasors*.—While a plaintiff may recover several judgments against joint tortfeasors,<sup>47</sup> he can have but one satisfaction, and a satisfaction of one of such judgments operates as a satisfaction of all,<sup>48</sup> but satisfaction in part, received from one joint tortfeasor,

45. See the following: **Ind.**—Dessar v. Rich, Wils. 372. **N. J.**—First Nat. Bank v. Hoffman, 68 N. J. L. 245, 52 Atl. 280 (payment of a judgment rendered on a note by a prior endorser, will operate to satisfy the judgment as to a later endorser of the note); Westervelt v. Frech, 33 N. J. Eq. 451. **N. Y.**—Coonley v. Wood, 36 Hun 559. **Tenn.**—Topp v. Alabama Branch Bank, 2 Swan 184. **Vt.**—Allen v. Ogden, 12 Vt. 9.

46. Kelsey v. Bradbury, 21 Barb. (N. Y.) 531 (*affirmed*, 12 N. Y. Leg. Obs. 222); Corey v. White, 3 Barb. (N. Y.) 12 (*overruling* 3 Denio 181, and *disapproving* 1 Hill 652); Harger v. McCullough, 2 Denio (N. Y.) 119; Bostwick v. Scott, 40 Hun (N. Y.) 212; Marsh v. Benedict, 14 Hun (N. Y.) 317.

47. See 15 STANDARD PROC. 788.

48. See the following: **U. S.**—Sessions v. Johnson, 95 U. S. 347, 24 L. ed. 596; Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129; American Bell Tel. Co. v. Albright, 32 Fed. 287; Collard v. Delaware, etc. R. R. Co., 6 Fed. 246. **Ala.**—Thompson v. Lassiter, 86 Ala. 536, 6 So. 33; Slade v. Street, 77 Ala. 576; Du Bose v. Marx, 52 Ala. 506; Blann v. Crocheron, 19 Ala. 647, 54 Am. Dec. 203. **Ark.**—Criner v. Brewer, 13 Ark. 225. **Cal.**—Cole v. Roebbling Const. Co., 156 Cal. 443, 105 Pac. 255; Grundel v. Union Iron Wks., 127 Cal. 438, 59 Pac. 826, 78 Am. St. Rep. 75, 47 L. R. A. 467; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31. See Fowden v. Pacific Coast, etc. Co., 149 Cal. 151, 157, 86 Pac. 178; Tompkins v. Clay St. R. Co., 66 Cal. 163, 166, 4 Pac. 1165. **Conn.**—Vincent v. McNamara, 70 Conn. 332, 39 Atl. 444; Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154; Sheldon v. Kibbe, 3 Conn. 214, 8 Am. Dec. 176. **Ill.**—People v. Wilson, 260 Ill. 145, 102 N. E. 1055; People v. Becker,

253 Ill. 131, 97 N. E. 269; City of Roodhouse v. Christian, 158 Ill. 137, 41 N. E. 748. **Ind.**—American Surety Co. v. State, 50 Ind. App. 475, 98 N. E. 829. **Kan.**—Story v. Long, 91 Kan. 323, 137 Pac. 795; Westbrook v. Mize, 35 Kan. 299, 10 Pac. 881. **Ky.**—City of Louisville v. Nicholls, 158 Ky. 516, 165 S. W. 660; Thomas' Admr. v. Maysville St. Ry., etc. Co., 136 Ky. 446, 124 S. W. 398; Elliot v. Porter, 5 Dana 299, 30 Am. Dec. 689. **Me.**—Cleveland v. City of Bangor, 87 Me. 259, 32 Atl. 892, 47 Am. St. Rep. 326; Jones v. Lowell, 35 Me. 538. **Mass.**—Cote v. New England Nav. Co., 213 Mass. 177, 99 N. E. 972; Brown v. Thayer, 212 Mass. 392, 99 N. E. 237; Knight v. Nelson, 117 Mass. 458; Elliott v. Hayden, 104 Mass. 180. **Neb.**—Fitzgerald v. Union Stockyards Co., 89 Neb. 393, 131 N. W. 192, 33 L. R. A. (N. S.) 983. **N. H.**—Fowler v. Owen, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588. **N. Y.**—Walsh v. New York Central & H. R. R. Co., 204 N. Y. 58, 97 N. E. 408, 37 L. R. A. (N. S.) 1137; Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807; Marsh v. Berry, 7 Cow. 344; Foy v. Barry, 159 App. Div. 749, 144 N. Y. Supp. 971; Berg v. Bates, 153 App. Div. 12, 137 N. Y. Supp. 1032. **N. C.**—Martin v. Buffaloe, 128 N. C. 305, 38 S. E. 902, 83 Am. St. Rep. 679. **Ohio.**—Maple v. Railroad Co., 40 Ohio St. 313, 48 Am. Rep. 685; Wright v. Lathrop, 2 Ohio 33, 15 Am. Dec. 529. **S. C.**—Smith v. Singleton, 2 McMull. 184, 39 Am. Dec. 122. **S. D.**—Kennedy v. Garigan, 23 S. D. 265, 121 N. W. 783. **Tenn.**—Knott v. Cunningham, 2 Sneed 204. **Tex.**—McGehee v. Shafer, 15 Tex. 198. **Vt.**—Sanderson v. Caldwell, Aik. 195. **W. Va.**—Griffie v. McClung, 5 W. Va. 131.

[a] In order for a joint judgment debtor to obtain satisfaction of, or re-

does not operate to discharge the others, since the plaintiff is entitled to full satisfaction of one judgment.<sup>49</sup> Payment by one joint tortfeasor of a judgment rendered against himself and several others jointly, is a satisfaction of the judgment as to all.<sup>50</sup>

**2. Surety.**—Payment by a surety of a judgment rendered against his principal and himself jointly operates as a satisfaction thereof.<sup>51</sup>

lease from, a judgment on the ground that another judgment for the same tort has been paid, he must show that the same wrong was litigated in both actions. *Story v. Lang*, 91 Kan. 323, 137 Pac. 795.

49. **Ark.**—*Ballard v. Noaks*, 2 Ark. 45. **Cal.**—*Urton v. Price*, 57 Cal. 270. **Ind.**—*American Express Co. v. Patterson*, 73 Ind. 430. **Ia.**—*McVey v. Mantatt*, 80 Iowa 132, 45 N. W. 548; *Metz v. Soule, etc. Co.*, 40 Iowa 236. **Kan.**—*Westbrook v. Mize*, 35 Kan. 299, 10 Pac. 881. **Ky.**—*City of Louisville v. Nicholls*, 158 Ky. 516, 165 S. W. 660; *United Society of Shakers v. Underwood*, 11 Bush 265, 21 Am. Rep. 214. **Neb.**—*Bryant v. Reed*, 34 Neb. 720, 52 N. W. 694. **N. J.**—*Rogers v. Cox*, 66 N. J. L. 432, 50 Atl. 143; *Spurr v. North Hudson, etc. R. Co.*, 56 N. J. L. 346, 28 Atl. 582. **N. Y.**—*Woods v. Pangburn*, 75 N. Y. 495; *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330; *Foy v. Barry*, 159 App. Div. 749, 144 N. Y. Supp. 971; *Union Associated Press v. Press Pub. Co.*, 24 Misc. 610, 54 N. Y. Supp. 183. **Tenn.**—*Brison v. Dougherty*, 3 Baxt. 93. **Vt.**—*Eastman v. Grant*, 34 Vt. 387. **Eng.**—*Thurman v. Wild*, 11 Ad. & El. 453, 113 Eng. Reprint 487; *Bird v. Randall*, 3 Burr. 1345, 97 Eng. Reprint 866.

[a] Where one of two actions against two joint wrongdoers has been prosecuted to judgment, a dismissal of the other action upon payment of a sum intended to be in settlement of costs therein and an acknowledgment of satisfaction, does not operate to satisfy the judgment, either wholly or pro tanto. *Bell v. Perry*, 43 Iowa 368.

50. **U. S.**—*Union Stock Yards Co. v. Chicago, B. & Q. R. Co.*, 196 U. S. 217, 25 Sup. Ct. 226, 49 L. ed. 453, 2 Ann. Cas. 525. **Ala.**—*Blann v. Crocheron*, 20 Ala. 320. **Conn.**—*Fields v. Low*, 2 Root 320; *Wilford v. Grant*, Kirby 116. **Ga.**—*Central of Georgia R. Co. v. Macon Ry. & L. Co.*, 9 Ga. App. 628, 71 S. E. 1076. **Ind.**—*Ashcraft v. Knoblock*, 146 Ind. 169, 45 N. E. 69;

*Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 711. **Ia.**—*McDonald v. Nugen*, 118 Iowa 512, 92 N. W. 675, 96 Am. St. Rep. 407. **Ky.**—*Louisville v. Louisville R. Co.*, 156 Ky. 141, 160 S. W. 771, 49 L. R. A. (N. S.) 350; *City of Louisville v. Hart's Admr.*, 143 Ky. 171, 136 S. W. 212, 35 L. R. A. (N. S.) 207; *Dupuy v. Johnson*, 1 Bibb 562. **Md.**—*Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504. **Mass.**—*Old Colony St. R. Co. v. Brockton & P. St. R. Co.*, 218 Mass. 84, 105 N. E. 866; *Bryant v. Rich's Grill*, 216 Mass. 344, 103 N. E. 925, Ann. Cas. 1915B, 869; *Brown v. Thayer*, 212 Mass. 392, 99 N. E. 237; *Gray v. Chase*, 184 Mass. 444, 68 N. E. 676; *Vose v. Grant*, 15 Mass. 505; *Campbell v. Phelps*, 1 Pick. 62, 11 Am. Dec. 139. **Minn.**—*Hunt v. Conrad*, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512. **Mo.**—*Doster v. Chicago, M. & St. P. Ry. Co. (Mo. App.)*, 158 S. W. 440. **N. Y.**—*Thomas v. Rumsey*, 6 Johns. 26; *Snider v. Croy*, 2 Johns. 227; *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330; *Peck v. Ellis*, 2 Johns. Ch. 131; *Gross v. Pennsylvania P. & B. R. Co.*, 65 Hun 191, 20 N. Y. Supp. 28, 47 N. Y. St. 374; *Breslin v. Peck*, 38 Hun 623; *Michell v. Allen*, 25 Hun 543. **Pa.**—*Floyd v. Browne*, 1 Rawle 121, 18 Am. Dec. 602. **S. D.**—*Kennedy v. Garrigan*, 23 S. D. 265, 121 N. W. 783. **Tenn.**—*Brown v. Keneloe*, 3 Coldw. 192. **Tex.**—*Misouri, K. & T. Ry. Co. of Texas v. Humphries (Tex. Civ. App.)*, 157 S. W. 1174. **Va.**—*Thweatt v. Jones*, 1 Rand. (22 Va.) 328, 10 Am. Dec. 538.

[a] Where Damages Apportioned. This is true though the amount of the recovery is improperly apportioned against the defendants separately, where the same is done without the objection of the plaintiff. *Foy v. Barry*, 159 App. Div. 749, 144 N. Y. Supp. 971.

Payment of joint judgment by one of defendants as satisfaction, see generally *supra*, I, B, 1, a.

51. **U. S.**—*McLean v. Lafayette Bank*, 3 McLean 587, 16 Fed. Cas. No.

in the absence of statute,<sup>52</sup> or an agreement of the parties, to the contrary,<sup>53</sup> or an assignment to a third person, not a party to the judgment, in trust for the surety,<sup>54</sup> although courts of equity will usually treat such judgment as subsisting for the benefit of such surety where justice requires it.<sup>55</sup>

**3. Stranger to Judgment.**—a. *Generally.*—Whether the payment of a judgment by a person not a party thereto shall operate as a satisfaction thereof, depends upon the intention and agreement

8,888. **Ala.**—Watts *v.* Eufaula Nat. Bank, 76 Ala. 474; Preslar *v.* Stallworth, 37 Ala. 402; Lyon *v.* Bolling, 9 Ala. 463, 44 Am. Dec. 444. **Ark.** Newton *v.* Field, 16 Ark. 216. **Ill.** Coggeshall *v.* Ruggles, 62 Ill. 401; Cleiman *v.* Murphy, 34 Ill. App. 633. **Ind.**—Shields *v.* Moore, 84 Ind. 440. **Ia.**—Drefahl *v.* Tuttle, 42 Iowa 177; Bones *v.* Aiken, 35 Iowa 534. **Mo.** Furnold *v.* Bank of Missouri, 44 Mo. 336; McDaniel *v.* Lee, 37 Mo. 204; Wyatt *v.* Fromme, 70 Mo. App. 613. **N. Y.**—Tappen *v.* Van Wagenen, 3 Johns. 465; Storz *v.* Boyce, 34 Misc. 279, 69 N. Y. Supp. 612. **N. C.**—Briles *v.* Sugg, 21 N. C. 366, 30 Am. Dec. 172; Sherwood *v.* Collier, 14 N. C. 380, 24 Am. Dec. 264. **Ohio.**—Neilson *v.* Fry, 16 Ohio St. 552, 91 Am. Dec. 110. **Pa.**—Cottrell's Appeal, 23 Pa. 294; Fleming *v.* Beaver, 2 Rawle 128, 19 Am. Dec. 629. **Tenn.**—Bittick *v.* Wilkins, 7 Heisk. 307. **Tex.**—Smith *v.* Lang, 2 Tex. Civ. App. 683, 22 S. W. 197. **Wis.**—Mason *v.* Pierron, 63 Wis. 239, 23 N. W. 119.

**52. Ala.**—Vanderveer *v.* Ware, 65 Ala. 606. **Ga.**—Cureton *v.* Cureton, 120 Ga. 559, 48 S. E. 162; Ezzard *v.* Bell, 100 Ga. 150, 28 S. E. 28. **Ind.**—Shields *v.* Moore, 84 Ind. 440. **Kan.**—Honce *v.* Schram, 73 Kan. 368, 85 Pac. 535. **Ky.** Alexander *v.* Lewis, 1 Mete. 407. **Miss.** Yates *v.* Mead, 68 Miss. 787, 10 So. 75. **Mont.**—Merchants' Nat. Bank *v.* Opera House Co., 23 Mont. 33, 57 Pac. 445, 75 Am. St. Rep. 499, 45 L. R. A. 285. **Neb.**—Nelson *v.* Webster, 72 Neb. 332, 100 N. W. 411, 117 Am. St. Rep. 799, 68 L. R. A. 513. **Ohio.**—Peters *v.* McWilliams, 36 Ohio St. 155.

**53. Del.**—Fulton *v.* Harrington, 7 Houst. 182, 30 Atl. 856; McDowell *v.* Bank of Wilmington & Brandywine, 1 Har. 369, 374. **Ga.**—Patterson *v.* Clark, 96 Ga. 494, 23 S. E. 496. **Ky.**—Roberts *v.* Bruce, 91 Ky. 379, 15 S. W. 872. **La.**—Sprigg *v.* Beamant, 6 La. (O. S.)

59; King *v.* Dwight, Exr., 3 Rob. 2. **Me.**—Morse *v.* Williams, 22 Me. 17. **Md.**—Grove *v.* Brien, 1 Md. 438. **N. C.** Barringer *v.* Boyden, 52 N. C. 187. **Ohio.**—Neal *v.* Nash, 23 Ohio St. (Reprint) 483. **Wash.**—Murray *v.* Meade, 5 Wash. 693, 32 Pac. 780.

**54. Anglo-American Land, etc. Co. v. Bush**, 84 Iowa 272, 50 N. W. 1063; Searing *v.* Berry, 58 Iowa 20, 11 N. W. 708; Hodges *v.* Armstrong, 14 N. C. 253.

**Assignment of judgment as satisfaction thereof**, see generally *infra*, IV.

**55. See the following:** **Ala.**—Knighton *v.* Curry, 62 Ala. 404; Houston *v.* Branch Bank, 25 Ala. 250. **Ga.**—Norris, Admr. *v.* Ham, R. M. Charl. 267. **Ill.**—Whitbeck *v.* Estate of Ramsay, 74 Ill. App. 524. **Ind.**—Gerber *v.* Sharp, 72 Ind. 553. **Md.**—Orem, Exrx. *v.* Wrightson, 51 Md. 34, 34 Am. Rep. 286. **Miss.**—Conway *v.* Strong, 24 Miss. 665. **Mo.**—Bushong *v.* Taylor, 82 Mo. 660; Bauer *v.* Gray, 18 Mo. App. 164. **N. J.** McKenna *v.* Coreoran, 70 N. J. Eq. 627, 61 Atl. 1026. **N. C.**—State *v.* Hearn, 109 N. C. 150, 13 S. E. 895; Jones *v.* McKinnon, 87 N. C. 294. **Pa.** Ort *v.* Condon, 21 Pa. Co. Ct. 609. **Tenn.**—Tapp *v.* Branch Bank of Alabama, 2 Swan 184.

See generally the title "Subrogation."

[a] Where a union of the law and equity powers of the court has been effected, the equity rule has been adopted. Lewis *v.* Palmer, 28 N. Y. 271; Mathews *v.* Aikin, 1 N. Y. 595; Alden *v.* Clark, Tift & Bradley, 11 How. Pr. (N. Y.) 209; Hayes *v.* Ward, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; Waller *v.* Harris, 7 Paige (N. Y.) 167; Ontario Bank *v.* Walker, 1 Hill (N. Y.) 652; City Trust, etc. Co. *v.* American Brewing Co., 70 App. Div. 511, 75 N. Y. Supp. 140, *affirmed*, 174 N. Y. 486, 67 N. E. 62.

of the parties to the transaction.<sup>56</sup> Such a payment operates as a satisfaction, if accepted by the judgment creditor as such,<sup>57</sup> without an agreement that it shall not operate as a discharge,<sup>58</sup> unless the party

**56. Ala.**—*Eastern Bank v. Taylor*, 41 Ala. 93. **Del.**—*Curlett v. Emmons*, 9 Del. Ch. 62, 85 Atl. 1079; *Sydam v. Cannon*, 1 Houst. 431. **Ga.**—*Phillips v. Behn*, 19 Ga. 298. **Ill.**—*Marshall v. Moore*, 36 Ill. 321; *People v. Weimer*, 94 Ill. App. 112. **Ind.**—*Owensby v. Platt*, 3 Ind. 459. **Ia.**—*Fretland v. Mack*, 76 Iowa 434, 41 N. W. 64. **La.** *Buckley v. McClosky*, 1 Rob. 312. **Me.** *Noble v. Merrill*, 48 Me. 140. **Md.** *McAleer v. Young*, 40 Md. 439; *Whiting, use of Sun Mutual Ins. Co. v. Independent Mut. Ins. Co.*, 15 Md. 297. **Minn.**—*Roberts v. Meighen*, 74 Minn. 273, 77 N. W. 139. **Miss.**—*Rollins v. Thompson*, 13 Smed. & M. 522. **Mo.** *Bender v. Matney*, 122 Mo. 244, 26 S. W. 950. **N. J.**—*Giveans v. McMurtry*, 17 N. J. Eq. 510. **N. Y.**—*Dowling v. Hastings*, 211 N. Y. 199, 105 N. E. 194; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *More v. Trumbour*, 5 Cow. 488; *Draper v. Gordon*, 4 Sandf. Ch. 210; *Sanford v. McLean*, 3 Paige 117, 23 Am. Dec. 773; *Gotthelf v. Krulewitch*, 153 App. Div. 746, 138 N. Y. Supp. 756; *Flagler v. Newcombe*, 13 N. Y. Supp. 299. **N. C.**—*Null v. Moore*, 32 N. C. 324; *Carter v. Halifax*, 8 N. C. 483. **Ohio.**—*Brown v. Merchants Nat. Bank*, 41 Ohio St. 445; *Burkham v. Cooper*, 2 Ohio Cir. Ct. 77, 1 Ohio Cir. Dec. 371; *Knauber v. Fritz*, 5 Ohio Dec. (Reprint) 410, 5 Am. L. Rec. 432. **Pa.**—*Delap v. Stewart*, 2 Penr. & W. 285. **S. C.**—*Potts v. Richardson*, 2 Bailey 15. **W. Va.**—*Crumlish's Admr. v. Cent. Imp. Co.*, 38 W. Va. 290, 18 S. E. 456, 45 Am. St. Rep. 872; *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep. 794. **Wis.**—*Gray v. Herman*, 75 Wis. 453, 44 N. W. 248, 6 L. R. A. 691; *Downer v. Miller*, 15 Wis. 612.

[a] See *Kimball v. Parker*, 7 Mete. (Mass.) 63, wherein the debtor, after all his lands were attached, conveyed a part of them by deeds of warranty and against incumbrances, and thereafter judgment was rendered against him in the action out of which the attachment had issued. The grantee of the debtor paid the judgment creditor a certain sum to release from attachment the lands thus conveyed to him, under an agreement with the

creditor that the money thus paid need not be applied towards the satisfaction of the judgment. When the creditor levied his execution on the unconveyed land of the debtor, and committed the debtor to prison on a pluries execution, the debtor brought a writ of audita querela against the creditor for relief, on the ground that the sum paid by his said grantee had satisfied the judgment pro tanto. Held that the sum paid by said grantee was not a satisfaction pro tanto, since it was not paid for the account of the debtor, and did not come directly or indirectly out of his funds.

[b] The payment of a judgment by a third person, with the intention of holding it for his own use, although no assignment or other transfer is taken, is not a payment and satisfaction of the judgment. *Campbell's Appeal*, 29 Pa. 401, 72 Am. Dec. 641.

**57. Cal.**—*Moran v. Abbey*, 63 Cal. 56; *Martin v. Quinn*, 37 Cal. 55. **Ind.** *Ritenour v. Mathews*, 42 Ind. 7. **Mo.** *Bunn v. Lindsay*, 95 Mo. 250, 7 S. W. 473, 6 Am. St. Rep. 48. **Pa.**—*Allegheeny V. R. Co. v. Dickey*, 131 Pa. 86, 18 Atl. 1003. **Tex.**—*Terry v. O'Neal*, 71 Tex. 592, 9 S. W. 673. **W. Va.** *Crumlish's Admr. v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120.

[a] **Reason.**—Since two satisfactions will not be allowed for the same debt or injury. **Ala.**—*McLane v. Miller*, 10 Ala. 856; *Bartlett & Waring v. McRae*, 4 Ala. 688; *Lockhart v. McElroy*, 4 Ala. 572. **Ark.**—*Brearly v. Peay*, 23 Ark. 172; *Whiting v. Beebe*, 12 Ark. 421. **N. Y.**—*Thomas v. Rumsey*, 6 Johns. 26.

[b] **Payment of a less sum than the amount due on a judgment, with the understanding that it shall satisfy the judgment, is a valid accord and satisfaction.** *Fowler v. Smith*, 153 Pa. 639, 25 Atl. 744. Partial payment as satisfaction or discharge of judgment, see generally *infra*, I, C, 2.

**58. Mass.**—*Kimball v. Parker*, 7 Mete. 63. **Miss.**—*Morris v. Lake*, 9 Smed. & M. 521, 48 Am. Dec. 724. **N. J.**—*Shinn v. Budd*, 14 N. J. Eq. 234.

paying the judgment takes an assignment thereof.<sup>59</sup> But where a stranger pays off a judgment with money furnished by the judgment debtor, he will not succeed to the rights of the creditor in the judgment.<sup>60</sup>

b. *Sheriff*.—A voluntary payment by the sheriff of an execution in his hands operates as a satisfaction of the judgment upon which it issued, even in the absence of any endorsement or return of satisfaction on the writ,<sup>61</sup> unless he has the judgment assigned to him, or to a third person for his use and benefit.<sup>62</sup> But payment by a sheriff of the amount due on a judgment, in order to exonerate himself from liability for failure to collect the execution issued thereon, does not operate as a satisfaction of the judgment;<sup>63</sup> unless the execution defendant avails himself of such payment to have the judgment satisfied.<sup>64</sup> So also a purchase by a sheriff of the property of the execution debtor, and payment of the execution out of his own funds, is not a discharge of the judgment, in the absence of the creditor's consent thereto, where the sheriff fails to pay the creditor the amount of his judgment.<sup>65</sup>

C. MEDIUM, MODE AND SUFFICIENCY OF PAYMENT.—1. **Generally.** A judgment rendered for an amount in money, may be paid in whatever currency may be a legal tender at that time and place;<sup>66</sup> but is

**Tex.**—Terry v. O'Neal & Son, 71 Tex. 592, 9 S. W. 673.

59. **Miss.**—Morris v. Lake, 9 Smed. & M. 521, 48 Am. Dec. 724. **Mo.**—St. Francis Mill Co. v. Sugg, 83 Mo. 476. **Pa.**—Chancellor v. Schott, 23 Pa. 68.

**Assignment of judgment as satisfaction thereof**, see generally *infra*, IV.

[a] **Reason.**—The taking of an assignment by the party paying shows an intention not to satisfy the judgment. **N. Y.**—Harbeck v. Vanderbilt, 20 N. Y. 395. **Tenn.**—Hardeman v. Burge, 10 Yerg. 202. **W. Va.**—Neely v. Jones, 16 W. Va. 625, 37 Am. Rep. 794.

60. **Ala.**—Hogan v. Reynolds, 21 Ala. 56, 56 Am. Dec. 236. **Vt.**—Shaw v. Clark, 6 Vt. 507, 27 Am. Dec. 578. **Wis.**—Felch v. Lee, 15 Wis. 265.

61. **Ala.**—Baren v. McGehee, 6 Port. 432, 31 Am. Dec. 695. **Ga.**—Arnett v. Cloud, 2 Ga. 53. **Me.**—Whittier v. Hemingway, 22 Me. 238, 38 Am. Dec. 309. **Mo.**—Garth v. McCampbell, 10 Mo. 154. **N. H.**—Chester v. Plaistow, 43 N. H. 542. **N. Y.**—Bigelow v. Provost, 5 Hill 566; Sherman v. Boyce, 15 Johns. 443; Reed v. Pruyn, 7 Johns. 426, 5 Am. Dec. 287. **Tenn.**—Lintz v. Thompson, 1 Head 456, 73 Am. Dec. 182; Harwell v. Worsham, 2 Humph. 524, 37 Am. Dec. 572. **W. Va.**—Hall v. Taylor, 18 W. Va. 544. **Can.**—Mc-

Leod v. Fortune, 19 U. C. Q. B. 100.

62. **Ala.**—Mooney v. Parker, 18 Ala. 708. **Del.**—Farmers' Bank v. Grantham, 3 Harr. 289. **Ga.**—Arnett v. Cloud, 2 Ga. 53. **Me.**—Whittier v. Hemingway, 22 Me. 238, 38 Am. Dec. 309. **Mass.**—Dunn v. Snell, 15 Mass. 481; Allen v. Holden, 9 Mass. 133, 6 Am. Dec. 46. **N. H.**—Cheever v. Mirrick, 2 N. H. 376. **N. C.**—Heilig v. Lemly, 74 N. C. 250, 21 Am. Rep. 489; Garrow v. Maxwell, 51 N. C. 529; Null v. Moore, 32 N. C. 324. **Tenn.**—Lintz v. Thompson, 1 Head 456, 73 Am. Dec. 182. **Va.**—Rhea v. Preston, 75 Va. 757. **W. Va.**—Beard v. Arbuckle, 19 W. Va. 135; Hall v. Taylor, 18 W. Va. 544; Neely v. Jones, 16 W. Va. 625, 37 Am. Rep. 794.

**Assignment of judgment as satisfaction thereof**, see generally *infra*, IV.

63. **Ala.**—Poe v. Dorrah, 20 Ala. 288, 56 Am. Dec. 196. **Ind.**—Burbank v. Slinkard, 53 Ind. 493. **Mass.**—Allen v. Holden, 9 Mass. 133, 6 Am. Dec. 46. **N. Y.**—Carpenter v. Stilwell, 12 Barb. 128; Baker v. Martin, 3 Barb. 634. **Tenn.**—Lintz v. Thompson, 1 Head 456, 73 Am. Dec. 182.

64. Poe v. Dorrah, 20 Ala. 288, 56 Am. Dec. 196.

65. Hood v. Moore, 9 Ill. 99.

66. **U. S.**—Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. ed. 818;

payable in legal tender only, except by authority of the owner, previously given,<sup>67</sup> or by his subsequent ratification.<sup>68</sup> Thus an officer to whom an execution is directed has no authority to receive specific property, of any kind, in payment thereof,<sup>69</sup> or unlawful or depreciated

*Glasgow v. Lipse*, 117 U. S. 327, 6 Sup. Ct. 757, 29 L. ed. 901; *Legal Tender Case*, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. ed. 204; *Thompson v. Butler*, 95 U. S. 694, 24 L. ed. 540; *Miller v. Leonard*, 2 Dall. 237, 1 L. ed. 363. **Ala.**—*Chambers v. Walker*, 42 Ala. 445. **Ga.**—*Westbrook v. Davis*, 48 Ga. 471; *Dumas v. Robinson*, 40 Ga. 349; *King v. King*, 37 Ga. 205. **N. Y.**—*Robinson v. International Life Assur. Soc.*, 42 N. Y. 54, 1 Am. Rep. 490. **P. I.**—*Urbano v. Ramirez*, 15 Phil. Isl. 371. **Tenn.**—*Burford v. Memphis Bulletin Co.*, 9 Heisk. 691. **Tex.**—*Rodgers v. Bass*, 46 Tex. 505. **Va.**—*Hale v. Wall*, 22 Gratt. (63 Va.) 424; *Pidgeon v. Williams*, 21 Gratt. (62 Va.) 251.

[a] **Payment in confederate money**, as satisfaction of judgment, see the following: **U. S.**—*Bissell v. Heyward*, 96 U. S. 580, 24 L. ed. 678; *Stewart v. Salamon*, 94 U. S. 434, 24 L. ed. 275. **Fla.**—*Hendry v. Benlisa*, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283. **Tenn.**—*Burford v. Memphis Bulletin Co.*, 9 Heisk. 691; *Henly v. Franklin*, 3 Coldw. 472, 91 Am. Dec. 296. **Tex.**—*Buie v. Crouch*, 37 Tex. 53. **W. Va.**—*Harper v. Harvey*, 4 W. Va. 539.

67. **U. S.**—*Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 20 Sup. Ct. 545, 44 L. ed. 673; *Legal Tender Case*, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. ed. 204; *Cook v. Lillo*, 103 U. S. 792, 26 L. ed. 460; *The Confederate Note Case*, 19 Wall. 548, 22 L. ed. 196; *Ward v. Smith*, 7 Wall. 447, 19 L. ed. 207; *Gwinn v. Buchanan*, *Hagan & Co.*, 4 How. 1, 11 L. ed. 849; *McFarland v. Gwin*, 3 How. 717, 11 L. ed. 799; *Griffin v. Thompson*, 2 How. 244, 11 L. ed. 253; *Buckhannon v. Tinnin*, 2 How. 258, 11 L. ed. 259; *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. ed. 334. **Ala.**—*Ellis v. Smith*, 42 Ala. 349; *Aicardi v. Robbins*, 41 Ala. 541, 94 Am. Dec. 614; *Shackleford v. Cunningham*, 41 Ala. 203; *West, Oliver & Co. v. Ball*, 12 Ala. 340; *Bobo v. Johnson*, 3 Stew. & P. 385. **Ark.**—*Randolph v. Ringgold*, 10 Ark. 279, 52 Am. Dec. 235. **Cal.**—*Mitchell v. Hockett*, 25 Cal. 538, 85 Am. Dec. 151. **Fla.**—*Hendry v. Benlisa*,

37 Fla. 609, 20 So. 800, 34 L. R. A. 283. **Ind.**—*Hooker v. State*, 7 Blackf. 272. **La.**—*Wells v. Gordon*, 16 La. 219. **Mich.**—*Kallander v. Neidhold*, 112 Mich. 329, 70 N. W. 892; *Heald v. Bennett*, 1 Doug. 513. **N. J.**—*Coxe v. State Bank at Trenton*, 8 N. J. L. 172, 14 Am. Dec. 417, holding that a defendant against whom a bank has obtained judgment, cannot bring into court the bank notes of a state bank in payment of such judgment and have satisfaction thereof entered, said notes not being cash. **N. Y.**—*Codwise v. Field*, 9 Johns. 263. **N. C.**—*Collier v. Bank of Newbern*, 17 N. C. 525. **Tenn.**—*Draper v. State*, 1 Head 262; *Baldwin v. Merrill*, 8 Humph. 132; *Crutchfield v. Robins, Tingley & Co.*, 5 Humph. 15, 42 Am. Dec. 417. **Tex.**—*Harris v. Ellis*, 30 Tex. 4, 94 Am. Dec. 296; *Portis v. Ennis*, 27 Tex. 574.

68. **U. S.**—*Rader's Admr. v. Mad-dox*, 150 U. S. 128, 14 Sup. Ct. 46, 37 L. ed. 1025, when a plaintiff has accepted the cash tendered in a payment of part cash and part property, he is bound to accept the property also, as he cannot ratify in part and repudiate in part. **Cal.**—*Musser v. Gray*, 31 Pac. 568. **Ind.**—*Philips v. East*, 16 Ind. 254. **Ia.**—*Lyon v. Northrup*, 17 Iowa 314. **La.**—*Woolfolk v. Degelos*, 24 La. Ann. 199. **Minn.**—*Ives v. Phelps*, 16 Minn. 451. **Miss.**—*Planters Bank v. Calvit*, 3 Smed. & M. 143, 41 Am. Dec. 616; *Newman v. Meek*, Smed. & M. Ch. 331. **Mo.**—*Bushong v. Taylor*, 82 Mo. 660; *Weston v. Clark*, 37 Mo. 568. **N. Y.**—*Pond v. Harwood*, 139 N. Y. 111, 34 N. E. 768; *Craft v. Merrill*, 14 N. Y. 456; *La Farge v. Herter*, 11 Barb. 159. **Pa.**—*Potter v. Hartnett*, 148 Pa. 15, 23 Atl. 1007. **Wash.**—*Gaffney v. Megrath*, 23 Wash. 476, 63 Pac. 520. **Can.**—*Maguire v. Carr*, 28 Nova Scotia 431; *Morrison v. Rees*, 1 Ont. Pr. 25; *Whiteford v. McLeod*, 28 U. C. Q. B. 349.

69. **U. S.**—*McFarland v. Gwin*, 3 How. 717, 11 L. ed. 799; *Griffin v. Thompson*, 2 How. 244, 11 L. ed. 253. **Ala.**—*Bobo v. Thompson*, 3 Stew. & P. 385. **Ill.**—*Dibble v. Briggs*, 28 Ill. 48. **Tex.**

currency,<sup>70</sup> unless authorized by the judgment creditor to do so.<sup>71</sup> So also, an attorney has no right to accept anything except money in satisfaction of his client's judgment, unless specially authorized<sup>72</sup> by

*Harris v. Ellis*, 30 Tex. 4, 94 Am. Dec. 296, draft of third person.

70. *Lamar v. Micou*, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. ed. 751; *Gwin v. Breedlove*, 2 How. (U. S.) 29, 11 L. ed. 167; *Henly v. Franklin*, 3 Coldw. (Tenn.) 472, 91 Am. Dec. 296.

[a] **Remedy of Judgment Creditor.**

(1) If he does, he takes it at his peril (*Gwin v. Breedlove*, 2 How. [U. S.] 29, 11 L. ed. 167; *Randolph v. Ringgold*, 10 Ark. 279, 52 Am. Dec. 235; *Ringgold v. Edwards*, 7 Ark. 86); (2) and the judgment creditor may elect to proceed against the defendant for a satisfaction of the judgment, or against the sheriff for a breach of official duty. *Randolph v. Ringgold*, 10 Ark. 279, 52 Am. Dec. 235.

71. **U. S.**—*Buckhannon v. Tinnin*, 2 How. 258, 11 L. ed. 259, if the plaintiff sanctions the acceptance of bank notes by a marshal, he is bound by it, and the payment is sufficient. **Ark.**—*Randolph v. Ringgold*, 10 Ark. 279, 52 Am. Dec. 235; *Ringgold v. Edwards*, 7 Ark. 86. **Fla.**—*Hendry v. Benlisa*, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283. **Ga.**—*Boyd v. Sales*, 39 Ga. 72. **La.**—*Harvey v. Walden*, 23 La. Ann. 162. **Tenn.**—*Henly v. Franklin*, 3 Coldw. 472, 91 Am. Dec. 296. **Tex.**—*Buie v. Crouch*, 37 Tex. 53.

72. **U. S.**—*United States v. Beebe*, 180 U. S. 343, 21 Sup. Ct. 371, 45 L. ed. 563. **Ala.**—*Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508 (cannot receive depreciated paper currency in payment of his client's judgment); *West, Oliver & Co. v. Ball*, 12 Ala. 340; *Craig v. Ely*, 5 Stew. & P. 354; *Kirk v. Glover*, 5 Stew. & P. 340 (unless specially authorized an attorney has no right to take a bond for the payment of his client's judgment); *Gullert v. Lewis*, 3 Stew. 23; *Cost v. Genette*, 1 Port. 212. **Ark.**—*Moore v. Murrell*, 56 Ark. 375, 19 S. W. 973; *Walker v. Scott*, 13 Ark. 644. **Colo.**—*Black v. Drake*, 2 Colo. 330; *McMurray v. Marsh*, 12 Colo. App. 95, 54 Pac. 852. **Ga.**—*Jeter v. Haviland, Keese & Co.*, 24 Ga. 252, cannot take the note of a third person in payment of his client's judgment. **Ill.**—*Trumbull v. Nicholson*, 27 Ill. 149; *Murray v. Murphy*, 16 Ill. 275;

*Nolan v. Jackson*, 16 Ill. 272. **Ind.**—*Jones v. Ransom*, 3 Ind. 327. **Ia.**—*Bigler v. Tay*, 68 Iowa 687, 28 N. W. 17; *McCarver v. Nealey*, 1 G. Gr. 360. **Kan.**—*Herriman v. Shomon*, 24 Kan. 387, 36 Am. Rep. 261. **Ky.**—*Givens v. Briscoe*, 3 J. J. Marsh. 534. **La.**—*Davis v. Lee*, 20 La. Ann. 248; *Garthwaite v. Wentz*, 19 La. Ann. 196; *Bailey v. Bagley*, 19 La. Ann. 172; *Phelps v. Preston*, 9 La. Ann. 488; *Perkins v. Grant*, 2 La. Ann. 328. **Me.**—*Lord v. Burbank*, 18 Me. 178. **Md.**—*Maddux v. Bevan*, 39 Md. 485; *Kent v. Ricards*, 3 Md. Ch. 392. **Mass.**—*Langdon v. Potter*, 13 Mass. 319. **Mich.**—*Pitkin v. Harris*, 69 Mich. 133, 37 N. W. 61; *Hurley v. Watson*, 68 Mich. 531, 36 N. W. 726. **Miss.**—*Garvin v. Lowry*, 7 Smed. & M. 24; *Gasquet v. Warren*, 2 Smed. & M. 514; *Keller v. Scott*, 2 Smed. & M. 81; *Clark v. Kingsland*, 1 Smed. & M. 248 (no authority to accept an assignment of another judgment in satisfaction of his client's judgment); *Fitch v. Scott*, 3 How. 314, 34 Am. Dec. 86. **Mo.**—*Walden v. Bolton*, 55 Mo. 405; *Vanderline v. Smith*, 18 Mo. App. 55. **Neb.**—*Smith v. Jones*, 47 Neb. 108, 66 N. W. 19, 53 Am. St. Rep. 519. **N. Y.**—*De Mets v. Dagron*, 53 N. Y. 635; *Lewis v. Woodruff*, 15 How. Pr. 539; *Jackson v. Bartlett*, 8 Johns. 361. **N. C.**—*Child v. Dwight*, 21 N. C. 171. **Ore.**—*Barr v. Rader*, 31 Ore. 225, 49 Pac. 962. **Pa.**—*Whitesell v. Peck*, 165 Pa. 571, 30 Atl. 933, 35 W. N. C. 540; *Stackhouse v. O'Hara's Exrs.*, 14 Pa. 88 (has no authority to receive real estate in full payment and satisfaction of a money judgment); *Ely v. Lamb*, 10 Pa. Co. Ct. 209. **S. C.**—*Treasurers v. McDowell*, 1 Hill 184, 26 Am. Dec. 166; *Commissioners v. Rose*, 1 Desaus. Eq. 461. **Tenn.**—*Pendexter v. Vernon*, 9 Humph. 84; *Baldwin v. Merrill*, 8 Humph. 132; *Kenny v. Hazeltine*, 6 Humph. 64. **Tex.**—*Portis v. Ennis*, 27 Tex. 574; *Wright v. Daily*, 26 Tex. 730; *Price v. Logue* (Tex. Civ. App.), 164 S. W. 1048. **Va.**—*Wilkinson v. Holloway*, 7 Leigh (34 Va.) 277; *Smock v. Dade*, 5 Rand. (26 Va.) 639, 16 Am. Dec. 780, no authority to take a bond from the debtor. **Wash.**—*Gaffney v. Megrath*, 23 Wash. 476, 63 Pac.

him to do so, except, perhaps, where recovery is doubtful.<sup>73</sup> But the acceptance by the creditor of a note in payment of a judgment will operate to extinguish and satisfy the judgment.<sup>74</sup> So also, the

520. **W. Va.**—Kent, *Paine & Co. v. Chapman*, 18 W. Va. 485; *Wiley v. Mahood*, 10 W. Va. 206; *Harper v. Harvey*, 4 W. Va. 539, the payment of confederate treasury notes to the attorney without the authority of the plaintiff to receive them, was not a payment in money that would satisfy a judgment or decree against the defendant.

[a] **Payment of a draft for the amount of the judgment**, does not operate as a satisfaction thereof, in the absence of express authority from plaintiff to his attorney to accept the draft. **Ky.**—Harrow *v. Farrow's Heirs*, 7 B. Mon. 126, 45 Am. Dec. 60. **N. C.** *Moye v. Cogdell*, 69 N. C. 93. **Tex.** *Portis v. Ennis*, 27 Tex. 574.

[b] **Acceptance by the attorney of record of collateral security**, to be collected by him and enough of the money retained to pay his client's judgment, is not a satisfaction; but if the attorney collects the money and retains a sum sufficient to satisfy the judgment of his client, it will operate as a satisfaction of the judgment, although the attorney fails to pay over the money to his client. *Holliday v. Thomas*, 90 Ind. 398. See *Smith's Admr. v. Lamberts*, 7 Gratt. (48 Va.) 138.

73. *Jeffries v. Mutual Life Ins. Co.*, 110 U. S. 305, 4 Sup. Ct. 8, 28 L. ed. 156; *Benedict v. Smith*, 10 Paige (N. Y.) 126.

74. **Ala.**—*Brewer v. Branch Bank*, 24 Ala. 439; *Abercrombie v. Conner*, 10 Ala. 293. **Cal.**—*Mitchell v. Hockett*, 25 Cal. 538, 85 Am. Dec. 151, by express agreement. **Ill.**—*White v. Jones*, 38 Ill. 159. **Ind.**—*Jones v. Ransom*, 3 Ind. 327. **Minn.**—*Kennedy v. Fidelity & Casualty Co.*, 100 Minn. 1, 110 N. W. 97, 117 Am. St. Rep. 658, 9 L. R. A. (N. S.) 478, holding that the execution and delivery of promissory notes by the judgment debtor to the judgment creditor, if given in good faith, operates as payment and satisfaction of the judgment. **Mo.**—*Riggs v. Goodrich*, 74 Mo. 108. **N. Y.**—*Guinnip v. Close*, 19 Wkly. Dig. 226.

[a] **This is true (1) regardless of whether such payment is made by a**

party thereto or a stranger (*McLane v. Miller*, 10 Ala. 856; *Harrisons v. Hicks*, 1 Port. [Ala.] 423, 27 Am. Dec. 638), (2) and notwithstanding the fact that it is for a less amount than the judgment. *Sanders v. Branch Bank*, 13 Ala. 353; *Jones v. Ransom*, 3 Ind. 327. Partial payment as satisfaction or discharge of judgment, see *infra*, I, C, 2.

[b] **An express agreement that the note shall operate as a satisfaction need not be shown.** Nor will the law presume in the absence of such an agreement that it was intended only as additional security, but when it is taken for the antecedent debt it will be presumed to have been a satisfaction unless it is shown to have been intended as additional security. *White v. Jones*, 38 Ill. 159.

[c] **Question of Fact.**—The question of whether the note was given in satisfaction of a judgment is one of fact and not of law. The nature of the new security, the purposes and objects for which it was given, together with all of the attendant circumstances, are to be considered by the jury in determining the question. The mere production of a note given after the recovery of a judgment is no evidence that it was in satisfaction, or even connected with the judgment. The giving of a promissory note does not, of itself, raise a presumption of a satisfaction of an antecedent account, or settlement of all accounts between the parties. But if it appeared that the note was given for the account or upon a settlement of accounts between the parties, the presumption would be that it was intended as a settlement and satisfaction of the antecedent demands. *White v. Jones*, 38 Ill. 159.

[d] **A note secured by a deed of trust on land**, will operate to satisfy a judgment, if given and accepted therefor. **Ill.**—*Hoag v. Starr*, 69 Ill. 365. **Mo.**—*Bushong v. Taylor*, 82 Mo. 660. **Tex.**—*Branch v. Wilkens* (Tex. Civ. App.), 63 S. W. 1083.

[e] **Notes as Part Payment.**—As acceptance of promissory notes, with satisfactory personal security, in payment of the balance due on the judg-

acceptance by the creditor of specific property in settlement of a judgment, will operate as a satisfaction of the judgment upon delivery of the property as agreed;<sup>75</sup> but there must be an express agreement by the plaintiff to accept such payment as a substitute for the regular payment of the judgment.<sup>76</sup>

The taking of collateral security for the payment of a judgment does not in itself operate to satisfy the judgment;<sup>77</sup> but an agreement of the plaintiff in execution with the debtor never to enforce his judgment thereafter does operate as a discharge and satisfaction of the judgment.<sup>78</sup>

ment, operates as a satisfaction thereof. *Shields v. Moore*, 84 Ind. 440; *Kusler v. Crofoot*, 78 Ind. 597; *Hardesty v. Graham*, 8 Ky. L. Rep. 954, 3 S. W. 909.

[f] A note designed only to fix the time of payment, and which is returned to the maker at maturity unpaid is not a satisfaction of the judgment, however, and an entry of satisfaction thereof was properly refused upon motion of codefendants. *Schneider v. Meyer*, 56 Mo. 475; *Sullivan v. Saunders*, 66 W. Va. 350, 66 S. E. 497, 19 Ann. Cas. 480.

75. *Neb.*—*Hetzell v. Bennett*, 94 Neb. 768, 144 N. W. 800. *N. Y.*—*Brown v. Feeter*, 7 Wend. 301, payment in lumber. *Tenn.*—*Young v. Fugett*, 1 Lea 447, 450.

[a] Since such acceptance thereby becomes irrevocable. *Cal.*—*Musser v. Gray*, 96 Cal. xvii, 31 Pac. 568. *Ia.* *Lyon v. Northrup*, 17 Iowa 314. *Minn.* *Ives v. Phelps*, 16 Minn. 451. *Mo.* *Weston v. Clark*, 37 Mo. 568. *Pa.* *Potter v. Hartnett*, 148 Pa. 15, 23 Atl. 1007.

[b] A sale of lands by the defendant to the plaintiff in execution not fully consummated will not effect a satisfaction of the judgment. *Earle's Admrs. v. Earle*, 20 N. J. L. 347.

[c] Where No Price for Land Agreed on.—A conveyance of real estate to the beneficial plaintiff in a judgment, to be applied in payment on the same, or as collateral security for the payment thereof, will not operate to satisfy the judgment, if no price for the lot was agreed on. *De Clerq v. Jackson*, 103 Ill. 658.

[d] Receipt for Purpose of Sale and Application of Proceeds.—Where a judgment creditor receives personal property from his debtor on an agreement to sell the same and credit the

judgment with the price thereof, a sale of the property operates as a satisfaction pro tanto of the judgment, regardless of the creditor's failure to receive pay for the property thus sold. *Casey v. Harris*, 2 Litt. (Ky.) 172.

[e] Property Incumbered.—The conveyance of real estate, under an agreement of the debtor to clear the same of certain incumbrances within a specified time, will not operate to satisfy the judgment to be paid thereby, where the debtor fails to perform such agreement. *Terrett v. Brooklyn Improvement Co.*, 13 Wkly. Dig. (N. Y.) 385, reversing 18 Hun (N. Y.) 6.

Effect of purchase by judgment creditor on execution, see *infra*, VI, B, 2.

76. *Kan.*—*McCoy v. Hazlett*, 14 Kan. 430. *Mass.*—*Howe v. Mackay*, 5 Pick. 44. *Mo.*—*Riggs v. Goodrich*, 74 Mo. 108; *Schneider v. Meyer*, 56 Mo. 475. *W. Va.*—*Sullivan v. Saunders*, 66 W. Va. 350, 66 S. E. 497, 19 Ann. Cas. 480.

77. *Ga.*—*Chambers v. McDowell*, 4 Ga. 185. *Kan.*—*Steffins v. Gurney*, 61 Kan. 292, 59 Pac. 725. *Minn.*—*Presley v. Lowry*, 26 Minn. 158, 2 N. W. 61. *N. Y.*—*Lancaster v. Knight*, 74 App. Div. 255, 77 N. Y. Supp. 488. *Va.*—*Deaton Grocery Co. v. Pepper*, 98 Va. 587, 36 S. E. 988. *W. Va.*—See *Sullivan v. Saunders*, 66 W. Va. 350, 66 S. E. 497, 19 Ann. Cas. 480.

[a] When a judgment is held as security by the guarantor of another judgment, payments on the judgments guaranteed will operate as payments pro tanto on the judgment held by the guarantor. *Wall's Appeal*, 84 Pa. 101, 4 W. N. C. 344, 34 L. I. 213.

78. *Chambers v. McDowell*, 4 Ga. 185.

[a] A judgment defendant may show that a judgment has been paid by collaterals placed with the plain-

## 2. Partial Payment as Satisfaction or Discharge of Judgment.<sup>79</sup>

Many courts now hold that a compromise settlement between the parties, and the acceptance by the creditor of a less sum than is due on the judgment as full payment thereof, is binding on him, and is a good satisfaction.<sup>80</sup> It is true that some of the earlier cases have held that an agreement to discharge a judgment for a sum less than that for which it was rendered, is void for want of consideration,<sup>81</sup> and that the acceptance by a judgment creditor of a sum less than the amount of the debt, without any additional consideration, benefit, or advantage to the creditor, will not operate to satisfy the judgment,

or that plaintiff is chargeable with the amount of such collaterals for neglect to collect the same. *Reeves v. Plough*, 46 Ind. 350.

79. Partial payment by one of several joint defendants, see *supra*, I, B, 1, a.

80. Ill.—*Agnew v. Brall*, 124 Ill. 312, 16 N. E. 230. Neb.—*Hetzell v. Bennett*, 94 Neb. 768, 144 N. W. 800; *Gering v. School District*, 76 Neb. 219, 107 N. W. 250. N. Y.—*Boyd v. Hitchcock*, 20 Johns. 76, 11 Am. Dec. 247; *Kellogg v. Richards*, 14 Wend. 116; *Orleans v. Bowen*, 4 Lans. 24. Pa.—*Hendrick v. Thomas*, 106 Pa. 327, 15 W. N. C. 72, 3 Kulp 81. Tex.—*The Singer Mfg. Co. v. Herman Herschlerode Mfg. Co.*, 1 White & W. Civ. Cas., §741. Wash.—*Brown v. Kern*, 21 Wash. 211, 57 Pac. 798.

[a] "It is certainly not in accordance with ethics and ought not be in accord with the rules of law, to allow a creditor to enter into a contract to compromise his debt or judgment, and by reason of that compromise receive an amount of money which he could not have received except through the medium of a compromise, and then allow him to violate his contract on the plea of want of consideration and still retain the fruits of the agreement which he made to compromise." *Brown v. Kern*, 21 Wash. 211, 57 Pac. 798.

[b] For many years the trend of the decisions has been to restrict, rather than to extend, the operation of the earlier rule, and to hold as binding on the creditor any contract to compromise his judgment whereby he receives money which he could not have obtained otherwise. *San Juan v. St. John's Gas Co.*, 195 U. S. 510, 25 Sup. Ct. 108, 49 L. ed. 299; *Chicago, M. & St. P. R. Co. v. Clark*, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. ed. 1099;

*Kellogg v. Richards*, 14 Wend. (N. Y.) 116.

[c] A stipulation by the parties that judgment shall be entered for a certain amount, which will be satisfied upon payment or tender of a certain less amount, if made on or before a date named therein, is valid. *Schwiete v. Guerre* (Mo. App.), 158 S. W. 402.

[d] A receipt (1) in full for a debt, though given upon payment of only a part of the entire amount, discharges the whole debt, unless impeached for fraud or mistake. *Aborn v. Rathbone*, 54 Conn. 444; *Calhoun v. The Mayor & Council of Atlanta*, 42 Ga. 187. (2) A creditor cannot impeach, as fraudulent, a receipt in full given by him on part payment for the purpose of aiding the debtor to settle more favorably with other creditors. *Aborn v. Rathbone*, 54 Conn. 444.

[e] Agreement Must Be Fully Executed.—An agreement by a creditor to accept a less sum than the amount due on a judgment in full payment and satisfaction thereof, does not operate to satisfy the same unless it is fully executed. *Keen v. Vaughn's Exrx.*, 48 Pa. 477.

[f] Partial Payment by Insolvent Debtor.—The acceptance by agreement of the plaintiff with an insolvent debtor, of a less sum than the amount of the judgment, and the giving of a receipt in full therefor, operates as a satisfaction of the judgment. *Harper v. Graham*, 20 Ohio 105; *McArthur v. Dane*, 61 Ala. 539, where no fraud or deceit has been perpetrated upon the creditor.

That attorney of plaintiff cannot receive less than full payment, see *supra*, I, A, 2.

81. *Deland v. Hiatt*, 27 Cal. 611, 87

ment, even when accepted as full payment,<sup>82</sup> except when the payment is acknowledged by a release under seal.<sup>83</sup>

A municipality or other public corporation may compromise a judgment rendered in its favor, and satisfy the same for a sum less than its face value, in the absence of fraud or collusion, or any purpose of making a gift to the debtor;<sup>84</sup> but some courts limit this right to cases in which the solvency of the debtor is questionable,<sup>85</sup> or his right of appeal has not expired.<sup>86</sup>

**D. EVIDENCE AND PRESUMPTIONS OF PAYMENT. — 1. Evidence of Payment.** — The payment of a judgment may be proved by a receipt entered upon the records of the court,<sup>87</sup> or by a written receipt or other writing passing between the parties,<sup>88</sup> or by the return and receipts on the execution issued upon the judgment,<sup>89</sup> or by parol evi-

Am. Dec. 102; *Garvey v. Jarvis*, 54 Barb. (N. Y.) 179.

82. *Campbell v. Booth*, 8 Md. 107; *Daniels v. Hatch*, 21 N. J. L. 391, 47 Am. Dec. 169.

83. See *infra*, VII, D.

84. *Ia.*—*Collins v. Welch*, 58 Iowa 72, 12 N. W. 121, 43 Am. Rep. 111. *N. Y.*—Board of Supervisors of Orleans County *v. Bowen*, 4 Lans. 24; *Meeker v. Requa*, 94 App. Div. 300, 87 N. Y. Supp. 959. *N. D.*—*Hagler v. Kelly*, 14 N. D. 218, 103 N. W. 629, county commissioners may sell and assign a judgment obtained by the county for less than the amount due thereon, if done in good faith. *S. D.*—*State v. Davis*, 11 S. D. 111, 75 N. W. 897, 74 Am. St. Rep. 780.

85. *N. Y.*—*Standart v. Burtis*, 46 Hun 82. *Wash.*—*Farnsworth v. Wilbur*, 49 Wash. 416, 95 Pac. 642, 19 L. R. A. (N. S.) 320. *Wis.*—*Washburn County v. Thompson*, 99 Wis. 585, 75 N. W. 309, *distinguishing* 50 Wis. 329, 7 N. W. 246.

86. *Ill.*—*Agnew v. Brall*, 124 Ill. 312, 16 N. E. 230; *Petersburg v. Mapin*, 14 Ill. 193, 56 Am. Dec. 501. *Ia.*—*Mills v. Burlington & M. R. R. Co.*, 47 Iowa 66. *Mo.*—*St. Louis, I. M. & S. R. Co. v. Anthony*, 73 Mo. 431. *Neb.*—*Gering v. School District*, 76 Neb. 219, 107 N. W. 250; *Farnham v. City of Lincoln*, 75 Neb. 502, 106 N. W. 666. *N. H.*—*Kinsley v. Norris*, 62 N. H. 652. *N. Y.*—*Orleans v. Bowen*, 4 Lans. 24. *Ore.*—*Multnomah County v. Dekum*, 51 Ore. 83, 93 Pac. 821. *S. D.*—*State v. Davis*, 11 S. D. 111, 75 N. W. 89, 74 Am. St. Rep. 780.

87. *Hollenbeck v. Stanberry*, 38 Iowa 325.

88. *Ala.*—*Pharis v. Leachman*, 20 Ala. 662. *Ga.*—*Merritt v. Gill*, 68 Ga. 209. *Ill.*—*Neal v. Handley*, 116 Ill. 418, 56 Am. Rep. 784. *Md.*—*Blackburn v. Beall*, 21 Md. 208. *Minn.*—*Brisbin v. Farmer*, 16 Minn. 215. *Mont.*—*Davis v. Frederick*, 6 Mont. 300, 12 Pac. 664. *S. C.*—*Hunter v. Campbell*, 1 Speers 53.

[a] A receipt purporting to be in full payment of a judgment is evidence of such payment, which can only be overcome by a clear preponderance of evidence. *Neal v. Handley*, 116 Ill. 418, 6 N. E. 45, 56 Am. Rep. 784; *Earle v. Earle*, 16 N. J. L. 273.

[b] A receipt of the clerk of the court, acknowledging the receipt of payment of a judgment of record, is not proper evidence to establish payment of such judgment, in the absence of authority to the clerk to receive payment of judgments. *Hays v. Boyer*, 59 Ind. 341. Payment to clerk of court as sufficient payment, see *supra*, I, A, 4, b.

89. *Ark.*—*Snider v. Greathouse*, 16 Ark. 72, 63 Am. Dec. 54. *Conn.*—*Pitts v. Clark*, 2 Root 221. *Ia.*—*Singer v. Given*, 61 Iowa 93, 15 N. W. 853. *Pa.*—*Ramsey v. Johnson*, 3 Pen. & W. 293.

[a] **Contradiction of Return.**—(1) The return of satisfaction on execution cannot be contradicted by parol after a lapse of nearly eight years. *O'Connor v. Silver*, 26 Tex. 606. (2) But a receipt endorsed on an execution issued thereon may be explained by oral testimony showing that no money was paid at a sale of property thereunder, but that the amount of the bid at the void sale was credited thereon. *John-*

dence.<sup>90</sup> So also payment may be proved by the exemplification of a judgment and execution against another defendant for the same debt, which has been paid.<sup>91</sup>

A regularly certified transcript of the record of a judgment of another state, containing an entry of satisfaction of the judgment by the defendant, is prima facie evidence of payment of such judgment.<sup>92</sup> But an unfiled order of a court declaring a judgment to be satisfied, is not admissible as evidence of satisfaction.<sup>93</sup>

**Weight and Sufficiency.**—The sufficiency of the proof of the discharge of a judgment depends upon the circumstances of each case.<sup>94</sup> A fair preponderance of the evidence and corroborating circumstances are all that is required to sustain or defeat the claim of payment, as the case may be.<sup>95</sup>

son *v. State ex rel. Slinkard*, 80 Ind. 220.

90. **Ala.**—*Bruce v. Barnes*, 20 Ala. 219. **Ga.**—*Boyd v. McFarlin*, 35 Ga. 208. **Ill.**—*Loughry v. Mail*, 34 Ill. App. 523. **Ind.**—*Morrison v. King*, 4 Blackf. 125. **Ia.**—*Shaffer v. McCrackin*, 90 Iowa 578, 58 N. W. 910, 48 Am. St. Rep. 465; *Hollenbeck v. Stanberry*, 38 Iowa 325. **La.**—*Vidichi v. Cousin*, 6 La. Ann. 489. **Md.**—*Downey v. Forrester*, 35 Md. 117. **Mo.**—*Emory v. Joice*, 70 Mo. 537, holding that parol evidence is admissible to explain whether an ambiguous entry on the margin of the record is an assignment or satisfaction. **N. C.**—*Vestal v. Wicker*, 108 N. C. 21, 12 S. E. 1037. **Pa.**—*Fowler v. Smith*, 153 Pa. 639, 25 Atl. 744. **Tenn.**—*Gates v. Brinkley*, 4 Lea 710. **Tex.**—*Peters v. Lawson*, 66 Tex. 336, 17 S. W. 734; *Imperial Roller Mill. Co. v. First Nat. Bk.*, 5 Tex. Civ. App. 686, 27 S. W. 49. **Va.**—*Barrett v. Wilkinson*, 87 Va. 442, 12 S. E. 885.

[a] Even when the payment was for a sum less than the whole amount due, if such sum is received and accepted in full discharge of the judgment. *Tarver v. Rankin*, 3 Ga. 210, 214. Partial payment as satisfaction or discharge of judgment, see *supra*, I, C, 2.

[b] But parol evidence is inadmissible to prove the payment of a judgment unless it be first shown by the record that the suit in which the judgment alleged to have been paid was rendered embraced the same subject-matter as the suit at bar. *Fountain v. Anderson*, 33 Ga. 372.

[c] To Dispute Payment.—Parol evidence is admissible to prove that

nothing has been paid on a judgment, of which part satisfaction has been entered of record. *State v. Martin*, 20 Ark. 629.

91. *Logan v. Sumter*, 28 Ga. 242, 73 Am. Dec. 755; *Napier v. Neal*, 3 Ga. 298. See also *Merritt v. Gill*, 68 Ga. 209, holding that the record of the pleadings, auditor's report, verdict and decree of a suit in equity is admissible to prove payment and satisfaction of a judgment.

[a] A docket entry of "settled," made by the judge, and not transferred to the minutes, is no evidence that a prior judgment for the same debt has been paid. *Tucker v. State*, 57 Ga. 507.

92. *Carter v. Adamson*, 21 Ark. 287.

93. *Hall v. Sauntry*, 80 Minn. 348, 83 N. W. 156, 384.

94. *Bethany v. His Creditors*, 7 Rob. (La.) 61.

95. See the following: **U. S.**—*American Bell Tel. Co. v. Albright*, 32 Fed. 287, appeal dismissed, 136 U. S. 629, 10 Sup. Ct. 1064, 34 L. ed. 557. **Ia.**—*Fuller v. Lendrum*, 58 Iowa 353, 12 N. W. 340. **Ky.**—*Howard v. London Mfg. Co.*, 24 Ky. L. Rep. 1934, 72 S. W. 771. **Mo.**—*Mercantile Bank v. Hawe*, 33 Mo. App. 214; *Sturdevant Bank v. Peterman*, 21 Mo. App. 512. **N. Y.**—*Miller v. Smith's Exrs.*, 16 Wend. 425; *Seaman v. Clarke*, 75 App. Div. 345, 78 N. Y. Supp. 171. **Pa.**—*Miller v. Overseers of Poor*, 17 Pa. Super. 159. **Tex.**—*Terry v. O'Neal*, 71 Tex. 592, 9 S. W. 673. **Va.**—*Barrett v. Wilkinson*, 87 Va. 442, 12 S. E. 885. **Wis.**—*Flanders v. Sherman*, 19 Wis. 178.

**Burden of Proof.**—If the judgment debtor pleads payment of the judgment as a defense, he thereby assumes the burden of proving it.<sup>96</sup>

**2. Presumptions.**—a. *Generally.*—Satisfaction of a judgment may be proved by presumptions, as well as by positive evidence.<sup>97</sup>

b. *From Lapse of Time.*—(I.) *Generally.*—In the absence of a statute to the contrary, satisfaction of a judgment will not be presumed until the lapse of twenty years from the time of its rendition;<sup>98</sup> and

96. **Ala.**—*Collins v. Boyd*, 14 Ala. 505. **Ga.**—*Sanders v. Etcherson*, 36 Ga. 404. **Neb.**—*Lewis v. Lewis*, 31 Neb. 528, 48 N. W. 267. **Ohio.**—*Platt v. St. Clair's Heirs*, Wright 526. **Tex.**—*Portis v. Ennis*, 27 Tex. 574.

97. *Abat v. Buisson*, 9 La. 417; *Bethany v. His Creditors*, 7 Rob. (La.) 61.

98. **U. S.**—*Gaines v. Miller*, 111 U. S. 395, 4 Sup. Ct. 426, 28 L. ed. 466; *Higginson v. Mein*, 4 Cranch 415, 2 L. ed. 664; *Dunlop & Co. v. Ball*, 2 Cranch 180, 2 L. ed. 246. **Ala.**—*McMohan v. Crabtree*, 30 Ala. 470; *Rhodes' Exr. v. Turner*, 21 Ala. 210; *Collins v. Boyd*, 14 Ala. 505. **Ark.**—*Woodruff v. Sanders*, 15 Ark. 143. **Conn.**—*Judson v. Phelps*, 87 Conn. 495, 89 Atl. 161; *Barber v. International Co.*, 74 Conn. 652, 51 Atl. 857, 92 Am. St. Rep. 246; *Blakeslee v. Tyler*, 55 Conn. 387; *Cottle v. Payne*, 3 Day 292. **Del.**—*Parsons v. Cannon's Exr.*, 88 Atl. 470; *Knowles v. Waller*, 7 Penne. 220, 78 Atl. 611; *Janvier v. Culbreth*, 5 Penne. 505, 63 Atl. 309; *Maxwell v. Devalinger*, 2 Penne. 504, 47 Atl. 381; *Moore v. Carey*, 1 Marv. (Del.) 401, 41 Atl. 75; *Robinson v. Milby's Admr.*, 2 Houst. 387; *Morrow v. Robinson*, 4 Del. Ch. 521; *Campbell v. Carey*, 5 Harr. 427; *Burton v. Cannon*, 5 Harr. 13; *Farmers' Bank v. Leonard*, 4 Harr. 536. **Ga.**—*Willingham v. Long*, 47 Ga. 540; *State v. Virgin*, 36 Ga. 388; *Burt v. Casey*, 10 Ga. 178. **Ill.**—*Howell v. Edmonds*, 47 Ill. 79. **Ind.**—*King v. Manville*, 29 Ind. 134; *Bright's Admr. v. Sexton*, 18 Ind. 186; *Barker v. Adams*, 4 Ind. 574; *Reddington v. Julian*, 2 Ind. 224. **Ia.**—*Hendricks v. Wallis*, 7 Iowa 224. **Ky.**—*Chiles v. Monroe*, 4 Mete. 72. **Me.**—*Noble v. Merrill*, 48 Me. 140; *Cony v. Barrows*, 46 Me. 497; *Thayer v. Mowry*, 36 Me. 287. **Mass.**—*Bass v. Bass*, 8 Pick. 187. **Miss.**—*Meyer v. Dorrance*, 32 Miss. 263. **Mo.**—*McFaul v. Haley*, 166 Mo. 56, 65 S. W. 995; *West v. Brison*, 99 Mo. 684, 13 S. W. 95; *Clemens v. Wilkinson*, 10 Mo. 97; *Cobb*

*v. Houston*, 117 Mo. App. 645, 94 S. W. 299; *Wencker v. Thompson's Admr.*, 96 Mo. App. 59, 69 S. W. 743; *Meyer v. Mehrhoff*, 19 Mo. App. 682, 2 West. Rep. 417. **N. J.**—*Gulick v. Loder*, 13 N. J. L. 68, 23 Am. Dec. 711; *Mease v. Stevens*, 1 N. J. L. 433; *Pears v. Bache*, 1 N. J. L. 206; *Bird's Admr. v. Inslee's Exr.*, 23 N. J. Eq. 363. **N. Y.**—*Daby v. Ericsson*, 45 N. Y. 786; *Miller v. Smith's Exrs.*, 16 Wend. 425; *Kendrick's Estate*, 15 Abb. N. C. 189; *Henderson v. Henderson*, 3 Denio 314; *In re Watson*, 163 App. Div. 41, 148 N. Y. Supp. 525; *Belfer v. Ludlow*, 69 Misc. 486, 126 N. Y. Supp. 130; *Camp v. Hallanan*, 42 Hun 628. **Ore.**—*Beekman v. Hamlin*, 20 Ore. 352, 25 Pac. 672, 19 Ore. 383, 24 Pac. 195, 20 Am. St. Rep. 827, 10 L. R. A. 454. **Pa.**—*Roberts v. Powell*, 210 Pa. 594, 60 Atl. 258; *Woodward v. Carson*, 208 Pa. 144, 57 Atl. 342; *Hummel v. Lilly*, 188 Pa. 463, 41 Atl. 613, 68 Am. St. Rep. 879; *Devereux's Estate*, 184 Pa. 429, 39 Atl. 225, 6 Pa. Dist. 195, 19 Pa. Co. Ct. 267; *Smith v. Shoenberger*, 176 Pa. 95, 34 Atl. 954; *Wheelen Bros. v. Phillips*, 140 Pa. 33, 21 Atl. 239 (*affirming* 20 Phila. 306), 47 Leg. Int. 415, 26 W. N. C. 363; *Gregory v. Com.*, 121 Pa. 611, 15 Atl. 452, 6 Am. St. Rep. 804, 22 W. N. C. 381; *Breneman's Appeal*, 121 Pa. 641, 15 Atl. 650, 22 W. N. C. 391; *Biddle v. Bank*, 109 Pa. 349, 16 W. N. C. 397, 42 Leg. Int. 366; *Moore v. Smith*, \*81 Pa. 182, 2 W. N. C. 433; *Webb v. Dean*, 21 Pa. 29; *Cope v. Humphreys*, 14 Serg. & R. 15; *Miller v. Overseers of Poor*, 17 Pa. Super. 159; *Broomall v. Laird*, 1 Del. Co. Rep. 161. **S. C.**—*Tobin v. Myers*, 18 S. C. 324; *Pratt v. McLure*, 10 Rich. Eq. 301; *Charlton & Co. v. Felder*, 6 Rich. Eq. 58; *Sargent v. Hayne*, Riley 293; *Kennedy v. Denoon*, 2 Treadw. 617. **Va.**—*James' Exr. v. Life*, 92 Va. 702, 24 S. E. 275; *Udike's Admr. v. Lane*, 78 Va. 132. **W. Va.**—*Criss v. Criss*, 28 W. Va. 388.

See also 9 ENCY. OF EV. 711.

presumption of satisfaction after the lapse of such period is *prima facie* only.<sup>99</sup> But under a statute fixing the time from which payment will be presumed, such presumption is conclusive after the lapse of the limit fixed thereby, unless repelled by a written acknowledgment of the debt, or part payment thereof,<sup>1</sup> or other facts or circumstances conclusively overcoming such presumption;<sup>2</sup> but no presumption of payment arises from the simple lapse of time until the statutory

[a] **Tennessee rule** is that payment is presumed after sixteen years. See *Yarnell v. Moore*, 3 Coldw. 173; *McDaniel v. Goodall*, 2 Coldw. 391; *Anderson v. Settle*, 5 Sneed 202; *Leiper v. Erwin*, 5 Yerg. 97; *Blackburn v. Squibb*, Peck 60.

[b] **The rule of equity** as to presumption of payment, where the period of twenty years has not elapsed, is that in addition to the lapse of time, some other circumstance must appear tending to the conclusion, or raising the presumption, that it has been paid. *Howe v. Robinson*, 20 Fla. 352; *Buckmaster v. Kelley*, 15 Fla. 180, 195.

99. **Conn.**—*Judson v. Phelps*, 87 Conn. 495, 89 Atl. 161; *Chapman v. Loomis*, 36 Conn. 459. **Del.**—*Parsons v. Cannon's Exr.*, 88 Atl. 470; *Knowles v. Waller*, 7 Penne. 220, 78 Atl. 611; *Janvier v. Culbreth*, 5 Penne. 505, 63 Atl. 309; *Campbell v. Carey*, 5 Harr. 427; *Burton v. Cannon*, 5 Harr. 13. **Ga.**—*Thomas v. Hunnicutt*, 54 Ga. 337; *Willingham v. Long*, 47 Ga. 540. **Ind.**—*Bright's Admr. v. Sexton*, 18 Ind. 186. **Me.**—*Noble v. Merrill*, 48 Me. 140; *Jackson v. Nason*, 38 Me. 85; *Thayer v. Mowry*, 36 Me. 287. **Mo.**—*Cobb v. Houston*, 117 Mo. App. 645, 94 S. W. 299. **Neb.**—*Alberts v. Courtland Wagon Co.*, 94 Neb. 313, 143 N. W. 198; *Platte County Bank v. Clark*, 81 Neb. 255, 115 N. W. 787. **N. H.**—*Clark, Admr. v. Clement*, 33 N. H. 563. **N. J.**—*Bird's Admr. v. Inslee's Exr.*, 23 N. J. Eq. 363; *Evans v. Huffman*, 5 N. J. Eq. 354. **N. Y.**—*Miller v. Smith's Exrs.*, 16 Wend. 425; *Jackson v. Sackett*, 7 Wend. 94; *Belfer v. Ludlow*, 69 Misc. 486, 126 N. Y. Supp. 130; *Jacoby v. Stephenson Silver Min. Co.*, 3 Silv. 130, 6 N. Y. Supp. 371. **Ore.**—*Bowman v. Holman*, 53 Ore. 456, 99 Pac. 424. **Pa.**—*Hummel v. Lilly*, 188 Pa. 463, 41 Atl. 613, 68 Am. St. Rep. 879; *Smith v. Shoenberger*, 176 Pa. 95, 34 Atl. 954; *Van Loon v. Smith*, 103 Pa. 238; *Cope v. Humphreys*, 14 Serg. & R. 15; *Miller v. Overseers of Poor*, 17

Pa. Super. 159; *Broomall v. Laird*, 1 Del. Co. 161. **S. C.**—*Du Bose v. Kell*, 90 S. C. 196, 71 S. E. 371; *Pratt v. McLure*, 10 Rich. Eq. 301; *McQueen v. Fletcher*, 4 Rich. Eq. 152; *Cohen v. Thomson*, 2 Mill 146; *Stover v. Duren*, 3 Strobb. L. 448, 51 Am. Dec. 634.

[a] Sometimes a great lapse of time will not raise the presumption of payment, where attending circumstances and conditions all tend to the contrary. *St. Francis Mill Co. v. Sugg*, 206 Mo. 148, 104 S. W. 45.

1. **Ark.**—*Rector v. Morehouse*, 17 Ark. 131; *Woodruff v. Sanders*, 15 Ark. 143. **Colo.**—*Jones v. Stockgrowers' Nat. Bank*, 17 Colo. App. 79, 67 Pac. 177. **La.**—*Tilghman's Succession*, 7 Rob. 387. **Mass.**—*Haynes v. Blanchard*, 194 Mass. 244, 80 N. E. 504, 120 Am. St. Rep. 551. **Mo.**—*McFaul v. Haley*, 166 Mo. 56, 65 S. W. 995; *Clemens v. Wilkinson*, 10 Mo. 97; *Cobb v. Houston*, 117 Mo. App. 645, 94 S. W. 299; *Chiles v. School District of Buckner*, 103 Mo. App. 240, 77 S. W. 82; *Wencker v. Thompson's Admr.*, 96 Mo. App. 59, 69 S. W. 743. **N. Y.**—*Matter of Kendrick*, 107 N. Y. 104, 13 N. E. 762; *Matter of Watson*, 163 App. Div. 41, 148 N. Y. Supp. 525; *Belfer v. Ludlow*, 143 App. Div. 147, 127 N. Y. Supp. 623; *Seaman v. Clarke*, 60 App. Div. 416, 69 N. Y. Supp. 1002; *Raphael v. Mencke*, 28 App. Div. 91, 50 N. Y. Supp. 920; *Gray v. Seeber*, 53 Hun 611, 6 N. Y. Supp. 802, 917; *Partridge v. Moynihan*, 59 Misc. 234, 110 N. Y. Supp. 539. **N. C.**—*Herman v. Watts*, 107 N. C. 646, 12 S. E. 437. **Ore.**—*Alexander v. Munroe*, 54 Ore. 500, 101 Pac. 903, 103 Pac. 514, 135 Am. St. Rep. 840; *Bowman v. Holman*, 53 Ore. 456, 99 Pac. 424. **Pa.**—*Stout's Admr. v. Stout's Admr.*, 44 Pa. 457. **Tenn.**—*Cannon v. Lamon*, 7 Lea 513.

**Rebuttal of presumption**, see *infra*, I, D, 2, c.

2. *In re Watson*, 163 App. Div. 41, 148 N. Y. Supp. 525.

bar attaches,<sup>3</sup> unless such lapse of time, taken in connection with other facts and circumstances pointing in the same direction, shall warrant the presumption of payment,<sup>4</sup> or the submission of the question of such fact to a jury.<sup>5</sup>

This presumption is usually considered as a rule of evidence, rather than a limitation, and therefore it is not subject to the exceptions and incidents of a statute of limitations;<sup>6</sup> but in some jurisdictions, such statutes are in fact statutes of limitations, barring the enforcement of the judgment.<sup>7</sup>

The rule as to presumption of payment from lapse of time applies only to judgments for the payment of money.<sup>8</sup>

(II.) **Computing Time.**—The lapse of time upon which a presumption of payment arises, does not begin until the amount of the judgment has been ascertained, and the entry of record completed.<sup>9</sup>

3. **Ga.**—*Thomas v. Hunnicutt*, 54 Ga. 395, 4 Sup. Ct. 426, 28 L. ed. 466.  
 337. **Ind.**—*Dodds v. Dodds*, 57 Ind. 371; *Chiles v. Monroe*, 4 Mete. 72.  
 293. **Ky.**—*Chiles v. Monroe*, 4 Mete. 72.  
 72. **Miss.**—*Meyer v. Dorrance*, 32 Miss. 263.  
 45 N. Y. 786; *Camp v. Hallanan*, 42 Hun 628.  
 21 Pa. 29.  
 92 Va. 702, 24 S. E. 275.  
 4. **U. S.**—*Renwick v. Wheeler*, 48 Fed. 431.  
 17 Ark. 131; *Woodruff v. Sanders*, 15 Ark. 143.  
 9 Misc. 161, 29 N. Y. Supp. 7.  
 238; *Briggs' Appeal*, 93 Pa. 485; *Moore v. Smith*, 81 Pa. 182, 2 W. N. C. 433; *Hughes v. Hughes*, 54 Pa. 240; *Webb v. Dean*, 21 Pa. 29; *Diamond v. Tobias*, 12 Pa. 312.  
 2 S. C. 483; *Wherry v. McCammon*, 12 Rich. Eq. 337, 91 Am. Dec. 240; *Sessions v. Stevenson*, 11 Rich. Eq. 282; *Cohen v. Thomson*, 2 Mill 146; *Barnwell v. Waring*, Rich. Eq. Cas. 283.  
 2 Coldw. 25, 88 Am. Dec. 588.  
 24 S. E. 275.  
 28 W. Va. 388.  
 5. *Janvier v. Culbreth*, 5 Penne. (Del.) 505, 63 Atl. 309; *Leiper v. Erwin*, 5 Yerg. (Tenn.) 97.  
 6. **U. S.**—*Gaines v. Miller*, 111 U. S. 395, 4 Sup. Ct. 426, 28 L. ed. 466.  
 371; *Cobb v. Houston*, 117 Mo. App. 645, 94 S. W. 299; *Chiles v. School Dist. of Buckner*, 103 Mo. App. 240, 77 S. W. 82.  
 198. **Pa.**—*Devereux's Estate*, 184 Pa. 429, 39 Atl. 225, 6 Pa. Dist. 195, 19 Pa. Co. Ct. 267; *Porter v. Nelson's Exrs.*, 121 Pa. 628, 15 Atl. 852, 22 W. N. C. 387; *Reed v. Reed*, 46 Pa. 239.  
 9 Tex. 119.  
 139.  
 7. **Ga.**—*Solomon v. Hinton*, 50 Ga. 163; *Akin v. Freeman*, 49 Ga. 51; *Black v. Burton*, 47 Ga. 362.  
 762. **N. C.**—*Herman v. Watts*, 107 N. C. 646, 12 S. E. 437.  
 [a] The effect of statutes of limitations on judgments is to deprive the creditor of the right of action to recover the debt, instead of extinguishing the debt itself. *Fanton v. Middlebrook*, 50 Conn. 44; *Howe v. Robinson*, 20 Fla. 352.  
 8. **Ala.**—*Moore v. Williams*, 129 Ala. 329, 29 So. 795.  
 87 Mo. App. 157.  
 144 N. Y. 498, 39 N. E. 647; *Barnard v. Onderdonk*, 98 N. Y. 158; *Van Rensselaer v. Wright*, 56 Hun 39, 8 N. Y. Supp. 885.  
 9. **N. Y.**—*De Agreda v. Mantel*, 1 Abb. Pr. 130; *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565; *Belfer v. Ludlow*, 143 App. Div. 147, 127 N. Y. Supp. 623; *Partridge v. Moynihan*, 59 Misc.

(III.) **Suspension or Interruption of Running of Time.**—A statute of limitations will not run against a judgment while the creditor is diligently endeavoring to enforce it;<sup>10</sup> and the running of the statute, or common-law period of twenty years, may be suspended or interrupted by a stay of execution,<sup>11</sup> or other legal restraint<sup>12</sup> or disability.<sup>13</sup>

c. **Rebuttal of Presumptions.**—The fact that a judgment has not been paid may always be shown, in the absence of statute to the contrary;<sup>14</sup> and there appears to be no controlling authority for requiring any particular kind of evidence to rebut the presumption<sup>15</sup> of pay-

234, 110 N. Y. Supp. 539. **Pa.**—Wills v. Gibson, 7 Pa. 154. **S. C.**—Dillard v. Brian, 5 Rich. 501.

See also *supra*, I, D, 2, b, (I), note 99.

10. **Kan.**—Steffins v. Gurney, 61 Kan. 292, 59 Pac. 725. **Mo.**—St. Francis Mill Co. v. Sugg, 206 Mo. 148, 104 S. W. 4; St. Francis Mill Co. v. Sugg, 169 Mo. 130, 69 S. W. 359. **N. Y.** *In re Watson*, 163 App. Div. 41, 148 N. Y. Supp. 525; Palen v. Bushnell, 51 Hun 423, 4 N. Y. Supp. 63. **Ore.** *Alexander v. Munroe*, 54 Ore. 500, 101 Pac. 903, 103 Pac. 514, 135 Am. St. Rep. 840.

11. *Kinsler v. Holmes*, 2 S. C. 483.

12. *In re Watson*, 163 App. Div. 41, 148 N. Y. Supp. 525; *Hutsonpiller v. Stover*, 12 Gratt. (53 Va.) 579.

13. *McQueen v. Fletcher*, 4 Rich. Eq. (S. C.) 152.

14. **U. S.**—*Higginson v. Mein*, 4 Cranch 415, 2 L. ed. 664; *Dunlop & Co. v. Ball*, 2 Cranch 180, 2 L. ed. 246. **Ark.**—*Rector v. Morehouse*, 17 Ark. 131; *Woodruff v. Sanders*, 15 Ark. 143. **Conn.**—*Judson v. Phelps*, 87 Conn. 495, 89 Atl. 161; *Fanton v. Middlebrook*, 50 Conn. 44; *Chapman v. Loomis*, 36 Conn. 459; *Boardman v. De Forest*, 5 Conn. 1. **Del.**—*Janvier v. Culbreth*, 5 Penne. 505, 63 Atl. 309; *Moore v. Carey*, 1 Marv. 401, 41 Atl. 75; *Robinson v. Milby's Admr.*, 2 Houst. 387.

**Ga.**—*Burt v. Casey*, 10 Ga. 178. **Ind.** *Bright's Admr. v. Sexton*, 18 Ind. 186; *Barker v. Adams*, 4 Ind. 574; *Reddington v. Julian*, 2 Ind. 224. **Me.**—*Knight v. Macomber*, 55 Me. 132; *Noble v. Merrill*, 48 Me. 140; *Brewer v. Thomas*, 28 Me. 81. **Mass.**—*Haynes v. Blanchard*, 194 Mass. 244, 80 N. E. 504, 120 Am. St. Rep. 551; *Walker v. Robinson*, 136 Mass. 280; *Denny v. Eddy*, 22 Pick. 533; *Bass v. Bass*, 8 Pick. 187. **Mo.**

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**Ore.**—*Bowman v. Halman*, 53 Ore. 456, 99 Pac. 424; *Beekman v. Hamlin*, 23 Ore. 313, 31 Pac. 707. **Pa.**—*Smith v. Shoenberger*, 176 Pa. 95, 34 Atl. 954; *Breneman's Appeal*, 121 Pa. 641, 15 Atl. 650, 22 W. N. C. 391; *Porter v. Nelson*, 121 Pa. 628, 15 Atl. 852, 22 W. N. C. 387; *Biddle v. Bank*, 109 Pa. 349, 16 W. N. C. 397, 42 Leg. Int. 366; *Hess v. Frankenfield*, 106 Pa. 440, 15 W. N. C. 405; *Van Loon v. Smith*, 103 Pa. 238; *Horne v. Hower*, 49 Pa. 475, 22 Leg. Int. 349, 7 Leg. & Ins. Rep. 333; *Wall v. Stone*, 3 Lack. Leg. N. 314. **S. C.**—*Anderson v. Baughman*, 69 S. C. 38, 48 S. E. 38; *Colvin v. Phillips*, 25 S. C. 228. **Va.**—*Scott's Admr. v. Isaacs*, 85 Va. 712, 8 S. E. 678.

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15. **Conn.**—*Judson v. Phelps*, 87 Conn. 495, 89 Atl. 161; *Fanton v. Middlebrook*, 50 Conn. 44. **Del.**—*Janvier v. Culbreth*, 5 Penne. 505, 63 Atl. 309. **Ga.**—*Burt v. Casey*, 10 Ga. 178. **Ind.** *Bright's Admr. v. Sexton*, 18 Ind. 186; *Barker v. Adams*, 4 Ind. 574; *Reddington v. Julian*, 2 Ind. 224. **Me.**—*Knight v. Macomber*, 55 Me. 132; *Noble v. Merrill*, 48 Me. 140; *Brewer v. Thomas*, 28 Me. 81. **Mass.**—*Haynes v. Blanchard*, 194 Mass. 244, 80 N. E. 504, 120 Am. St. Rep. 551; *Walker v. Robinson*, 136 Mass. 280; *Denny v. Eddy*, 22 Pick. 533; *Bass v. Bass*, 8 Pick. 187. **Mo.**

*Cobb v. Houston*, 117 Mo. App. 645, 94 S. W. 299. **N. J.**—*Johnson v. Tuttle*, 9 N. J. Eq. 365 (the fact that a judgment was permitted to remain unpaid for twenty-four years, when the creditor had under execution and within his reach, ample property to pay it, is not conclusive that it was satisfied; the indulgence may be explained); *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685, 23 Am. Dec. 748. **N. C.**—*In re Walker*, 107 N. C. 340, 12 S. E. 136.

**Ore.**—*Bowman v. Halman*, 53 Ore. 456, 99 Pac. 424; *Beekman v. Hamlin*, 23 Ore. 313, 31 Pac. 707. **Pa.**—*Smith v. Shoenberger*, 176 Pa. 95, 34 Atl. 954; *Breneman's Appeal*, 121 Pa. 641, 15 Atl. 650, 22 W. N. C. 391; *Porter v. Nelson*, 121 Pa. 628, 15 Atl. 852, 22 W. N. C. 387; *Biddle v. Bank*, 109 Pa. 349, 16 W. N. C. 397, 42 Leg. Int. 366; *Hess v. Frankenfield*, 106 Pa. 440, 15 W. N. C. 405; *Van Loon v. Smith*, 103 Pa. 238; *Horne v. Hower*, 49 Pa. 475, 22 Leg. Int. 349, 7 Leg. & Ins. Rep. 333; *Wall v. Stone*, 3 Lack. Leg. N. 314. **S. C.**—*Anderson v. Baughman*, 69 S. C. 38, 48 S. E. 38; *Colvin v. Phillips*, 25 S. C. 228. **Va.**—*Scott's Admr. v. Isaacs*, 85 Va. 712, 8 S. E. 678.

15. **Conn.**—*Judson v. Phelps*, 87 Conn. 495, 89 Atl. 161; *Fanton v. Middlebrook*, 50 Conn. 44. **Del.**—*Janvier v. Culbreth*, 5 Penne. 505, 63 Atl. 309. **Ga.**—*Burt v. Casey*, 10 Ga. 178. **Ind.** *Bright's Admr. v*

ment, except where the statutes provide how the presumption of payment must be rebutted.<sup>16</sup>

An admission in writing, made by the judgment debtor prior to the time when the presumption of payment attaches, to the effect that the judgment is an existing obligation which he is bound to pay, removes such presumption.<sup>17</sup> So also, the issuance of a writ of seire facias before the time when the presumption of payment arises, with proper prosecution of the claim, will rebut the presumption of payment.<sup>18</sup> The return of an execution unsatisfied within the limited period may also be shown to repel such presumption.<sup>19</sup> But the removal of the debtor to another state, after the lapse of several years, is not a circumstance calculated to rebut the presumption of payment.<sup>20</sup> Nor will the mere poverty or insolvency of a judgment debtor rebut the presumption of payment, raised by lapse of time,<sup>21</sup> though in some jurisdictions, proof of an abiding inability to pay during the entire period, if shown, will rebut such presumption.<sup>22</sup> The question

J. Eq. 365. **N. C.**—*In re Walker*, 107 N. C. 340, 12 S. E. 136. **Ore.**—*Bowman v. Halman*, 53 Ore. 456, 99 Pac. 424; *Beekman v. Hamlin*, 20 Ore. 352, 25 Pac. 672. **Pa.**—*Van Loon v. Smith*, 103 Pa. 238; *Smith's Exrs. v. Wagenseller*, 21 Pa. 491. **S. C.**—*Anderson v. Baughman*, 69 S. C. 38, 48 S. E. 38; *Colvin v. Phillips*, 25 S. C. 228.

[a] **Partial Payment in Rebuttal of Presumption.**—In an action on a judgment after the expiration of twenty years from its rendition, a partial payment made on the judgment by a surety before the lapse of said period, without the knowledge of the principal debtor, was held to be competent evidence to rebut the presumption of payment. **Mass.**—*Denny v. Eddy*, 22 Pick. 533. **Ohio.**—*Bissell v. Jaudon*, 16 Ohio St. 498. **Pa.**—*Jenkins v. Anderson*, 8 Sadler 363, 11 Atl. 558. **Va.**—*Rowe's Admr. v. Hardy's Admr.*, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811.

16. **Ark.**—*Rector v. Morehouse*, 17 Ark. 131. **Mo.**—*Cobb v. Houston*, 117 Mo. App. 645, 94 S. W. 299. **N. Y.**—*Fisher v. New York*, 67 N. Y. 73.

As to method provided by statute for repelling presumption, see *supra*, I, D, 2, a.

17. **Del.**—*Burton v. Cannon*, 5 Harr. 13. **Mo.**—*Chiles v. School Dist. of Buckner*, 103 Mo. App. 240, 77 S. W. 82. **N. Y.**—*Waddell v. Elmendorf*, 10 N. Y. 170. **Ore.**—*Beekman v. Hamlin*, 19 Ore. 383, 24 Pac. 195, 20 Am. St. Rep. 827, 10 L. R. A. 454. **S. C.**—*McNair v. Ingraham*, 21 S. C. 70.

18. *Brearly v. Peay*, 23 Ark. 172; *In re Miller's Estate*, 243 Pa. 328, 90 Atl. 77; *James v. Jarrett*, 17 Pa. 370.

[a] **But reasonable diligence in the prosecution of a seire facias is required of the judgment plaintiff, and where he permits it to lie dormant for more than twenty years, it will be deemed to have been abandoned, and cease to rebut the presumption of payment.** *Biddle v. Girard Nat. Bank*, 109 Pa. 349, 16 W. N. C. 397, 42 Leg. Int. 366; *Van Loon v. Smith*, 103 Pa. 238.

19. *Black v. Carpenter*, 3 Baxt. (Tenn.) 350; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531, 1 L. R. A. 639.

20. *Kline v. Kline*, 20 Pa. 503.

[a] **Absence of Debtor.**—Where it is sought to repel the presumption of payment on the ground of the absence of the debtor, it must be shown that the absence was continuous and permanent, and not merely occasional. *Boardman v. De Forest*, 5 Conn. 1.

21. *Kline v. Kline*, 20 Pa. 503; *Taylor v. Megargee*, 2 Pa. 225.

[a] **Proof that the debtor failed in business soon after the judgment was rendered, will not raise the legal inference that his insolvency continued afterwards so as to prevent him from paying the judgment.** **Me.**—*Jackson v. Nason*, 38 Me. 85. **N. C.**—*Grant v. Burgwyn*, 84 N. C. 560. **Pa.**—*Taylor v. Megargee*, 2 Pa. 225.

22. **Me.**—*Knight v. Macomber*, 55 Me. 132; *Jackson v. Nason*, 38 Me. 85. **N. Y.**—*Waddell v. Elmendorf*, 10 N. Y.

as to whether a given state of facts rebuts the presumption of payment arising from lapse of time, is one of law for the court.<sup>23</sup>

**II. BY TENDER OF PAYMENT.**—A tender of payment of a judgment does not in itself operate to satisfy or release the judgment, but the defendant may upon refusal to accept the tender pay the money into court and apply for an entry of satisfaction.<sup>24</sup> To be effective even to this extent, however, the tender must be made to the judgment plaintiff, his attorney of record, or other person authorized to receive payment,<sup>25</sup> by a party having an interest to protect by the payment of the judgment;<sup>26</sup> and must be of the full amount due on the judgment, including interest to the date of the tender and all costs.<sup>27</sup> The tender must be made in money of good legal tender, then and there present.<sup>28</sup>

**III. BY MERGER OF JUDGMENT OR LIEN THEREOF.**—**A. IN GENERAL.**—A second judgment recovered on the same cause of action, although for a less amount than the first, operates as a merger and extinguishment of the first judgment,<sup>29</sup> except where one is only collateral to the other.<sup>30</sup> But a new judgment recovered in an action

170; *Henderson v. Cairns*, 14 Barb. 15. **Ore.**—*Beekman v. Hamlin*, 23 Ore. 313, 31 Pac. 707. **S. C.**—*Adams v. Richardson*, 30 S. C. 215, 9 S. E. 95. **Tenn.** *Yarnell v. Moore*, 3 Coldw. 173. **Va.** *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531, 1 L. R. A. 639. **Wash.**—*Murray v. Meade*, 5 Wash. 693, 32 Pac. 780.

23. *Beale's Exrs. v. Kirk's Admr.*, 84 Pa. 415.

24. **Cal.**—*Ferre v. Tubbs*, 125 Cal. 687, 58 Pac. 308. **Ill.**—*Tinney v. Wolston*, 41 Ill. 215, 219; *Campion v. Friedberg*, 55 Ill. App. 450. See *Chicago & E. I. R. Co. v. Kamman*, 119 Ill. 362, 10 N. E. 217, holding that money deposited before judgment, but not afterwards tendered in full of the judgment, when paid over operates as satisfaction pro tanto. **Minn.**—*Rother v. Monahan*, 60 Minn. 186, 62 N. W. 263. **N. H.**—*Rogers v. McDearmid*, 7 N. H. 506. **N. Y.** *Law v. Jackson*, 9 Cow. 641; *Jackson v. Law*, 5 Cow. 248, affirmed in 9 Cow. 641; *Callanan v. Gilman*, 23 Jones & S. 511, 2 N. Y. Supp. 702. **Pa.**—*Nesbit v. Martin*, 4 Pa. Co. Ct. 95. **Tenn.** *Thompson v. McMillan*, 89 Tenn. 110, 14 S. W. 439; *Bank v. Ewing*, 12 Lea 598. **Va.**—*Shumaker v. Nichols*, 6 Gratt. (47 Va.) 592, tender nugatory unless followed by payment of money into court, and motion to enter satisfaction on the record.

**Proceedings to obtain entry of satisfaction**, see *infra*, VIII, B, 2.

25. *Ferre v. Tubbs*, 125 Cal. 687, 58 Pac. 308; *Roland v. Roland*, 139 Ga. 825, 78 S. E. 249.

[a] Where the attorney of record has no authority to receive payment, a tender to him is not good. *Roland v. Roland*, 139 Ga. 825, 78 S. E. 249.

To whom payment made, see generally *supra*, I, A.

26. *Roberts v. Meighen*, 74 Minn. 273, 77 N. W. 139.

By whom payment made, see generally *supra*, I, B.

27. *Ferre v. Tubbs*, 125 Cal. 687, 58 Pac. 308; *Harper v. Rosenberger*, 56 Mo. App. 388.

28. *Roland v. Roland*, 139 Ga. 825, 78 S. E. 249; *Jackson v. Law*, 5 Cow. (N. Y.) 248.

29. **Kan.**—*Price v. First Nat. Bank*, 62 Kan. 735, 64 Pac. 637, 84 Am. St. Rep. 419. **Neb.**—*Johnson v. Hesser*, 61 Neb. 631, 85 N. W. 894. **Wis.**—*Barth v. Loeffelholz*, 108 Wis. 562, 84 N. W. 846.

30. **U. S.**—*Lynch v. Burt*, 132 Fed. 417, 67 C. C. A. 305. **Conn.**—*Fairchild v. Holly*, 10 Conn. 474. **Tex.**—*Cook v. Sparks*, 47 Tex. 28.

[a] A statutory judgment arising by operation of law on a delivery bond given, and returned forfeited, does not

on a former one, is merely cumulative, and as a rule does not merge the first judgment, so as to extinguish the same,<sup>31</sup> although there are authorities to the contrary.<sup>32</sup>

B. ON FORFEITED DELIVERY OR FORTHCOMING BOND.—An original judgment is merged in a new judgment obtained on a forfeited delivery bond:<sup>33</sup> and by statute in some of the states, an original judgment is merged in a new statutory judgment arising by operation of law upon the forfeiture of a delivery bond.<sup>34</sup>

C. MERGER OF JUDGMENT LIEN.—Where a judgment creditor acquires title to a parcel of land subject to the lien of his judgment, the lien of such judgment is thereby merged in the title,<sup>35</sup> at least pro tanto to the value of the property over the amount of his bid,<sup>36</sup> unless otherwise provided by statute,<sup>37</sup> or it is necessary to keep the lien alive to protect the interest of the creditor.<sup>38</sup> While a purchase by

satisfy the original judgment, whose execution had been released thereby. *Cole v. Robertson*, 6 Tex. 356, 55 Am. Dec. 784.

31. **U. S.**—*Hay v. Alexandria, etc.*, R. Co., 20 Fed. 15; *Griswold v. Hill*, 2 Paine 492, 11 Fed. Cas. No. 5,836. **Cal.**—*In re Wiley's Est.*, 138 Cal. 301, 71 Pac. 441. **Ind. Ter.**—*Armour Bros. Banking Co. v. Addington*, 1 Ind. Ter. 304, 37 S. W. 100. **N. H.**—*Weeks v. Pearson*, 5 N. H. 324. **N. Y.**—*Townsend v. Whitney*, 75 N. Y. 425; *Mumford v. Stocker*, 1 Cow. 178; *Forman v. Lawrence*, 6 Thomp. & C. 640. **N. C.** *Springs v. Pharr*, 131 N. C. 191, 42 S. E. 590, 92 Am. St. Rep. 775; *McLean v. McLean*, 90 N. C. 530. **S. C.**—*Lawton v. Perry*, 40 S. C. 255, 18 S. E. 861. **Va.**—*Kelly v. Hamblen*, 98 Va. 283, 36 S. E. 491.

32. *Gould v. Hayden*, 63 Ind. 443 (holding that where a judgment obtained in one state is the basis of an action which is prosecuted to judgment in another state, the former judgment is thereby merged into the latter, and the lien of the former abandoned); *Dunn v. Dilks*, 31 Ind. App. 673, 68 N. E. 1035; *Denegre v. Haun*, 13 Iowa 240.

33. **Ala.**—*Patton v. Hamner*, 32 Ala. 307; *Crawford v. Bank of Mobile*, 5 Ala. 55. **Pa.**—*Rice v. Groff*, 58 Pa. 116. **Tex.**—*Cole v. Robertson*, 6 Tex. 356, 55 Am. Dec. 784. **Va.**—*Cooper v. Daugherty*, 85 Va. 343, 7 S. E. 387; *Rhea v. Preston*, 75 Va. 757; *Leake v. Ferguson*, 2 Gratt. (43 Va.) 419; *Randolph v. Randolph*, 3 Rand. (24 Va.) 490.

34. **Ark.**—*Lipscomb v. Grace*, 26

*Ark.* 231, 7 Am. Rep. 607; *Black v. Nettles*, 25 Ark. 606; *Russell v. Shute*, 25 Ark. 469; *Douglas v. Twombly*, 25 Ark. 124; *Neale v. Jeter*, 20 Ark. 98; *Frazier v. McQueen*, 20 Ark. 68; *Kelly v. Garvin, Carson & Co.*, 12 Ark. 613; *Whiting v. Beebe*, 12 Ark. 421. **Ky.** *Chitty v. Glenn*, 3 Mon. 424; *Harrison v. Wilson*, 2 A. K. Marsh. 547. **Miss.** *Davis v. Hoopes*, 33 Miss. 173; *Bank of United States v. Patton*, 5 How. 200, 35 Am. Dec. 428; *Witherspoon v. Spring*, 3 How. 60, 32 Am. Dec. 310; *McComb v. Elliott*, 8 Smed. & M. (Miss.) 505. **Tenn.**—*Young v. Read*, 3 Yerg. 297.

[a] **Bond Given Upon Third Party Claim.**—The original judgment rendered in an action is not merged by one created by operation of law on a bond given for the trial of the right of property returned forfeited, the latter being merely cumulative security for the payment of the former, and for the damages on a failure to sustain the claim of title to the property levied on. *Lewis v. Taylor*, 17 Tex. 57.

35. **Ia.**—*Gorman Bank v. Iowa Iron Works*, 123 Iowa 516, 99 N. W. 174; *Price v. Rea*, 92 Iowa 12, 60 N. W. 208, in both cases creditor agreed to assume judgments. **N. Y.**—*Vroom v. Ditmas*, 4 Paige 526. **Pa.**—*Koons v. Hartman*, 7 Watts 20. **Wis.**—*Mariner v. Milwaukee, etc. R. Co.*, 26 Wis. 84.

36. *Benton v. Hatch*, 122 N. Y. 322, 25 N. E. 486.

37. *Van Horne v. McLaren*, 8 Paige (N. Y.) 285, 35 Am. Dec. 685; *Enmet's Admrs. v. Bradstreet*, 20 Wend. (N. Y.) 50.

38. **Colo.**—*Vaughn v. Comet Consol.*

the owner of land of a judgment against himself constituting a lien thereon usually operates to satisfy the lien of such judgment,<sup>39</sup> the rule does not apply to a grantee of the mortgagor or judgment debtor, unless such grantee takes a conveyance of the land subject to the judgment and assumes its payment as a part of the consideration.<sup>40</sup>

**IV. BY ASSIGNMENT OF JUDGMENT.**<sup>41</sup>—The assignment of a judgment to a person primarily liable therein, as the principal or a joint defendant, operates as a satisfaction and discharge thereof.<sup>42</sup> But an assignment of a judgment to a person only secondarily liable for the debt, as a surety, or to one not a party thereto, will vest in such assignee all the rights, interests and remedies of his assignor; it does not operate as a satisfaction of the judgment.<sup>43</sup>

Min. Co., 21 Colo. 54, 39 Pac. 422. Ind.—Boas v. Morgan, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237; Caley v. Morgan, 114 Ind. 350, 16 N. E. 790; Hancock v. Fleming, 103 Ind. 533, 3 N. E. 254; Gatling v. Dunn, 52 Ind. 498. Pa.—Richards v. Ayres, 1 Watts & S. 485.

39. Clark v. Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223.

40. Clark v. Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; Donk v. Alexander, 117 Ill. 330, 7 N. E. 672.

41. Effect of assignment of judgment on right to set off same against another judgment, see *infra*, V, A, 4.

42. See the following: Ala.—Preslar v. Stallworth, 37 Ala. 402. D. C. Flagg v. Kirk, 9 Mackey (D. C.) 335. Ga.—Adams v. Keeler, 30 Ga. 86. Idaho. Vermont Loan & Tr. Co. v. McGregor, 6 Idaho 134, 53 Pac. 399. Ill.—Tompkins v. Fifth Nat. Bank of Chicago, 53 Ill. 57; Russell v. Hugunin, 2 Ill. 562, 23 Am. Dec. 423. Ind.—Hubble v. Berry, 180 Ind. 513, 103 N. E. 328; Zimmerman v. Gaumer, 152 Ind. 552, 53 N. E. 829; Ashcraft v. Knoblock, 146 Ind. 169, 45 N. E. 69; Merritt v. Richey, 97 Ind. 236. Ia.—Bones v. Aiken, 35 Iowa 534. Mass.—National Security Bank v. Hunnewell, 124 Mass. 260; Holmes v. Day, 108 Mass. 563. Miss.—Rollins v. Thompson, 13 Smed. & M. 522. Mo.—Weston v. Clark, 37 Mo. 568; Warren County Bank v. Kemble, 61 Mo. App. 215. Neb.—First Nat. Bank of Plattsmouth v. Gibson, 60 Neb. 767, 84 N. W. 259. N. H.—Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207. N. Y.—Ten Eyck v. Craig, 62 N. Y. 406 (*affirmed* in 2 Hun 452, 5 Thomp. & C. 65); Harbeck v. Vanderbilt, 20 N. Y. 395; Chicago Varnish Co. v. Har-

good Realty, etc. Co., 78 Misc. 256, 138 N. Y. Supp. 93; Storz v. Boyce, 37 Misc. 279, 69 N. Y. Supp. 612; Breslin v. Peck, 38 Hun 623; Booth v. Farmers, etc., Nat. Bank, 11 Hun 258; Thompson v. Noble, 8 N. Y. Supp. 373, 28 N. Y. St. 514. N. C.—Dunn v. Beaman, 126 N. C. 764, 36 S. E. 174; Hinton v. Odenheimer, 57 N. C. 406; Towe v. Felton, 52 N. C. 216; Sherwood v. Collier, 14 N. C. 380, 24 Am. Dec. 264. Pa.—Thompson v. Sankey, 175 Pa. 594, 34 Atl. 1104; Boyer v. Bolender, 129 Pa. 324, 18 Atl. 127, 15 Am. St. Rep. 723. R. I.—Sager v. Moy, 15 R. I. 528, 9 Atl. 847. S. C.—Fowler v. Wood, 31 S. C. 398, 10 S. E. 93, 5 L. R. A. 721. Tenn.—Anderson v. Saylors, 3 Head 551; Baldwin v. Merrill, 8 Humph. 132. Vt.—Porter v. Gile, 44 Vt. 520.

See also *supra*, I, B, 1, a, note 43.

[a] The assignment of a judgment to a firm, (1) one member of which is a joint defendant therein, operates as a satisfaction of the judgment as to both. Morley v. Stevens, 47 How. Pr. (N. Y.) 228. (2) But the purchase by a firm of a judgment against one of its members and other persons, the assignment being taken in the name of a member who was not a party to the judgment, does not operate as a satisfaction of the judgment. Owensby v. Platt, 3 Ind. 459.

43. See the following: Cal.—Heisen v. Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39; Brown v. Scott, 25 Cal. 189. Colo.—Barnum v. Green, 13 Colo. App. 254, 57 Pac. 757. Conn. Vila v. Weston, 33 Conn. 42. Fla. Ritch v. Eichelberger, 13 Fla. 169. Ga. Thompson v. First State Bank, 102 Ga. 696, 29 S. E. 610. Ill.—Pearson's Exrs. v. Luecht, 199 Ill. 475, 65 N. E.

**V. BY SET-OFF.**<sup>44</sup> — A. OF JUDGMENT AGAINST JUDGMENT.<sup>45</sup> — **1. Generally.** — Courts of law as well as courts of chancery are now generally authorized by statute to set off one judgment against another;<sup>46</sup> but independent of statute, courts have the power, under their general jurisdiction over their officers and suitors, and in the exercise of their general equitable powers under the common law, to set off one judgment against another,<sup>47</sup> and this power is inherent in courts of law, in the exercise of their legitimate and incidental powers, as well as in courts of equity, and co-extensive with the latter.<sup>48</sup>

363. **Ind.**—Perry v. Roberts, 30 Ind. 244, 95 Am. Dec. 689; Applegate v. Mason, 13 Ind. 75; Burson v. Blair, 12 Ind. 371; Owensby v. Platt, 3 Ind. 459. **Ia.**—Anglo-American Land, etc. Co. v. Bush, 84 Iowa 272, 50 N. W. 1063. **Ky.**—Forwood v. Dehoney, 5 Bush 174. **Mass.**—Brown v. Maine Bank, 11 Mass. 153. **Miss.**—Vanhouten v. Reily, 6 Smed. & M. 440. **Mo.**—Bardon v. Savage, 1 Mo. 560; Burns v. Bangert, 16 Mo. App. 22. **Neb.**—Lederer v. Union Savings Bank, 52 Neb. 133, 71 N. W. 954. **N. J.**—Wimpfheimer v. Perrine, 61 N. J. Eq. 126, 47 Atl. 769. **N. Y.** Eolen v. Crosby, 49 N. Y. 183; Parmelee v. Dann, 23 Barb. 461; Bishop v. Garcia, 14 Abb. Pr. (N. S.) 69; Elsworth v. Caldwell, 18 Abb. Pr. 20; Kretsch v. Denofrio, 137 App. Div. 617, 122 N. Y. Supp. 242; Avery v. Ackart, 20 Misc. 631, 46 N. Y. Supp. 1085; Fratt v. Wertheimer, 39 Hun 463. **Pa.** Richmond Bldg. Assn. v. Richmond Bldg. Assn., 100 Pa. St. 191; Shoup v. Shoup, 25 Pa. Super. 552; Bechtel v. Lauer Brewing Co., 21 Pa. Co. Ct. 449. **S. C.**—King v. Aughtry, 3 Strobbh. 149. **Tex.**—Davidson v. Lee (Tex. Civ. App.), 162 S. W. 414.

See also *supra*, I, B, 2, note 54; I, B, 3, note 59; I, B, 3, b, note 62.

44. As to set-off generally, see the title "Set-Off, Counterclaim and Recoupment."

45. Set-off of judgment against claim, see *infra*, V, B.

Set-off of claim against judgment, see *infra*, V, C.

46. See generally the statutes and the following: **U. S.**—18 St. at L. 481. **Ga.**—Langston v. Roby, 68 Ga. 406; Meriwether v. Bird, 9 Ga. 594. **Ky.** McBrayer v. Dean, 100 Ky. 398, 38 S. W. 508; Bush v. Monroe, 20 Ky. L. Rep. 547, 47 S. W. 215. **Mass.**—Franks v. Edinberg, 185 Mass. 49, 69 N. E. 1058. **Mo.**—State v. Hudson, 86 Mo.

App. 501; Haseltine v. Thrasher, 65 Mo. App. 334; Skinker v. Smith, 48 Mo. App. 91.

[a] The judgment, and not the execution issuing thereon, is the proper subject matter of set-off. Bryant v. Hambrick, 9 Ga. 133.

47. See the following: **U. S.** Blount v. Windley, 95 U. S. 173, 24 L. ed. 424; Teller v. United States, 113 Fed. 463, 51 C. C. A. 297; Reed v. Smith, 158 Fed. 889. **Ky.**—Jeffries v. Evans, 6 B. Mon. 119, 43 Am. Dec. 158. **Me.**—Collins v. Campbell, 97 Me. 23, 53 Atl. 837, 94 Am. St. Rep. 458. **Mass.**—Perry v. Pye, 215 Mass. 403, 102 N. E. 653. **Mich.**—Robinson v. Kunkleman, 117 Mich. 193, 75 N. W. 451, 5 Det. Leg. N. 192. **Minn.**—Temple v. Scott, 3 Minn. 419. **N. H.** Chandler v. Drew, 6 N. H. 469, 26 Am. Dec. 704. **N. J.**—Brown v. Hendrickson, 39 N. J. L. 239. **N. M.** Scholle v. Pino, 9 N. M. 393, 54 Pac. 335. **Pa.**—Leitz v. Hohm, 207 Pa. 289, 56 Atl. 868, 99 Am. St. Rep. 791. **S. C.**—Simmons v. Reid, 31 S. C. 389, 9 S. E. 1058, 17 Am. St. Rep. 36; Duncan v. Bloomstock, 2 McCord 318, 13 Am. Dec. 728. **Tex.**—Dutton v. Mason, 21 Tex. Civ. App. 389, 52 S. W. 651. **Vt.**—Rix v. Nevins, 26 Vt. 384. **W. Va.**—Zinn v. Dawson, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772.

48. See the following: **U. S.**—Loy v. Alston, 172 Fed. 90, 96 C. C. A. 578, courts of equity have original jurisdiction. **Ala.**—Scott v. Rivers, 1 Stew. & P. 24, 21 Am. Dec. 646. **Cal.**—Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786. **Colo.**—Whitehead v. Jessup, 7 Colo. App. 460, 43 Pac. 1042, jurisdiction by court of law does not divest court of equity of jurisdiction. **Ga.** Skrine v. Simmons, 36 Ga. 402, 91 Am. Dec. 771; Colquitt v. Bonner, 2 Ga. 155. **Ia.**—Ballinger v. Tarbell, 16 Iowa 491, 85 Am. Dec. 527. **Ky.**—Palmateer v.

Where a set-off is not a matter of right under the statutes, it rests in the sound discretion of the judge to allow it or not, and no exception will lie to his refusal to do so.<sup>49</sup> Whether the power to set off judgments shall be exercised is to be determined in every case upon equitable considerations, and it will not be done where it will operate as an injustice, or infringe upon the substantial rights<sup>50</sup> of

Meredith, 4 J. J. Marsh. 74; Dickinson v. Chism, 4 Mon. 1; Prior v. Richard's Admr., 4 Bibb 356; Davidson v. Geoghagan, 3 Bibb 233. **Me.**—Collins v. Campbell, 97 Me. 23, 53 Atl. 837, 94 Am. St. Rep. 458; New Haven Copper Co. v. Brown, 46 Me. 418. **Mass.** Ames v. Bates, 119 Mass. 397; Green v. Hatch, 12 Mass. 195; Makepeace v. Coates, 8 Mass. 451; Goodenow v. Buttrick, 7 Mass. 140; Winslow v. Hathaway, 1 Pick. 211. **Minn.**—Temple v. Scott, 3 Minn. 419. **N. H.**—Goodwin v. Richardson, 44 N. H. 125; Brown v. Warren, 43 N. H. 420; Wright v. Coleleigh, 23 N. H. 32; Hurd v. Fogg, 22 N. H. 98; Hutchins v. Riddle, 12 N. H. 464; Chandler v. Drew, 6 N. H. 469, 26 Am. Dec. 704. **N. J.**—McAdams v. Randolph, 42 N. J. L. 332; Brown v. Henderson, 39 N. J. L. 239. **N. M.** Schole v. Pino, 9 N. M. 393, 54 Pac. 335. **N. Y.**—Stilwell v. Carpenter, 2 Abb. N. C. 238; Simpson v. Hart, 14 Johns. 63, 1 Johns. Ch. 91. **Pa.** Leitz v. Holman, 207 Pa. 289, 56 Atl. 868, 99 Am. St. Rep. 791; Coate's Appeal, 7 Watts & S. 99; Burns v. Thornburgh, 3 Watts 78; Wellock v. Cowan, 16 Serg. & R. 318; Ehrhart v. Esbenshade, 53 Pa. Super. 258; Chapman v. Griffith, 19 Pa. Dist. 855; Dry v. Filbert, 2 Woodw. Dec. 134; Moser v. Quirk, 2 Leg. Rec. 1. **S. C.**—Simmons v. Reid, 31 S. C. 389, 9 S. E. 1058, 17 Am. St. Rep. 36; Duncan v. Bloomstock, 2 McCord 318, 13 Am. Dec. 728; Williams v. Evans, 2 McCord 203. **Tenn.** Duff v. Wells, 7 Heisk. 17. **Tex.** Simpson v. Huston, 14 Tex. 476; Dutton v. Mason, 21 Tex. Civ. App. 389, 52 S. W. 651. **Vt.**—Rix v. Nevius, 26 Vt. 384. **W. Va.**—Zinn v. Dawson, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772.

49. **U. S.**—Reed v. Smith, 158 Fed. 889. **Ala.**—Scott v. Rivers, 1 Stew. & P. 24, 21 Am. Dec. 646. **Ga.**—Colquitt v. Bonner, 2 Ga. 155. **Kan.** Schuler v. Collins, 63 Kan. 372, 65 Pac. 662. **Ky.**—Davidson v. Geoghagan, 3

Bibb 233. **Me.**—Bartlett v. Pearson, 29 Me. 9. **Mass.**—Chipman v. Fowle, 130 Mass. 352; Makepiece v. Coates, 8 Mass. 451. **Minn.**—Lundberg v. Davidson, 68 Minn. 328, 71 N. W. 395, 72 N. W. 71; Temple v. Scott, 3 Minn. 419. **Mo.**—Skinker v. Smith, 48 Mo. App. 91. **N. H.**—Chandler v. Drew, 6 N. H. 469, 26 Am. Dec. 704. **N. J.**—Brown v. Hendrickson, 39 N. J. L. 239; Cox v. State Bank at Trenton, 8 N. J. L. 172, 14 Am. Dec. 417. **N. Y.**—Alexander v. Durkee, 112 N. Y. 655, 19 N. E. 514; Baker v. Hoag, 6 How. Pr. 201; Kretsch v. Denofrio, 137 App. Div. 617, 122 N. Y. Supp. 242; Rando v. National Park Bank, 137 App. Div. 190, 121 N. Y. Supp. 1048. **Pa.** Thropp v. Susquehanna Mut. Fire Ins. Co., 125 Pa. 427, 17 Atl. 473, 11 Am. St. Rep. 909; Burns v. Thornburgh, 3 Watts 78; Ehrhart v. Esbenshade, 21 Pa. Dist. 658, 53 Pa. Super. 258. **S. C.** Rookard v. Atlanta & C. Air Line Ry. Co., 89 S. C. 371, 71 S. E. 992; *Ex parte* Wells, 43 S. C. 477, 21 S. E. 334; Simmons v. Reid, 31 S. C. 389, 17 Am. St. Rep. 36; Meador v. Rhyne, 11 Rich. L. 631; Low v. Duncan, 3 Strobb. 195; Tolbert v. Harrison, 1 Bailey 599; Duncan v. Bloomstock, 2 McCord 318, 13 Am. Dec. 728; Williams v. Evans, 2 McCord 203. **Vt.**—Rix v. Nevins, 26 Vt. 384; Conable v. Bucklin, 2 Aik. 221. **Wis.**—Gauche v. Milbrath, 105 Wis. 355, 81 N. W. 487.

[a] A statute providing that an attorney's lien on a judgment shall be "subordinate to the rights existing between the parties to the action or proceeding" does not give a party the right to a set-off demandable as of right. Lundberg v. Davidson, 68 Minn. 328, 71 N. W. 395, 72 N. W. 71.

50. See the following: **U. S.**—Reed v. Smith, 158 Fed. 889. **Ind.**—Beard v. Puett, 105 Ind. 68, 4 N. E. 671. **Ia.** Miller v. Rosebrook, 136 Iowa 158, 113 N. W. 771. **Kan.**—Schuler v. Collins, 63 Kan. 372, 65 Pac. 662; Herman v. Miller, 17 Kan. 328. **Ky.**—Davidson,

others honestly acquired, and of equal grade.<sup>51</sup> But the legal title will control the equity, and authorize a set-off by a judgment defendant against another judgment in which a stranger has acquired an equitable interest prior to the motion to set off the judgments.<sup>52</sup>

**2. Requisites of Judgment To Be Set-off.**<sup>53</sup> — a. *Generally.* — A judgment cannot be set off unless it is the final adjudication of the cause upon which it is founded,<sup>54</sup> by a court of competent jurisdiction,<sup>55</sup> for the payment of money,<sup>56</sup> and appears of record as a subsisting demand.<sup>57</sup> One judgment cannot be set off against another pending an appeal from either, until the rights of the parties are finally determined.<sup>58</sup>

for *McKim v. Geoghagan*, 3 Bibb 233; *Mercer v. Henderson*, 7 Ky. Op. 448; *McNees v. Owens*, 15 Ky. L. Rep. 126. **Mass.**—*Ames v. Bates*, 119 Mass. 397; *Makepeace v. Coates*, 8 Mass. 451. **N. Y.** *Kretsch v. Denofrio*, 137 App. Div. 617, 122 N. Y. Supp. 242. See *Berg v. Bates*, 153 App. Div. 12, 137 N. Y. Supp. 1032. **Pa.**—*Leitz v. Hohman*, 207 Pa. 289, 56 Atl. 868, 99 Am. St. Rep. 791 (*reversing* 22 Pa. Super. 1); *Chapman v. Griffith*, 19 Pa. Dist. 855; *Ehrhart v. Esbenshade*, 53 Pa. Super. 258. **S. C.** *Rookard v. Atlanta & C. Air Line Ry. Co.*, 89 S. C. 371, 71 S. E. 992. **Tex.** *McManus v. Cash*, 101 Tex. 261, 108 S. W. 800; *Dutton v. Mason*, 21 Tex. Civ. App. 389, 52 S. W. 651. **Utah.**—*Snow v. West*, 37 Utah 528, 110 Pac. 52. **Can.** *Moffat v. Foley*, 26 U. C. Q. B. 509.

[a] Where the right of set-off was not asserted for more than three years after the judgments were rendered, nor until other rights had intervened, and where the party had neglected to avail himself of the special security decreed to him with which to satisfy his judgment, the court properly refused the application for a set-off. *Schuler v. Collins*, 63 Kan. 372, 65 Pac. 662.

\* 51. **U. S.**—*Blount v. Windley*, 95 U. S. 173, 24 L. ed. 424; *Reed v. Smith*, 158 Fed. 889. **Ky.**—*Mercer v. Henderson*, 7 Ky. Op. 448. **N. J.**—*Schautz v. Kearney*, 47 N. J. L. 56; *Terney v. Wilson*, 45 N. J. L. 282; *McAdams v. Randolph*, 42 N. J. L. 332. **N. D.** *Cleveland v. McCanna*, 7 N. D. 455, 75 N. W. 908, 66 Am. St. Rep. 670, 41 L. R. A. 852. **Ohio.**—*Gieske v. Schrakamp*, 8 Ohio 610, 6 Ohio N. P. 299.

52. *Williams v. Taylor*, 69 Ind. 48; *Brooks v. Harris*, 41 Ind. 390.

[a] A party must be the absolute and beneficial owner of a judgment before he can have it offset a judgment

against him. *Herman v. Miller*, 17 Kan. 328.

53. **Form and sufficiency of judgments generally**, see 15 STANDARD PROC. 22 et seq.

54. *Zerbe v. Missouri, etc. R. Co.*, 80 Mo. App. 414.

55. *Skrine v. Simmons*, 36 Ga. 402, 91 Am. Dec. 771; *Hamor v. Loeb*, 9 Pa. Co. Ct. 609.

56. **Cal.**—*Hobbs v. Duff*, 23 Cal. 596. **Minn.**—*Temple v. Scott*, 3 Minn. 419. **N. Y.**—*Gridley v. Garrison*, 4 Paige 647.

57. **Ga.**—*Camp v. Pace*, 40 Ga. 45. **Mass.**—*Parker v. Rugg*, 9 Gray 209. **Neb.**—*Spencer v. Johnston*, 58 Neb. 44, 78 N. W. 482. **N. Y.**—*Smith v. Briggs*, 9 Barb. 252; *Utica Ins. Co. v. Power*, 3 Paige 365; *Firmenich v. Bovee*, 1 Hun 532. **Pa.**—*Rupp v. Swartz*, 3 Lack. Jur. 125. **Tex.**—*Simpson v. Huston*, 14 Tex. 476. **Va.**—*Magarity v. Succop's Admr.*, 90 Va. 561, 19 S. E. 260.

[a] A judgment which has been paid, and extinguished, cannot be set off against another judgment. *Selinas v. Lee*, 73 Vt. 363, 51 Atl. 5.

58. **Minn.**—*Lindholm v. Itasca Lumber Co.*, 64 Minn. 46, 65 N. W. 931. **Mo.**—*Gemmell v. Hueben*, 71 Mo. App. 291. **N. Y.**—*De Camp v. Thomson*, 159 N. Y. 444, 54 N. E. 11, 70 Am. St. Rep. 570.

[a] A motion for a set-off of judgments made pending an appeal from one of the judgments, will be retained by the court without decision thereon until the appeal is determined. *Irvine v. Myers & Co.*, 6 Minn. 562.

[b] **Stay of Execution for Purpose of Set-Off.**—(1) A trial court, after affirmation of its judgment on appeal, and the record has been remitted, may stay the execution of the judgment, and hold it for the purpose of setting

Judgments may be set off regardless of the fact that one may be founded on an action *ex contractu* and the other on an action *ex delicto*,<sup>59</sup> or that one is founded upon a claim for usurious interest.<sup>60</sup>

A judgment for costs in favor of a defendant, may be set off against the judgment rendered for plaintiff on a retrial,<sup>61</sup> or where plaintiff appeals from a judgment in his favor, and defendant obtains a judgment for costs on the appeal;<sup>62</sup> but a judgment at law cannot be set off against the costs on a creditor's bill.<sup>63</sup>

b. *Mutuality of Parties*.—One judgment may be set off against another between mutual debtors.<sup>64</sup> Nor is it necessary that all the

it off against a counter judgment. *Troxell v. Delaware, L. & W. R. Co.*, 205 Fed. 830; *Blackburn v. Reilly*, 48 N. J. L. 82, 2 Atl. 817. But see *Booth v. Walton*, 44 U. C. Q. B. (Can.) 497. (2) But it has been held that a stay of execution, allowed by law on a judgment upon which replevin bail has been entered, does not prevent the owner of such judgment from setting it off in an action against him by the judgment debtor. *Hayes v. Boyer*, 59 Ind. 341.

59. **U. S.**—*Reed v. Smith*, 158 Fed. 889. **Ga.**—*Langston v. Roby*, 68 Ga. 406. **Ind.**—*Quick v. Durham*, 115 Ind. 302, 16 N. E. 601; *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Pickrell v. Jerauld*, 1 Ind. App. 10, 27 N. E. 433, 50 Am. St. Rep. 192. **Minn.**—*Hunt v. Conrad*, 47 Minn. 557, 50 N. W. 614; *14 L. R. A.* 512. **Pa.**—*Leitz v. Hohman*, 207 Pa. 289, 56 Atl. 868, 99 Am. St. Rep. 791; *Porreca v. Marks*, 23 Pa. Dist. 276; *Chapman v. Griffith*, 19 Pa. Dist. 855; *Ziegenfuss v. Cyphers*, 19 Pa. Dist. 854; *Ehrhart v. Esbenshade*, 53 Pa. Super. 258; *Pasek v. Vockroth*, 13 Pa. Co. Ct. 593.

60. *Lloyd v. First Nat. Bank*, 5 Kan. App. 512, 47 Pac. 575.

61. **U. S.**—*Troxell v. Delaware, L. & W. R. Co.*, 205 Fed. 830. **Mo.**—*Zerbe v. Missouri, K. & T. Ry. Co.*, 80 Mo. App. 414. **S. C.**—*Rookard v. Atlanta etc. Air Line Ry. Co.*, 89 S. C. 371, 71 S. E. 992.

62. *Louisville & N. R. Co. v. Perkins*, 1 Ala. App. 376, 56 So. 105; *Van Cise v. Peterman*, 100 N. Y. Supp. 536.

63. *Brisley v. Jones*, 5 N. J. Eq. 512.

64. **U. S.**—*Blount v. Windley*, 95 U. S. 173, 24 L. ed. 424; *Troxell v. Delaware, L. & W. R. Co.*, 205 Fed. 830; *Sowles v. Witters*, 40 Fed. 413; *United States v. Griswold*, 30 Fed. 604. **Ala.**—*Louis-*

*ville & N. R. Co. v. Perkins*, 1 Ala. App. 376, 56 So. 105. **Ark.**—*Milner v. Camden Lumber Co.*, 74 Ark. 224, 85 S. W. 234. **Cal.**—*Coonan v. Loewenthal*, 147 Cal. 218, 81 Pac. 527, 109 Am. St. Rep. 128; *McBride v. Fallon*, 65 Cal. 301, 4 Pac. 17. **Ga.**—*Skrine v. Simmons*, 36 Ga. 402, 91 Am. Dec. 771. **Ill.**—*Leathe v. Thomas*, 109 Ill. App. 434. **Ind.**—*Quick v. Durham*, 115 Ind. 302, 16 N. E. 601. **Ia.**—*Schnitker v. Schnitker*, 109 Iowa 349, 80 N. W. 403. **Kan.**—*Leavenson v. Lafontaine*, 3 Kan. 523; *Lloyd v. First Nat. Bank*, 5 Kan. App. 512, 47 Pac. 575. **La.**—*L. Luderbach Plumbing Co. v. Its Creditors*, 121 La. 371, 46 So. 359. **Me.**—*Harrington v. Bean*, 94 Me. 208, 47 Atl. 147; *Peirce v. Bent*, 69 Me. 381; *New Haven Copper Co. v. Brown*, 46 Me. 418. **Mass.**—*Ames v. Bates*, 119 Mass. 397; *Winslow v. Hathaway*, 1 Pick. 211; *Green v. Hatch*, 12 Mass. 195; *Makepeace v. Coates*, 8 Mass. 451; *Goodenow v. Buttrick*, 7 Mass. 140. **Mich.**—*Robinson v. Kunkleman*, 117 Mich. 193, 75 N. W. 451, 5 Det. Leg. N. 192. **Minn.**—*Irvine v. Myers*, 6 Minn. 562; *Temple v. Scott*, 3 Minn. 419. **Mo.**—*Tice v. Fleming*, 173 Mo. 49, 72 S. W. 689, 96 Am. St. Rep. 479 (an award for improvements may be set off against a judgment for rents and profits of land, in an ejectment suit); *Johnson v. Hall*, 84 Mo. 210; *Fenwick v. Gill*, 38 Mo. 510; *Walton v. Catron*, 125 Mo. App. 501, 102 S. W. 1058; *Wabash R. Co. v. Bowring*, 103 Mo. App. 158, 77 S. W. 106; *Haseltine v. Thrasher*, 65 Mo. App. 334; *Tissier v. Hill*, 13 Mo. App. 36. **N. H.**—*Chase v. Woodward*, 61 N. H. 79; *Brown v. Warren*, 43 N. H. 430. **N. J.**—*Schautz v. Kearney*, 47 N. J. L. 56; *McAdams v. Randolph*, 42 N. J. L. 332; *Brown v. Hendrickson*, 39 N. J. L. 239; *McChesney v. Rogers*, 8 N. J. L. 272, holding that a judgment rend-

parties to the different records shall be the same, where circumstances render it equitable to allow the set-off,<sup>65</sup> though it is necessary that a substantial mutuality shall exist.<sup>66</sup>

**Insolvency.**—Where two parties have judgments against each other and one of them is insolvent, the right of set-off exists<sup>67</sup> to protect the

ered against a debtor in his individual capacity cannot be off-set against him as administrator, the claims being in different rights. **N. M.**—Schalle *v.* Pino, 9 N. M. 393, 54 Pac. 335. **N. Y.** Simpson *v.* Hart, 14 Johns. 63, 1 Johns. Ch. 91. **Pa.**—Miller *v.* Klopp, 141 Pa. 275, 21 Atl. 601; Matthews *v.* Russell, 17 Pa. Co. Ct. 590. **S. C.**—Rookard *v.* Atlanta etc. Air Line R. Co., 89 S. C. 371, 71 S. E. 992. **Tenn.**—Hadley's Admr. *v.* Hickman, 1 Yerg. 501. **Tex.** Kelly Furniture, etc. Co. *v.* Shelton (Tex. Civ. App.), 62 S. W. 794; Brin *v.* Anderson, 25 Tex. Civ. App. 323, 60 S. W. 778. **Vt.**—Rix *v.* Nevins, 26 Vt. 284. **W. Va.**—Zinn *v.* Dawson, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772. **Wis.**—Hart *v.* Godkin, 122 Wis. 646, 100 N. W. 1057.

65. **U. S.**—Troxell *v.* Delaware, L. & W. R. Co., 205 Fed. 830. **Cal.**—Hobbs *v.* Duff, 23 Cal. 596. **Ga.**—Colquitt *v.* Bonner, 2 Ga. 155. **Ind.**—Cosgrove *v.* Cosby, 86 Ind. 511; Carter *v.* Compton, 79 Ind. 37. **Mass.**—Sheldon *v.* Kendall, 7 Cush. 217; Barrett *v.* Barrett, 8 Pick. 241. **Minn.**—Hunt *v.* Conrad, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512. **N. Y.**—Baker *v.* Hoag, 6 How. Pr. 201. **Ohio.**—Johnson *v.* Taylor, 1 Disu. 168. **Pa.**—Hibert *v.* Lang, 165 Pa. 439, 30 Atl. 1004. **Utah.**—Snow *v.* West, 37 Utah 528, 110 Pac. 52. **Tex.**—McManus *v.* Cash, 101 Tex. 261, 108 S. W. 800. **Wis.**—Wasburn Water Works Co. *v.* Town of Washburn, 156 Wis. 434, 145 N. W. 1090.

[a] **Thus**, (1) a judgment in favor of a principal alone may be set off in satisfaction of one against him and his surety. Johnson *v.* Hall, 84 Mo. 210; Skinker *v.* Smith, 48 Mo. App. 91. (2) A judgment in favor of one surety on a bond may, with his consent, be set off against a judgment obtained against another surety on the same bond (Hibert *v.* Lang, 165 Pa. 439, 30 Atl. 1004), (3) or a judgment in favor of a sole plaintiff is properly set off against one in which such plaintiff is a joint defendant (**Ia.**—Ballinger *v.* Tarbell, 16 Iowa 491, 85 Am. Dec. 527.

**Kan.**—Read *v.* Jeffries, 16 Kan. 534. **Minn.**—Hunt *v.* Conrad, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512. **Mo.** State *v.* Hudson, 86 Mo. App. 501); (4) or a judgment in favor of a partnership may be offset by one in favor of the defendant therein and against one of the partners individually (McManus *v.* Cash, 101 Tex. 261, 108 S. W. 800), (5) or a judgment recovered by a feme sole may be set off against one rendered against her husband and herself after marriage. Rutherford *v.* Crabb, 5 Yerg. (Tenn.) 112.

66. **U. S.**—Troxell *v.* Delaware, L. & W. R. Co., 205 Fed. 830. **Ala.**—Louisville & N. R. Co. *v.* Perkins, 1 Ala. App. 376, 56 So. 105. **Cal.**—Corwin *v.* Ward, 35 Cal. 195, 95 Am. Dec. 93. **Conn.**—Atkins *v.* Churchill, 19 Conn. 394. **Ga.**—Daniel *v.* Bush, 80 Ga. 218, 4 S. E. 271. **Ill.**—Howe Machine Co. *v.* Hickox, 106 Ill. 461; Hughes *v.* Trahern, 64 Ill. 48. **Ind.**—Carter *v.* Compton, 79 Ind. 37; Brooks *v.* Harris, 41 Ind. 390. **Ia.**—Miller *v.* Rosebrook, 136 Iowa 158, 113 N. W. 771; Gallaher *v.* Pendleton, 55 Iowa 142, 7 N. W. 512; Bell *v.* Perry & Townsend, 43 Iowa 368. **Ky.**—Mercer *v.* Henderson, 7 Ky. Op. 448; Dickinson *v.* Chism's Admr., 4 Mon. 1; Prior *v.* Richard's Admr., 4 Bibb 356. **Minn.**—Martin County Nat. Bank *v.* Bird, 92 Minn. 110, 99 N. W. 780. **N. Y.** Aikin *v.* Satterlee, 1 Paige 289. **N. D.** Patterson *v.* Ward, 8 N. D. 87, 76 N. W. 1046. **Ohio.**—Holmes *v.* Robinson, 4 Ohio 90. **Ore.**—Richmond *v.* Bloch, 36 Ore. 590, 60 Pac. 385; Ladd *v.* Ferguson, 9 Ore. 180.

[a] **Cestui Que Trust.**—(1) The defendant in a suit by a trustee may set off a debt due him from the cestui que trust. Heavenridge *v.* Mondy, 49 Ind. 434. (2) But he cannot set off one due him by the trustee personally. Heavenridge *v.* Mondy, 49 Ind. 434.

67. **Conn.**—Betts *v.* Connecticut Life Ins. Co., 78 Conn. 442, 62 Atl. 345. **Ky.**—Jeffries *v.* Evans, 6 B. Mon. 119, 43 Am. Dec. 158. **Mass.**—Perry *v.* Pye, 215 Mass. 403, 102 N. E. 653. **Minn.**—Hunt *v.* Conrad, 47 Minn. 557,

solvent party; and will be granted even where the insolvent has assigned his judgment.<sup>68</sup>

c. *Ownership Must Be Shown*.—A party seeking to set off one judgment against another, must show that he is the real and beneficial owner of the judgment which he seeks to set off against his own debt;<sup>69</sup> and he may do this even where the judgment stands in the name of another person.<sup>70</sup>

d. *Judgments of Different Courts*.—Judgments rendered by different courts may be set off against each other,<sup>71</sup> by order of the court rendering the judgment sought to be off-set.<sup>72</sup>

50 N. W. 614, 14 L. R. A. 512. **Mo.** Walton v. Catron, 125 Mo. App. 501, 102 S. W. 1058. **N. Y.**—Simpson v. Hart, 14 Johns. 63, 1 Johns. Ch. (N. Y.) 91; Hopper v. Ersler, 38 N. Y. Supp. 176, 1 Ann. Cas. 192. **Tex.**—Trammell v. Chamberlain, 60 Tex. Civ. App. 238, 128 S. W. 429.

68. Hopper v. Ersler, 38 N. Y. 176, 1 Ann. Cas. 192; Trammell v. Chamberlain, 60 Tex. Civ. App. 238, 128 S. W. 429.

**Effect of assignment to a third person on right to set-off, see *infra*, V, A, 4.**

69. **Ala.**—Hembree v. Glover, 93 Ala. 622, 8 So. 660. **Cal.**—Jones v. Chalfant, 55 Cal. 505. **Ga.**—Lee v. Lee, 31 Ga. 26, 76 Am. Dec. 681. **Ky.**—See Mercer v. Henderson, 7 Ky. Op. 448. **Mich.**—McGraw v. Pettibone, 10 Mich. 530. **N. Y.**—Turner v. Saterlee, 7 Cow. 480; Mason v. Knowlson, 1 Hill 218. **S. C.**—Meador v. Rhyne, 11 Rich. L. 631.

70. **Md.**—Norwood v. Norwood, 4 Har. & J. 112. **N. H.**—Andrews v. Varrell, 46 N. H. 17; Wright v. Cobleigh, 23 N. H. 32. **Utah.**—Snow v. West, 37 Utah 528, 110 Pac. 52.

71. **U. S.**—Reed v. Smith, 158 Fed. 889; Sowles v. Witters, 40 Fed. 413, decree in equity may be set off against a judgment at law. **Ind.**—Heavenridge v. Mondy, 49 Ind. 434; Brooks v. Harris, 41 Ind. 390. **Ky.**—Smith v. Bohon, 12 Bush 448. *Compare* Tenant's Heirs v. Marmaduke, 5 B. Mon. 76, holding that the consent of the owner of the judgment to be offset is necessary. **Me.**—Howe v. Klein, 89 Me. 376, 36 Atl. 620. **Mich.**—Robinson v. Kunkleman, 117 Mich. 193, 75 N. W. 451, 5 Det. Leg. N. 192; McEwen v. Bigelow, 40 Mich. 215. **N. J.**—Phillips v. Mackay, 54 N. J. L. 319, 23 Atl. 941; Schautz v. Kearney, 47 N. J. L.

56 (holding that a decree in admiralty in favor of a libellant, on a libel for damages in a federal court, may be set off in a state court against the libellant, the parties to the two suits being the same); Brookfield v. Hughson, 44 N. J. L. 285; Brown v. Hendrickson, 39 N. J. L. 239; Coxe v. State Bank at Trenton, 8 N. J. L. 172, 14 Am. Dec. 417, holding that judgments of a justice's court may be set off against a judgment of a circuit court. **N. Y.**—People v. New York Com. Pleas, 13 Wend. 649, 28 Am. Dec. 495; Smith v. Lowden, 1 Sandf. 696; Cooke v. Smith, 7 Hill 186; Kimball v. Munger, 2 Hill 364; Ewen v. Terry, 8 Cow. 126; Schermerhorn v. Schermerhorn, 3 Caines Cas. 190; Simpson v. Hart, 14 Johns. 63, 75, 1 Johns. Ch. 91; Brewerton v. Harris, 1 Johns. 144; Winterson v. Hitchings, 1 Ann. Cas. 193. **N. C.**—Hogan v. Kirkland, 64 N. C. 250; Wright v. Mooney, 28 N. C. 22; Noble v. Howard, 3 N. C. 163. **Pa.**—Best v. Lawson, 1 Miles 11. **S. C.**—Duncan v. Bloomstock, 2 McCord 318, 13 Am. Dec. 728. **Tenn.**—Sneed v. Sneed, 14 Lea 13. **Vt.**—Rix's Admr. v. Nevins, 26 Vt. 384. **Wis.**—Welsher v. Libby, 107 Wis. 47, 82 N. W. 693; Taylor v. Williams, 14 Wis. 155.

72. **Ind.**—Brooks v. Harris, 41 Ind. 390. **Me.**—Howe v. Klein, 89 Me. 376, 36 Atl. 620. **Mich.**—Robinson v. Kunkleman, 117 Mich. 193, 75 N. W. 451, 5 Det. Leg. N. 192. **N. J.**—Brown v. Hendrickson, 39 N. J. L. 239; Coxe v. State Bank at Trenton, 8 N. J. L. 172, 14 Am. Dec. 417. **N. Y.**—Cooke v. Smith, 7 Hill 186; Ross v. Hicks, 11 Barb. 481; Smith v. Lowden, 1 Sandf. 696; People v. New York Com. Pleas, 13 Wend. 649, 28 Am. Dec. 495; Ewen v. Terry, 8 Cow. 126; Brewerton v. Harris, 1 Johns. 144; Haff v. Spicer, 3 Caines' Cas. 190; Simpson v. Hart,

**3. Effect of Attorney's Lien.**<sup>73</sup> — Generally, where the judgments sought to be set off against each other were recovered in different actions, the attorney's lien for his services or for his taxable costs is superior to the equities of the parties seeking the set-off.<sup>74</sup> There are authorities, however, to the effect that the right of set-off is superior to the attorney's lien under such circumstances.<sup>75</sup> Where the judgments sought to be set off were recovered in the same action,<sup>76</sup> the right

14 Johns. 63, 1 Johns. Ch. 91. See *Wycoff v. Williams*, 136 App. Div. 495, 121 N. Y. Supp. 189. **N. C.**—*Hogan v. Kirkland*, 64 N. C. 250; *Wright v. Mooney*, 28 N. C. 22; *Noble v. Howard*, 3 N. C. 163. **Pa.**—*Best v. Lawson*, 1 Miles 11. **S. C.**—*Duncan v. Bloomstock*, 2 McCord 318, 13 Am. Dec. 728. **Vt.** *Rix's Admr. v. Nevins*, 26 Vt. 384. **Wis.**—*Welsher v. Libby*, 107 Wis. 47, 82 N. W. 693; *Taylor v. Williams*, 14 Wis. 155.

**73. Effect of attorney's lien on right to set off generally**, see the title "**Set-off, Counterclaim and Recoupment.**"

**74.** See the following: **U. S.**—*Bucki & Son Lbr. Co. v. Atlantic Lbr. Co.*, 128 Fed. 332, 63 C. C. A. 62. **Fla.** *Carter v. Bennett*, 6 Fla. 214. **Ill.** *Brent v. Brent*, 24 Ill. App. 448. **Ind.** *Harshman v. Armstrong*, 119 Ind. 224, 21 N. E. 662; *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280; *Adams v. Lee*, 82 Ind. 587; *Johnson v. Ballard*, 44 Ind. 270. **Kan.**—*Leavenson v. Lafontane*, 3 Kan. 523. **Me.**—*Collins v. Campbell*, 97 Me. 23, 53 Atl. 837, 94 Am. St. Rep. 458; *Harrington v. Bean*, 94 Me. 208, 47 Atl. 147; *Howe v. Klein*, 89 Me. 376, 36 Atl. 620; *Peirce v. Bent*, 69 Me. 381; *Stratton v. Hussey*, 62 Me. 286; *Stone v. Hyde*, 22 Me. 318; *Hooper v. Brundage*, 22 Me. 460. **Minn.** *Lindholm v. Itasca Lbr. Co.*, 64 Minn. 46, 65 N. W. 931. **Mo.**—*Kansas City Rapid Motor & Transp. Co. v. Young*, 188 Mo. App. 289, 175 S. W. 95; *State v. U. S. Fidelity, etc. Co.*, 135 Mo. App. 160, 115 S. W. 1081. **Neb.**—*Rice v. Day*, 33 Neb. 204, 49 N. W. 1128; *Ward v. Watson*, 27 Neb. 768, 44 N. W. 27; *Boyer v. Clark*, 3 Neb. 161. **N. J.**—*Pride v. Smalley*, 66 N. J. L. 578, 52 Atl. 955; *Phillips v. Mackay*, 54 N. J. L. 319, 23 Atl. 941; *Terney v. Wilson*, 45 N. J. L. 282; *Brown v. Hendrickson*, 39 N. J. L. 239. **N. Y.** *Davidson v. Alfaro*, 80 N. Y. 660; *Zogbaum v. Parker*, 55 N. Y. 120; *Perry v. Chester*, 53 N. Y. 240; *Devoy*

*v. Boyer*, 3 Johns. 247; *Dunkin v. Vandenberg*, 1 Paige 622; *Cole v. Grant*, 2 Caines Cas. 105; *In re Steele*, 165 App. Div. 683, 151 N. Y. Supp. 81; *Webb v. Parker*, 130 App. Div. 92, 114 N. Y. Supp. 489; *Smith v. Cayuga Lake Cement Co.*, 107 App. Div. 524, 95 N. Y. Supp. 236; *Barry v. Third Ave. R. Co.*, 87 App. Div. 543, 84 N. Y. Supp. 830; *Wesley v. Wood*, 73 Misc. 33, 132 N. Y. Supp. 248; *Kaufman v. Keenan*, 13 Civ. Proc. 225. **Ohio.** *Diehl v. Friester*, 37 Ohio St. 473. **S. D.** *Mostetter v. Holborn*, 21 S. D. 547, 114 N. W. 693; *Hroch v. Aultman, etc. Co.*, 3 S. D. 477, 54 N. W. 269. **Tenn.** *Roberts v. Mitchell*, 94 Tenn. 277, 29 S. W. 5, 29 L. R. A. 705. **Tex.**—*McManus v. Cash*, 101 Tex. 261, 108 S. W. 800; *Davidson v. Lee* (Tex. Civ. App.), 162 S. W. 414. **Wis.**—*Stanley v. Bouck*, 107 Wis. 225, 83 N. W. 298. **Can.**—*Rogers v. Ledden*, 4 N. Bruns. 59.

[a] **The reason** is that the set-off will destroy the judgment to which the lien has attached. *Webb v. Parker*, 130 App. Div. 92, 114 N. Y. Supp. 489.

**75. Ga.**—*Smith v. Evans*, 110 Ga. 536, 35 S. E. 633; *Langston v. Roby*, 68 Ga. 406. **Ia.**—*Tiffany v. Stewart*, 60 Iowa 207, 14 N. W. 241; *Hurst v. Sheets*, 21 Iowa 501. **Vt.**—*McDonald v. Smith*, 57 Vt. 502. **W. Va.**—*Renick v. Ludington*, 16 W. Va. 378.

[a] **The lien of the attorney is subject to all the equitable liens of the defendant in the judgment**, existing at the time of the rendition of the judgment or decree. *Renick v. Ludington*, 16 W. Va. 378.

**76.** See the following: **Ia.**—*Watson v. Smith*, 63 Iowa 228, 18 N. W. 916. **Mass.**—*Little v. Rogers*, 2 Metc. 478. **Mo.**—*State v. United States Fidelity, etc. Co.*, 135 Mo. App. 160, 115 S. W. 1081. **N. Y.**—*Dunkin v. Vandenberg*, 1 Paige 622; *Smith v. Chenoweth*, 18 Abb. N. C. 349, 14 Daly 166; *Hoyt v. Godfrey*, 11 Daly 278; *Hayes v. Carr*,

to set-off cannot be defeated by any lien of the attorney, though there is a possible exception in favor of his taxable costs.<sup>77</sup>

**4. Effect of Assignment to a Third Person.**<sup>78</sup>—A bona fide assignment of one of the judgments prior to notice, or application to set off the same, will extinguish the right of set-off,<sup>79</sup> especially where the assignment of the one judgment is made before the rendition of the other;<sup>80</sup> but an assignment after notice of the right and demand of set-off will not avail to defeat that right.<sup>81</sup> Nor will an

44 Hun 372; *Warden v. Frost*, 35 Hun 141; *Hopper v. Ersler*, 1 N. Y. Ann. Cas. 192, 38 N. Y. Supp. 176; *Winterston v. Hitchings*, 1 Ann. Cas. 193; *Van Cise v. Peterman*, 100 N. Y. Supp. 536. **S. D.**—*Garrigan v. Huntimer*, 21 S. D. 269, 111 N. W. 563; *Lindsay v. Pettigrew*, 8 S. D. 244, 66 N. W. 321. **Wis.**—*Bosworth v. Tallman*, 66 Wis. 533, 29 N. W. 542.

**77.** *Winton v. Winton*, 18 Civ. Proc. (N. Y.) 67; *Place v. Hayward*, 8 Civ. Proc. (N. Y.) 352; *Lachenmeyer v. Lachenmeyer*, 65 How. Pr. (N. Y.) 422; *Wellman v. Frost*, 38 Hun (N. Y.) 339; *Tunstall v. Winton*, 31 Hun (N. Y.) 219 (*affirmed* in 96 N. Y. 660;) *Strauss v. Seamon*, 18 N. Y. St. 942.

**78.** Effect of assignment as satisfaction of judgment, see *supra*, IV.

**79. U. S.**—*Anglo-Am. Provision Co. v. Davis Provision Co.*, 112 Fed. 574. **Ill.**—*Lockhart v. Wolf*, 82 Ill. 37. **Ind.** *Ault v. Zehering*, 38 Ind. 429. **Ia.** *Davis v. Milburn*, 3 Iowa 163. **Ky.** *Pfeifer v. Harris*, 11 Bush 400. **Md.** *Levy v. Steinbach*, 43 Md. 212. **Mass.** *Ames v. Bates*, 119 Mass. 397; *Makepeace v. Coates*, 8 Mass. 451. **Mich.** *Ledyard v. Phillips*, 58 Mich. 204, 24 N. W. 551; *Huntoon v. Russell*, 41 Mich. 316, 2 N. W. 38. **Minn.**—*Wyvell v. Barwise*, 43 Minn. 171, 45 N. W. 11. **Miss.**—*Holly v. Cook*, 70 Miss. 590, 13 So. 228. **Mo.**—*Walton v. Catron*, 125 Mo. App. 501, 102 S. W. 1058; *Haseltine v. Thrasher*, 65 Mo. App. 334. **N. H.**—*Goodwin v. Richardson*, 44 N. H. 125. **N. J.**—*McAdams v. Randolph*, 42 N. J. L. 332. **N. Y.** *Perry v. Chester*, 53 N. Y. 240; *Roberts v. Carter*, 38 N. Y. 107; *Mackey v. Mackey*, 43 Barb. 58; *Hackett v. Connett*, 2 Edw. Ch. 73; *Kretsch v. Denofrio*, 137 App. Div. 617, 122 N. Y. Supp. 242; *Silver v. Krellman*, 89 App. Div. 363, 85 N. Y. Supp. 945; *Hopper v. Ersler*, 1 Ann. Cas. 192. **N. C.**—*Sellers v. Bryan*, 17 N. C. 358. **Pa.**

*Horton v. Miller*, 44 Pa. 256; *Ramsey's Appeal*, 2 Watts 228, 27 Am. Dec. 301; *Marine Saw Mill Co.'s Appeal*, 1 Sadler 342, 2 Atl. 866; *Matthews v. Russell*, 17 Pa. Co. Ct. 590. **S. C.**—*Ex parte Wells*, 43 S. C. 477, 21 S. E. 334. **Tex.** *McManus v. Cash*, 101 Tex. 261, 108 S. W. 800; *Davidson v. Lee* (Tex. Civ. App.), 162 S. W. 414; *Dutton v. Mason*, 21 Tex. Civ. App. 389, 52 S. W. 651. **Vt.**—*Day v. Abbott*, 15 Vt. 632.

**80. Mass.**—*Smith v. Brown*, 151 Mass. 338, 24 N. E. 31. **Miss.**—*Holly v. Cook*, 70 Miss. 590, 13 So. 228. **N. H.** *Goodwin v. Richardson*, 44 N. H. 125. **N. J.**—*Laubsch v. West N. Y. Silk Mill Co.*, 57 N. J. L. 234, 30 Atl. 550. **N. Y.** *McDonogh v. Sherman*, 138 App. Div. 291, 122 N. Y. Supp. 1033. **Pa.**—*Horton v. Miller*, 44 Pa. 256. **Tex.**—*McManus v. Cash & Luckel*, 101 Tex. 261, 108 S. W. 800; *Dutton v. Mason*, 21 Tex. Civ. App. 389, 52 S. W. 651. **Vt.** *Day v. Abbott*, 15 Vt. 632.

**81. U. S.**—*Wood v. Carr*, 3 Story 366, 30 Fed. Cas. No. 17,940. **Ala.** *Skipper v. Stokes*, 42 Ala. 255, 94 Am. Dec. 646. **Cal.**—*Coonan v. Loewenthal*, 147 Cal. 218, 81 Pac. 527, 109 Am. St. Rep. 128; *McBride v. Fallon*, 65 Cal. 301, 4 Pac. 17; *Porter v. Liscom*, 22 Cal. 430, 83 Am. Dec. 76; *Russell v. Conway*, 11 Cal. 93. **Colo.**—*Whitehead v. Jessup*, 7 Colo. App. 460, 43 Pac. 1042. **Del.**—*Morris v. Hollis*, 2 Harr. 4. **Ga.**—*Langston v. Roby*, 68 Ga. 406. **Ind.**—*Williams v. Taylor*, 69 Ind. 48. **Ia.**—*Miller v. Rosebrook*, 136 Iowa 158, 113 N. W. 771; *Gregory v. Cuppy*, 82 N. W. 1016; *Benson v. Haywood*, 86 Iowa 107, 53 N. W. 85, 23 L. R. A. 335; *Hurst v. Sheets*, 14 Iowa 322. **Ky.**—*Jeffries v. Evans*, 6 B. Mon. 119, 43 Am. Dec. 158; *Merrill v. Souther*, 6 Dana 305. **Me.**—*Peirce v. Bent*, 69 Me. 381; *New Haven Copper Co. v. Brown*, 46 Me. 418; *Bartlett v. Pearson*, 29 Me. 9; *Hooper v. Brundage*, 22 Me. 460. **Mass.**—*Franks v. Edin-*

equitable assignment of a part of a judgment, without the consent of the judgment debtor, defeat his right to set off his cross-judgments against the whole of such judgment.<sup>82</sup>

**Assignment as Collateral.**—While a judgment is held by an assignee having a lien thereon as collateral, the right of set-off against it is suspended, but attaches immediately upon satisfaction of such lien.<sup>83</sup>

**5. Effect of Claim of Exemption, etc.**—A set-off may be defeated by a claim of exemption under the exemption laws;<sup>84</sup> and a judgment recovered for the value of exempt personal property, levied on and sold contrary to law, is likewise exempt, and may not be offset by another judgment.<sup>85</sup> But the right of exemption is personal and

berg, 185 Mass. 49, 69 N. E. 1058; *Green v. Hatch*, 12 Mass. 195. **Minn.** *Irvine v. Myers*, 6 Minn. 562. **Miss.** *Kershaw v. Merchants Bank of New York*, 7 How. 386, 40 Am. Dec. 70. **Mo.**—*Wabash R. Co. v. Bowring*, 103 Mo. App. 158, 77 S. W. 106; *Skinker v. Smith*, 48 Mo. App. 91. **Mont.** *Wells v. Clarkson*, 5 Mont. 336, 5 Pac. 894. **N. H.**—*Chase v. Woodward*, 61 N. H. 79; *Hovey v. Morrill*, 61 N. H. 9, 60 Am. Rep. 315. **N. J.**—*Brown v. Hendrickson*, 39 N. J. L. 239. **N. M.** *Scholle v. Pino*, 9 N. M. 393, 54 Pac. 335. **N. Y.**—*Noxon v. Gregory*, 5 How. Pr. 339; *Groves v. Woodbury*, 4 Hill 559, 40 Am. Dec. 296; *Cormier v. Constantine*, 5 N. Y. Supp. 177. **Ohio.** *Johnson v. Taylor*, 1 Disn. 168. **Pa.** *Skinner v. Chase*, 6 Pa. Super. 279. **Tex.**—*Davidson v. Lee* (Tex. Civ. App.), 162 S. W. 414. **W. Va.**—*Nuzum v. Morris*, 25 W. Va. 559. **Wis.**—*Yorton v. Milwaukee, L. S. & W. R. Co.*, 62 Wis. 367, 21 N. W. 516, 23 N. W. 401. **Can.**—*Grant v. McAlpine*, 46 U. C. Q. B. 284.

[a] **An assignment by an insolvent assignor, after the right of set-off has accrued to the adverse party, will not defeat the right of set-off.** *Haker v. Serhant*, 20 Ohio Cir. Ct. (N. S.) 446.

**82.** *Bank v. Noonan*, 88 Mo. 372; *Loomis v. Robinson*, 76 Mo. 488; *Burnett v. Crandall*, 63 Mo. 410; *Love v. Fairfield*, 13 Mo. 300, 53 Am. Dec. 148; *Crecelius v. Bierman*, 72 Mo. App. 355.

**83.** *Stilwell v. Carpenter*, 2 Abb. N. C. (N. Y.) 238, 62 N. Y. 639, *modifying* 59 N. Y. 414, which *reversed* 1 *Thomp. & C.* 615.

**84.** **Ark.**—*Atkinson & Co. v. Pittman*, 47 Ark. 464, 2 S. W. 114. **Ga.** *Taylor v. Jarrell*, 104 Ga. 169, 30 S. E. 675; *Daniel v. Bush*, 80 Ga. 218, 4 S. E.

271; *Watkins v. Cason*, 46 Ga. 444. **Ind.**—*Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280. **Mo.**—*Wabash R. Co. v. Bowring*, 103 Mo. App. 158, 77 S. W. 106; *Bowen v. Holden*, 95 Mo. App. 1, 75 S. W. 686; *Lewis v. Gill*, 76 Mo. App. 504. **N. D.**—*Cleveland v. McCanna*, 7 N. D. 455, 75 N. W. 908, 66 Am. St. Rep. 670, 41 L. R. A. 852. **Ohio.**—*Haker v. Serhant*, 20 Ohio Cir. Ct. (N. S.) 446. **Tenn.**—*Duff v. Wells*, 7 Heisk. 17. **Tex.**—*James McCord Co. v. Rea* (Tex. Civ. App.), 178 S. W. 649; *Stagg's Heirs v. Piland*, 31 Tex. Civ. App. 245, 71 S. W. 762.

[a] **For the reason that an exemption statute will not be annulled by one for the set-off of judgments.** **Mo.** *Wabash R. Co. v. Bowring*, 103 Mo. App. 158, 77 S. W. 106; *Bowen v. Holden*, 95 Mo. App. 1, 75 S. W. 686; *Lewis v. Gill*, 76 Mo. App. 504. **N. D.** *Cleveland v. McCanna*, 7 N. D. 455, 75 N. W. 908, 66 Am. St. Rep. 670, 41 L. R. A. 852. **Ohio.**—*Gieske v. Schrakamp*, 8 Ohio Dec. 610, 6 Ohio N. P. 299; *Haker v. Serhant*, 20 Ohio Cir. Ct. (N. S.) 446. **Tex.**—*James McCord Co. v. Rea* (Tex. Civ. App.), 178 S. W. 649.

[b] **In equity, the chancellor will generally follow the exemption statutes in enforcing the right of set-off.** *Wabash R. Co. v. Bowring*, 103 Mo. App. 158, 77 S. W. 106.

**85.** **Cal.**—*Beckman v. Manlove*, 18 Cal. 388. **Ind.**—*Junker v. Hustes*, 113 Ind. 524, 16 N. E. 197; *Pickrell v. Jerauld*, 1 Ind. App. 10, 27 N. E. 433, 50 Am. St. Rep. 192. **Ia.**—*Millington v. Laurer*, 89 Iowa 322, 56 N. W. 533, 48 Am. St. Rep. 385, and note. **Minn.** *Wylie v. Grundysen*, 51 Minn. 360, 53 N. W. 805, 38 Am. St. Rep. 509, 19 L. R. A. 33. **N. D.**—*Cleveland v. McCanna*, 7 N. D. 455, 75 N. W. 908, 66

cannot be transferred to the assignee of a judgment against which the right of set-off existed.<sup>86</sup>

**6. Procedure To Obtain.**<sup>87</sup> — a. *By Motion or Rule.*<sup>88</sup> — (I.) In **General.** — Courts have general jurisdiction over their judgments, processes and suitors,<sup>89</sup> and may proceed upon motion,<sup>90</sup> or under a rule of court,<sup>91</sup> to set off one judgment against another pro tanto between the same parties.

(II.) **Jurisdiction.** — A motion to set off a judgment obtained in one court against a judgment in another court should be made in that court where the judgment against the mover was rendered.<sup>92</sup>

Am. St. Rep. 670, 41 L. R. A. 852. **Tenn.**—*Collier v. Murphy*, 90 Tenn. 300, 16 S. W. 465, 25 Am. St. Rep. 698. **Tex.**—*Cullers v. May*, 81 Tex. 110, 16 S. W. 813; *Howard v. Tandy*, 79 Tex. 450, 15 S. W. 578. **Wis.**—*Below v. Robbins*, 76 Wis. 600, 45 N. W. 416, 20 Am. St. Rep. 89, 8 L. R. A. 467.

But see *Temple v. Scott*, 3 Minn. 419.

[a] A judgment recovered for the value of a building wrongfully severed from the homestead by a trespasser, will be treated as a judgment for exempt personal property. *Wylie v. Grundysen*, 51 Minn. 360, 53 N. W. 805, 38 Am. St. Rep. 509, 19 L. R. A. 33.

**86.** *Lane v. Richardson*, 104 N. C. 642, 10 S. E. 189; *Haker v. Serhant*, 20 Ohio Cir. Ct. (N. S.) 446.

**Effect of assignment to a third person on right to set-off judgment**, see *supra*, V, A, 4.

**87. Procedure in connection with set-off generally**, see the title "**Set-off, Counterclaim and Recoupment.**"

**88.** See generally the title "**Motions.**"

**89.** See generally the title "**Jurisdiction.**"

**90.** **Cal.**—*Coonan v. Loewenthal*, 147 Cal. 218, 81 Pac. 527, 109 Am. St. Rep. 128; *Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786; *Jones v. Chalfant*, 55 Cal. 505; *Porter v. Liscom*, 22 Cal. 430, 83 Am. Dec. 76. **Ga.**—*Langston v. Roby*, 68 Ga. 406. **Ind.**—*Hill v. Brinkley*, 10 Ind. 102. **Ky.**—*Bush v. Monroe*, 20 Ky. L. Rep. 547, 47 S. W. 215. *Compare*, *Tenant's Heirs v. Marmaduke*, 5 Mon. 76, as to consent of holder of the judgment to be offset. **Mass.**—*Green v. Hatch*, 12 Mass. 195. **Minn.**—*Hunt v. Conrad*, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512; *Irvine v. Myers*, 6 Minn. 562, holding that mo-

tion is a very familiar practice in the courts to set off judgments. **N. J.**—*Coxe v. State Bank at Trenton*, 8 N. J. L. 172, 14 Am. Dec. 417. **N. Y.**—*Kretsch v. Denofrio*, 137 App. Div. 617, 122 N. Y. Supp. 242. **Pa.**—*Horton v. Miller*, 44 Pa. 256. **S. C.**—*Rookard v. Atlanta, etc. Air Line Ry. Co.*, 89 S. C. 371, 71 S. E. 992; *Duncan v. Bloomstock*, 2 McCord 318, 13 Am. Dec. 728; *Williams v. Evans*, 2 McCord 203. **Tenn.**—*Rutherford v. Crabb*, 5 Yerg. 112; *Hadley's Admr. v. Hickman*, 1 Yerg. 501. **W. Va.**—*Zinn v. Dawson*, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772, upon proper notice.

[a] A motion to satisfy judgments by setting them off one against another does not require a complaint or pleadings, as all defenses can be introduced on the hearing of the motion. *Brooks v. Harris*, 41 Ind. 390; *Hill v. Brinkley*, 10 Ind. 102.

**91.** *Troxell v. L. & W. R. Co.*, 205 Fed. 830; *Ehrhart v. Esbenshade*, 53 Pa. Super. 258.

**92.** **Ind.**—*Brooks v. Harris*, 41 Ind. 390. **Me.**—*Howe v. Klein*, 89 Me. 376, 36 Atl. 620. **Mich.**—*Robinson v. Kunkleman*, 117 Mich. 193, 75 N. W. 451, 5 Det. Leg. N. 192. **Minn.**—*Irvine v. Myers*, 6 Minn. 562. **N. J.**—*Brookfield v. Hughson*, 44 N. J. L. 285; *Brown v. Hendrickson*, 39 N. J. L. 239; *Coxe v. State Bank at Trenton*, 8 N. J. L. 172, 14 Am. Dec. 417. **N. Y.**—*People v. New York Com. Pleas*, 13 Wend. 649, 28 Am. Dec. 495; *Smith v. Lowden*, 1 Sandf. 696; *Brewerton v. Harris*, 1 Johns. 144. **N. C.**—*Hogan v. Kirkland*, 64 N. C. 250; *Wright v. Mooney*, 28 N. C. 22. **Pa.**—*Best v. Lawson*, 1 Miles 11. **S. C.**—*Duncan v. Bloomstock*, 2 McCord 318, 13 Am. Dec. 728. **Vt.**—*Rix v. Nevins*, 26 Vt. 384. **W. Va.**—*Zinn v. Dawson*, 47 W. Va.

b. *Action at Law*.—An action at law may be maintained to have one judgment set off against another.<sup>93</sup>

c. *Suit in Equity*.—When there is no adequate remedy at law, or when there has been an obstacle to the party's proceeding at law, such as insolvency or non-residence, a court of equity will, upon bill filed, compel an equitable set-off of mutual judgments between parties;<sup>94</sup> and when necessary, will enjoin the enforcement of a judgment to that end, even where defense might have been made against such judgment in the action at law.<sup>95</sup>

B. OF JUDGMENT AGAINST CLAIM.<sup>96</sup>—A judgment may be pleaded as a set-off in an action on an open account, or demand for money,<sup>97</sup> or in assumpsit for money collected,<sup>98</sup> or against a note held by one who is insolvent, even where the note is not due.<sup>99</sup> A judgment may also be pleaded as a set-off in an action founded upon a contract,

45, 34 S. E. 784, 81 Am. St. Rep. 772. **Wis.**—*Welsher v. Libby*, 107 Wis. 47, 82 N. W. 693.

93. **Kan.**—*Lloyd v. First Nat. Bank*, 5 Kan. App. 512, 47 Pac. 575. **Mass.** *Franks v. Edinberg*, 185 Mass. 49, 69 N. E. 1058, by statute. **Minn.**—*Morton v. Urquhart*, 79 Minn. 390, 82 N. W. 653.

See generally *supra*, V, A, 1.

[a] Such action may be tried upon an agreed statement of facts. *Lloyd v. First Nat. Bank*, 5 Kan. App. 512, 47 Pac. 575.

94. See the following: **U. S.**—*Loy v. Alston*, 172 Fed. 90, 96 C. C. A. 578; *Reed v. Smith*, 158 Fed. 889. **Cal.** *Coonan v. Loewenthal*, 147 Cal. 218, 81 Pac. 527, 109 Am. St. Rep. 128; *Russell v. Conway*, 11 Cal. 93. **Ga.**—*Livingston v. Marshall*, 82 Ga. 281, 11 S. E. 542. **Ill.**—*Hughes v. Trahern*, 64 Ill. 48; *Buckmaster v. Grundy*, 8 Ill. 626. **Ind.**—*Cosgrove v. Cosby*, 86 Ind. 511. **Ia.**—*Davis v. Milburn*, 3 Iowa 163. **Ky.**—*Prior v. Richards' Admr.*, 4 Bibb 356. **Mo.**—*Walton v. Catron*, 125 Mo. App. 501, 102 S. W. 1058; *Gemmell v. Hueben*, 71 Mo. App. 291. **N. Y.** *Kretsch v. Denofrio*, 137 App. Div. 617, 122 N. Y. Supp. 242. **Tenn.**—*Edmonson v. Baxter*, 4 Hayw. 112, 9 Am. Dec. 751. **Vt.**—*Damner v. Dana*, 17 Vt. 518.

See also *supra*, V, A, 1; and 15 STANDARD PROC. 345, et seq.

[a] Equity will entertain a bill for the purpose of setting off a debt due on a dormant judgment, when a scire facias is pending to revive it, against a judgment which is not dormant, when

the defendant in the former and plaintiff in the latter is insolvent. *Camp v. Pace*, 42 Ga. 161; *Tommey v. Ellis*, 41 Ga. 260.

[b] Where no other special equities intervene, a court of equity will not refuse to allow a set-off on the ground that the claims of the party sought to be set off have not been settled and liquidated at law, or are uncertain, but will allow the amount to be ascertained, and then order the set-off against the judgment of the opposing insolvent or non-resident party. *Davis v. Milburn*, 3 Iowa 163.

95. See 15 STANDARD PROC. 347.

96. Set-off of one judgment against another, see *supra*, V, A.

Set-off of claim against judgment, see *infra*, V, C.

97. **U. S.**—*Mendenhall v. Hall*, 134 U. S. 559, 10 Sup. Ct. 616, 33 L. ed. 1012. **Ala.**—*McMahan v. Crabtree*, 30 Ala. 470. **Ky.**—*Carlisle v. Long*, 1 A. K. Marsh. 486. **Me.**—*Harrington v. Bean*, 94 Me. 208, 47 Atl. 147. **N. Y.** *Wells v. Henshaw*, 3 Bosw. 625; *Cornell v. Donovan*, 3 N. Y. St. 261. **N. C.** *Wright v. Mooney*, 28 N. C. 22. **Pa.** *Metzgar v. Metzgar*, 1 Rawle 227; *Benjamin v. Phelps*, 2 L. T. N. S. 140. **Tex.** *Sheldon v. Martin*, 65 Tex. 409. **Vt.** *Hassam v. Hassam*, 22 Vt. 516.

98. *Turner v. Tapscott*, 30 Ark. 312; *Moffat v. Foley*, 26 U. C. Q. B. 509.

99. **Ind.**—*Keightley v. Walls*, 27 Ind. 384; *King v. Conn*, 25 Ind. 425. **Ky.**—*Dickinson v. Chism's Admr.*, 4 Mon. 1. **Mo.**—*Barber v. Baker*, 70 Mo. App. 680.

even where the action is for unliquidated damages thereunder,<sup>1</sup> or for wrongful attachment of a stock of merchandise.<sup>2</sup>

A stockholder may set off a judgment against the company against a suit in equity by the company to make him individually liable in proportion to his stock.<sup>3</sup>

**C. OF CLAIM AGAINST JUDGMENT.**<sup>4</sup>—Any legal claim may be pleaded as a set-off in an action or proceeding for the collection of a judgment of which the defendant is possessed at the commencement of the suit, upon which an action could be maintained;<sup>5</sup> and the fact that such claim existed prior to the rendition of the judgment sought to be enforced, does not preclude the defendant from interposing it as a defense,<sup>6</sup> although some courts refuse to set off a claim which could have been pleaded in defense of the action in which the judgment was recovered;<sup>7</sup> but a claim for damages cannot be set off in an action on a judgment, unless the damages have been liquidated, or spring from the same transaction as that upon which the judgment rests.<sup>8</sup>

**VI. BY PROCEEDINGS UNDER EXECUTION.**<sup>9</sup>—A. **LEVY OF EXECUTION.**<sup>10</sup>—1. **On Personal Property.**<sup>11</sup>—a. *Generally.*—The levy of an execution on personal property of the judgment debtor

1. *Read v. Jeffries*, 16 Kan. 534; by confession or obtained by adverse process.

*Brady-Neely Grocer Co. v. De Foe* (Tex. Civ. App.), 169 S. W. 1135.

2. *Brady-Neely Grocery Co. v. De Foe* (Tex. Civ. App.), 169 S. W. 1135.

3. *Boyd v. Hall*, 56 Ga. 563.

4. **Set-off of one judgment against another**, see *supra*, V, A.

**Set-off of judgment against claim**, see *supra*, V, B.

5. **U. S.**—*Nashville & C. R. Co. v. United States*, 101 U. S. 639, 25 L. ed. 1074; *Central Appalachian Co. v. Buchanan*, 90 Fed. 454, 33 C. C. A. 598.

**Ala.**—*Weaver v. Brown*, 87 Ala. 533, 6 So. 354. **D. C.**—*Fedarwisch v. Alsop*, 18 Abb. Cas. 318. **Ind.**—*Bannister v. Jett*, 83 Ind. 129. **Ky.**—*Bishop's Admr. v. Bishop*, 162 Ky. 769, 173 S. W. 130; *Rowzee v. Gregg*, Litt. Sel. Cas. 487.

**La.**—*Gilmore's Succession*, 12 La. Ann. 562. **Mass.**—*Fiske v. Steele*, 152 Mass. 260, 25 N. E. 291; *Sheldon v. Kendall*, 7 Cush. 217. **Miss.**—*Lockwood v. Rainey*, 19 So. 294. **N. H.**—*Malony v. Waddle*, 55 N. H. 227. **N. C.**—*Mann v. Blount*, 65 N. C. 99. **R. I.**—*Cole v. Shanahan*, 24 R. I. 427, 53 Atl. 273.

6. **Ind.**—*Bannister v. Jett*, 83 Ind. 129. **Ky.**—*Bishop's Admr. v. Bishop*, 162 Ky. 769, 173 S. W. 130; *Rowzee v. Gregg*, Litt. Sel. Cas. 487.

**La.**—*Gilmore's Succession*, 12 La. Ann. 562. **Mass.**—*Fiske v. Steele*, 152 Mass. 260, 25 N. E. 291; *Sheldon v. Kendall*, 7 Cush. 217. **Miss.**—*Lockwood v. Rainey*, 19 So. 294. **N. H.**—*Malony v. Waddle*, 55 N. H. 227. **N. C.**—*Mann v. Blount*, 65 N. C. 99. **R. I.**—*Cole v. Shanahan*, 24 R. I. 427, 53 Atl. 273.

7. **U. S.**—*Lee v. Munroe*, 7 Cranch 366, 3 L. ed. 373; *Olyphant v. St. Louis Ore. etc. Co.*, 39 Fed. 308. **Ill.**—*Raymond v. Varnum*, 185 Ill. App. 289. **Ind.**—*Patten v. Stewart*, 24 Ind. 332. **La.**—*Hereford v. Babin*, 14 La. Ann. 333. **Md.**—*Smith v. Washington Gas Light Co.*, 31 Md. 12, 100 Am. Dec. 49. **Pa.**—*Kennedy v. Kennedy*, 41 Pa. 185; *Anderson's Appeal*, 2 Walk. 491. **Tex.**—*Howard v. Randolph*, 73 Tex. 454, 11 S. W. 495.

8. **U. S.**—*Lee v. Munroe*, 7 Cranch 366, 3 L. ed. 373; *Olyphant v. St. Louis Ore. etc. Co.*, 39 Fed. 308. **Ill.**—*Raymond v. Varnum*, 185 Ill. App. 289. **Ind.**—*Patten v. Stewart*, 24 Ind. 332. **La.**—*Hereford v. Babin*, 14 La. Ann. 333. **Md.**—*Smith v. Washington Gas Light Co.*, 31 Md. 12, 100 Am. Dec. 49. **Pa.**—*Kennedy v. Kennedy*, 41 Pa. 185; *Anderson's Appeal*, 2 Walk. 491. **Tex.**—*Howard v. Randolph*, 73 Tex. 454, 11 S. W. 495.

9. **Execution to enforce judgments**, see generally the title "Judgments and Decrees, Enforcement of."

10. **As to levy of execution generally**, see the title "Judgments and Decrees, Enforcement of."

11. **Levy on real property as satis-**

But see *McKee v. Verner*, 239 Pa. 69, 86 Atl. 646, 44 L. R. A. (N. S.) 727, holding that a debt not in judgment cannot be set off against a judgment, whether the judgment is entered

sufficient in value to pay the judgment, operates as a satisfaction, *prima facie*, as between the parties, so long as the levy remains in force,<sup>12</sup> if the property be taken from the possession of the defendant

faction of judgment, see *infra*, VI, A, 2.

12. **U. S.**—United States *v.* Dashiell, 3 Wall. 688, 18 L. ed. 268; Smith *v.* Bank of Columbia, 4 Cranch C. C. 143, 22 Fed. Cas. No. 13,011; Campbell *v.* Pope, Hempst. 271, 4 Fed. Cas. No. 2,365a. **Ala.**—Cobb *v.* Cage, 7 Ala. 619; Campbell *v.* Spence, 4 Ala. 543, 39 Am. Dec. 301. **Ark.**—Whiting *v.* Beebe, 12 Ark. 421, 540; Cummins *v.* Webb, 4 Ark. 229. **Cal.**—Barber *v.* Reynolds, 44 Cal. 519; Mulford *v.* Estudillo, 23 Cal. 94; People *v.* Chisholm, 8 Cal. 29. **Del.**—Fiddeman *v.* Biddle, 1 Harr. 500. **Ga.**—Code, 1910, §§6047, 6048; Chisolm *v.* Chittenden & Co., 45 Ga. 213; Foster *v.* Rutherford, 20 Ga. 676; Hammond *v.* Myrick, 14 Ga. 77; Marshall *v.* Morris, 13 Ga. 185; Lynch *v.* Pressley, 8 Ga. 327. **Ill.**—Robinson *v.* Brown, 82 Ill. 279; Martin *v.* Charter, 27 Ill. 294; Smith *v.* Hughes, 24 Ill. 270; Montgomery *v.* Wayne, 14 Ill. 373; Ambrose *v.* Weed, 11 Ill. 488; Pearl *v.* Wellman, 8 Ill. 311. **Ind.**—Burr *v.* Mendenhall, 80 Ind. 49; Frank *v.* Brasket, 44 Ind. 92; Freeman *v.* Smith, 7 Ind. 582; Barret *v.* Thompson, 5 Ind. 457; Stewart *v.* Nunemaker, 2 Ind. 47; McIntosh *v.* Chew, 1 Blackf. 289. **Ia.**—Williams *v.* Gartrell, 4 Greene 287. **Mass.**—Wood *v.* Mann, 125 Mass. 319; Ladd *v.* Blunt, 4 Mass. 403. **Minn.**—Bennett *v.* McGrade, 15 Minn. 132; First Nat. Bank *v.* Rogers, 15 Minn. 381; First Nat. Bank of Hastings *v.* Rogers, 13 Minn. 407, 97 Am. Dec. 239. **Miss.**—Peale *v.* Bolton, 24 Miss. 630; Heizer *v.* Fisher, 13 Smed. & M. 672; Banks *v.* Evans, 10 Smed. & M. 35, 48 Am. Dec. 734; Kershaw *v.* Merchants' Bank of New York, 7 How. 286, 40 Am. Dec. 70; Bingham *v.* Hyatt, Smed. & M. Ch. 437. **Mo.**—State *v.* Six, 80 Mo. 61; Lower *v.* Buchanan Bank, 78 Mo. 67; Trigg *v.* Harris, 49 Mo. 176; Blair *v.* Caldwell, 3 Mo. 353; City of Warrensburg *v.* Simpson, 22 Mo. App. 695. **Nev.**—Sweeney *v.* Hawthorne, 6 Nev. 129. **N. J.**—Hanness *v.* Bonnell, 23 N. J. L. 159; Carr *v.* Weld, 19 N. J. Eq. 319; Banta *v.* McClennan, 14 N. J. Eq. 120; Johnson *v.* Tuttle, 9 N. J. Eq. 365. **N. Y.**—Shepard *v.* Rowe, 14 Wend. 260; Mickles *v.* Haskin,

11 Wend. 125; Wood *v.* Torrey, 6 Wend. 561; Ontario Bank *v.* Hallett, 8 Cow. 192; Cornell *v.* Cook, 7 Cow. 310; Jackson *v.* Bowen, 7 Cow. 13; *Ex parte* Lawrence, 4 Cow. 417, 15 Am. Dec. 386; Troup *v.* Wood, 4 Johns. Ch. 228. **N. C.**—Seawell *v.* Bank of Cape Fear, 14 N. C. 279, 22 Am. Dec. 722; Sanderson *v.* Rogers, 14 N. C. 38. **Ohio.**—Reynolds *v.* Rogers' Exrs., 5 Ohio 169; Ford *v.* Skinner, 4 Ohio 378; Cass *v.* Adams, 3 Ohio 223. **Pa.**—Catheart's Appeal, 13 Pa. 416; Hamner *v.* Griffith, 1 Grant Cas. 193; Lytle *v.* McHaffy, 8 Watts 267; Hunt *v.* Breeding, 12 Serg. & R. 37, 14 Am. Dec. 665; Monongahela Nav. Co. *v.* Ledlie, 3 Pa. L. J. 179, 1 Clarke 498; Coleman *v.* Mansfield, 1 Miles 56. **S. C.**—McElwee *v.* Jeffreys, 7 S. C. 228; Collins *v.* Montgomery, 2 Nott & McC. 392; Lewis *v.* Spann, 1 Rich. L. 429. **Tenn.**—Fry *v.* Manlove, 1 Baxt. 256, 25 Am. Rep. 775; Clark *v.* Bell, 8 Humph. 26; Carroll *v.* Fields, 6 Yerg. 305; Camp *v.* Laird, 6 Yerg. 246; Young *v.* Read, 3 Yerg. 297. **Tex.**—Garner *v.* Cutler, 28 Tex. 175; Cornelius *v.* Burford, 28 Tex. 202, 91 Am. Dec. 309; White *v.* Graves, 15 Tex. 183. **Eng.**—Clerk *v.* Withers, 1 Salk. 322, 91 Eng. Reprint 286; Slie *v.* Finch, 2 Rolle 57, 81 Eng. Reprint 657; Speake *v.* Richards, Hob. 206, 80 Eng. Reprint 353.

[a] An execution is constructive discharge of a debt where the sheriff takes sufficient to pay it and will not dispose of it. *Ex parte* King, 13 N. C. 341, 21 Am. Dec. 335.

[b] "The reason of the rule is, that the moment the levy is made the title is divested out of the defendant and vested in the officer. The officer then is lawfully in possession of property sufficient to discharge the debt, and he and his official sureties are substituted as the plaintiff's debtors instead of the original defendants." Fry *v.* Manlove, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775. To same effect, see White *v.* Graves, 15 Tex. 183.

[c] The presumption of satisfaction does not arise from a mere levy, but from a sufficient levy. Lindley *v.* Kelley, 42 Ind. 294, 308.

[d] Value of property levied on

in execution,<sup>13</sup> and is a sufficient satisfaction to discharge third persons who are liable collaterally, such as sureties thereon.<sup>14</sup> It is deemed a payment in those cases, where, if it were not, the defendant would be twice deprived of his property on the same judgment; in all other instances it is no payment.<sup>15</sup> The levy operates as a temporary satisfaction,<sup>16</sup> which becomes permanent only when the defendant's title is permanently divested although the creditor may not have been paid.<sup>17</sup>

According to some authorities, the term suspension is more applicable to the effect of such a levy than the term satisfaction;<sup>18</sup> or, as stated in some decisions, the levy is a satisfaction sub modo only.<sup>19</sup>

b. *Where Levy Is Unproductive.*—If the levy is unproductive,<sup>20</sup> because it is overreached by a prior lien,<sup>21</sup> or because it is abandoned

must be shown to raise presumption. *Fuller v. Watkins*, 11 Heisk. (Tenn.) 489.

[e] **Levy Upon Both Real and Personal Property.**—If the execution is levied upon personal property and upon land at the same time, and only the land is sold, the execution is not, prima facie, satisfied by such a levy on personal property. *Dowdell v. Neal*, 10 Ga. 148. Levy upon real property as satisfaction of judgment, see *infra*, VI, A, 2.

13. Ga.—*Marshall v. Morris*, 13 Ga. 185, query. Miss.—*Parker v. Dean*, 45 Miss. 408, 419. N. Y.—*Peck v. Tiffany*, 2 N. Y. 451. Tenn.—*Murphy v. Pardee*, 7 Baxt. 373; *Fry v. Manlove*, 1 Baxt. 256, 25 Am. Rep. 775. Tex. *Cornelius v. Burford*, 28 Tex. 202, 91 Am. Dec. 309; *Garner v. Cutler*, 28 Tex. 175.

See also, *infra*, VI, A, 1, b, note 24.

14. *Mulford v. Estudillo*, 23 Cal. 94; *Lynch v. Pressley*, 8 Ga. 327; *Newsom v. McLendon*, 6 Ga. 392.

15. *Parker v. Dean*, 45 Miss. 408; *Banks v. Evans*, 10 Smed. & M. (Miss.) 35, 57, 48 Am. Dec. 734; *Ex parte King*, 13 N. C. 341, 21 Am. Dec. 335.

16. *Montgomery v. Wayne*, 14 Ill. 373; *Fry v. Manlove*, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775.

17. *United States v. Dashiell*, 3 Wall. (U. S.) 688, 18 L. ed. 268; *Fry v. Manlove*, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775.

18. *Colburn v. Barton*, 17 Ill. App. 391.

[a] "A mere levy upon sufficient personal property, without anything more, never amounts to a satisfaction

of the judgment. So long as the property remains in legal custody, the other remedies of the creditor will be suspended." *People v. Hopson*, 1 Denio (N. Y.) 574. To same effect: *Ark. Black v. Nettles*, 25 Ark. 606; *Whiting v. Beebe*, 12 Ark. 421, 539. *Ind. Lindley v. Kelley*, 42 Ind. 294, 307. *Ky.—Morrow v. Hart*, 1 A. K. Marsh. 291.

19. Ga.—*Lynch v. Pressley*, 8 Ga. 327. Ill.—*Everingham v. National City Bank*, 124 Ill. 527, 17 N. E. 26; *Logsdon v. Spivey*, 54 Ill. 104. *Ind.—Lindley v. Kelley*, 42 Ind. 294, 307. N. Y. *Green v. Burke*, 23 Wend. 490.

20. See *Newsom v. McLendon*, 6 Ga. 392, and cases cited *infra*, this section.

[a] A levy is a satisfaction so far as to throw upon the plaintiff the burden of proving, either that it was insufficient, or that its proceeds were applied to the extinguishment of prior liens, or that it was otherwise unproductive, and made so without fault in the plaintiff, or the levying officer. *Newsom v. McLendon*, 6 Ga. 392.

21. *United States v. Dashiell*, 3 Wall. (U. S.) 688, 18 L. ed. 268; *Newsom v. McLendon*, 6 Ga. 392.

[a] The presumption that the levy has satisfied the judgment is not rebutted by a showing that the property was sold and the proceeds applied to the payment of debts of higher lien, without the further showing that the property, at its full value, was insufficient to pay the debts of higher lien and the *feri facias* levied. *Horn v. Ross*, 20 Ga. 210, 65 Am. Dec. 621.

or released<sup>22</sup> at the instance of the debtor, or to his benefit,<sup>23</sup> or because it is defeated by his misconduct,<sup>24</sup> it does not amount to a satisfaction of the judgment. Nor is the judgment deemed satisfied if the title reverts or the possession is restored to the defendant,<sup>25</sup> or if the property seized does not belong to the defendant.<sup>26</sup> If on the sale the property does not produce a sufficient amount to pay the execution in full, the levy ceases to be a satisfaction, except pro tanto and a new execution will issue.<sup>27</sup>

c. *Effect of Failure of Officer To Make Due Return.*<sup>28</sup>—A levy

22. **U. S.**—United States *v.* Dashiell, 3 Wall. 688, 18 L. ed. 268. **Ala.**—Sumnerhill *v.* Trapp, 48 Ala. 363. **Ark.**—Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338; Kelly *v.* Garvin, Carson & Co., 12 Ark. 613, 617; Whiting *v.* Beebe, 12 Ark. 421. **Cal.**—Mulford *v.* Estudillo, 32 Cal. 131. **Ill.**—Chandler *v.* Higgins, 109 Ill. 602. **Minn.**—Willis *v.* Jelineck, 27 Minn. 18. **Tenn.**—Williams *v.* Bowdon, 1 Swan 282; Pigg *v.* Sparrow, 3 Hayw. 144.

[a] Where the plaintiff, at the instance of the defendant, authorizes the sheriff to release the goods, the defendant cannot avail himself of the doctrine. Coleman *v.* Mansfield, 1 Miles (Pa.) 56; Cornelius *v.* Burford, 28 Tex. 202, 91 Am. Dec. 309.

23. **U. S.**—United States *v.* Dashiell, 3 Wall. 688, 18 L. ed. 268. **Ga.**—Rawson *v.* Davis, 36 Ga. 511. **Mo.**—Thomas' Exr. *v.* Cleveland, 33 Mo. 126, 82 Am. Dec. 155; Williams *v.* Boyce, 11 Mo. 537. **N. Y.**—Benedict *v.* Smith, 10 Paige 126. **Ohio.**—Ford *v.* Skinner, 4 Ohio 378. **Pa.**—Feak's Appeal, 81\* Pa. 76.

24. Cornelius *v.* Burford, 28 Tex. 202, 91 Am. Dec. 309.

[a] If the property seized is fraudulently withdrawn by the defendant, or by his procurement or agency, from the custody of the officer, the levy is not a satisfaction of the judgment. **Ark.**—Biscoe *v.* Sandefur, 14 Ark. 568; Walker *v.* Bradley, 2 Ark. 578. **Ill.**—Chandler *v.* Higgins, 109 Ill. 602. **Mich.**—Lustfield *v.* Ball, 103 Mich. 17, 61 N. W. 339.

[b] If the fruits of the levy are destroyed by some act of the debtor, the levy is not a satisfaction. Montgomery *v.* Wayne, 14 Ill. 373; Garner *v.* Cutler, 28 Tex. 175.

25. **Ark.**—Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338; Caudle *v.* Dare, 7 Ark. 46. **Ill.**—Howard *v.* Ben-

nett, 72 Ill. 297; Montgomery *v.* Wayne, 14 Ill. 373. **Ky.**—Morrow *v.* Hart, 1 A. K. Marsh. 291. **Miss.**—Parker *v.* Dean, 45 Miss. 408, 419. **Mo.**—City of Warrensburg *v.* Simpson, 22 Mo. App. 695. **N. Y.**—Peck *v.* Tiffany, 2 N. Y. 451. **Ore.**—Wright *v.* Young, 6 Ore. 87.

[a] If the levy is annulled by mandate of law, it is no satisfaction. Fry *v.* Manlove, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775.

[b] On Giving a Stay or Delivery Bond.—**Ark.**—Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338; Whiting *v.* Beebe, 12 Ark. 421, 548; Walker *v.* Bradley, 2 Ark. 578. **Minn.**—First Nat. Bank of Hastings *v.* Rogers, 15 Minn. 381; Bennett *v.* McGrade, 15 Minn. 132. **Miss.**—McNutt *v.* Wilcox, 3 How. 419. **Mo.**—Blackburn *v.* Jackson, 26 Mo. 308; Blair *v.* Caldwell, 3 Mo. 353. **Tenn.**—Fry *v.* Manlove, 1 Baxt. 256, 25 Am. Rep. 775; Camp *v.* Laird, 6 Yerg. 246; Carroll *v.* Fields, 6 Yerg. 305; Young *v.* Read, 3 Yerg. 297.

26. Biscoe *v.* Sandefur, 14 Ark. 568.

[a] But a defendant who denies that he is the owner of the property levied on is estopped from invoking the rule. Ontario Bank *v.* Hallett, 8 Cow. (N. Y.) 192; Coleman *v.* Mansfield, 1 Miles (Pa.) 56.

27. **U. S.**—Smith *v.* Bank of Columbia, 4 Cranch C. C. 143, 22 Fed. Cas. No. 13,011; Corning *v.* Burdick, 4 McLean 133, 6 Fed. Cas. No. 3,246. **Ark.**—Trapnall *v.* Richardson, Waterman & Co., 13 Ark. 543, 550, 58 Am. Dec. 338. **Ill.**—Montgomery *v.* Wayne, 14 Ill. 373. **Miss.**—Moody *v.* Harper, 28 Miss. 615; Bibb *v.* Jones, 7 How. 397; McNutt *v.* Wilcox, Freem. Ch. 116.

As to issuance of alias and pluries writ, see generally the title "Judgments and Decrees, Enforcement of."

28. Effect of failure of officer to make return of writ of execution gen-

upon sufficient property to satisfy the writ operates as a satisfaction even though the officer fails to make return on his execution.<sup>29</sup>

**2. On Real Property.**<sup>30</sup>—The mere levy of an execution upon real estate is not *prima facie* a satisfaction thereof,<sup>31</sup> though it will

erally, see the title "Judgments and Decrees, Enforcement of."

**29. U. S.**—United States *v.* Dashiell, 3 Wall. 688, 18 L. ed. 268. **Ala.**—Houston *v.* Crutchfield's Admr., 22 Ala. 76; Campbell *v.* Spence, 4 Ala. 543, 39 Am. Dec. 301. **Ark.**—Whiting *v.* Beebe, 12 Ark. 421, 548. **Ga.**—Oliver *v.* State, 64 Ga. 480. **Ill.**—Harris *v.* Evans, 81 Ill. 419. **Mass.**—Ladd *v.* Blunt, 4 Mass. 402. **Minn.**—First Nat. Bank of Hastings *v.* Rogers, 13 Minn. 407, 97 Am. Dec. 239. **Miss.**—Parker *v.* Dean, 45 Miss. 408, 419; Kershaw *v.* The Merchants' Bank of New York, 7 How. 386, 40 Am. Dec. 70. **N. Y.**—Peck *v.* Tiffany, 2 N. Y. 451; People *v.* Hopson, 1 Denio 574. **Tenn.**—Fry *v.* Manlove, 1 Baxt. 256, 25 Am. Rep. 775; Sewell *v.* Morgan, 2 Heisk. 672; Evans *v.* Barnes, 2 Swan 292; Williams *v.* Bowdon, 1 Swan 282; Hogshead *v.* Caruth, 5 Yerg. 227; Pigg *v.* Sparrow, 3 Hayw. 144. **Can.**—Massey-Harris Co. *v.* Mollond, 15 Man. 364.

*Compare, infra*, VI, C.

[a] A sheriff's receipt for a county warrant taken in satisfaction of an execution, operates to discharge the judgment upon which the execution issued, although the sheriff failed to pay the money to the judgment creditor. Trigg *v.* Harris, 49 Mo. 176.

**30. Levy on personal property** as satisfaction of judgment, see *supra*, VI, A, 1.

**31. U. S.**—United States *v.* Dashiell, 3 Wall. 688, 18 L. ed. 268. **Ala.**—Fry *v.* Branch Bank of Mobile, 16 Ala. 282. **Ark.**—Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338; Whiting *v.* Beebe, 12 Ark. 421, 541. **Colo.**—New Zealand Ins. Co. *v.* Maaz, 13 Colo. App. 493, 59 Pac. 213. **Conn.**—Clarkson *v.* Beard-sley, 45 Conn. 196. **Del.**—Farmers' Bank *v.* Leonard, 4 Harr. 536. **Ga.**—Overby *v.* Hart, 68 Ga. 493; Foster *v.* Rutherford, 20 Ga. 676; Hammond *v.* Myrick, 14 Ga. 77; Deloach *v.* Myrick, 6 Ga. 410. **Ill.**—Scott *v.* Aultman Co., 211 Ill. 612, 71 N. E. 1112, 103 Am. St. Rep. 215; Everingham *v.* National City Bank, 124 Ill. 527, 17 N. E. 26; Robinson *v.* Brown, 82 Ill. 279;

Gold *v.* Johnson, 59 Ill. 62; Gregory *v.* Stark, 4 Ill. 611; Cassell *v.* Morrison, 8 Ill. App. 175. **Ind.**—Doc *v.* Dutton, 2 Ind. 309, 52 Am. Dec. 510. But see McIntosh *v.* Chew, 1 Blackf. 289. **Me.**—Parlin *v.* Churchill, 30 Me. 187; Ware *v.* Pike, 12 Me. 303; Chandler *v.* Furbish, 8 Me. 408. **Md.**—Sasser *v.* Walker, 5 Gill & J. 102, 25 Am. Dec. 272. **Mass.**—M'Lellan *v.* Whitney, 15 Mass. 137; Gooch *v.* Atkins, 14 Mass. 378; Tate *v.* Anderson, 9 Mass. 92; Ladd *v.* Blunt, 4 Mass. 402. **Mich.**—Ackerman *v.* Pfent, 145 Mich. 710, 108 N. W. 1084, 13 Det. Leg. N. 647; Spafford *v.* Beach, 2 Doug. 149. **Minn.**—Davidson *v.* Gaston, 16 Minn. 230. **Miss.**—Peale *v.* Bolton, 24 Miss. 630; Beazley *v.* Prentiss, 13 Smed. & M. 97; Pickens *v.* Marlow, 2 Smed. & M. 428. **Mo.**—Schneider *v.* Johnson, 164 Mo. App. 639, 147 S. W. 538. **N. H.**—Sullivan *v.* M'Kean, 1 N. H. 371. **N. Y.**—Taylor *v.* Ranney, 4 Hill 619; Shepard *v.* Rowe, 14 Wend. 260. **N. C.**—Seawell *v.* Bank of Cape Fear, 14 N. C. 279, 22 Am. Dec. 722. **Ohio.**—Reynolds *v.* Rogers' Exrs., 5 Ohio 169. **Pa.**—Gro *v.* Huntington Bank, 1 Penr. & W. 425; Patterson *v.* Swan, 9 Serg. & R. 16; Lyons *v.* Ott, 6 Whart. 163. **S. D.**—Wood *v.* Conrad, 2 S. D. 405, 50 N. W. 903. **Tenn.**—Boyd *v.* Mann, 9 Baxt. 349; Hogshead *v.* Carruth, 5 Yerg. 227. **Tex.**—Cavanaugh *v.* Peterson, 47 Tex. 197; Cundiff *v.* Teague, 46 Tex. 475; Townsend *v.* Smith, 20 Tex. 465, 70 Am. Dec. 400; White *v.* Graves, 15 Tex. 183. **Vt.**—Tarbell *v.* Downer, 29 Vt. 339.

[a] The reason for the distinction as to land is that the debtor sustains no loss by a mere levy upon his land and the creditor gains nothing beyond what he already had by the lien of his judgment. The land remains in the possession of the defendant and he continues to receive and enjoy the rents and profits thereof. United States *v.* Dashiell, 3 Wall. (U. S.) 688, 18 L. ed. 268.

[b] **Exempt Land.**—The levy of an execution, by mistake, upon land that is exempt from levy, where return

operate as a satisfaction of the judgment where the creditor takes and holds possession of the land,<sup>32</sup> or secures a writ of *elegit* for rents and profits arising therefrom;<sup>33</sup> and it will cast upon the judgment creditor the onus of showing that the levy was not productive of a complete satisfaction, before he can take other proceedings on his judgment.<sup>34</sup>

3. **Levy on Property of Joint Debtor.**<sup>35</sup>—A levy of execution on the property of one of two joint debtors is *prima facie* a satisfaction of the judgment;<sup>36</sup> but this may be overcome by a showing that the property was restored to the debtor or that the levy was otherwise unproductive,<sup>37</sup> unless the other debtor is in the position of a surety, rather than one primarily bound.<sup>38</sup>

B. **SALE ON EXECUTION.**<sup>39</sup>—1. **Generally.**—A sale of the debtor's property upon execution, which is not set aside, operates to satisfy the judgment to the extent of the net amount realized by such sale,<sup>40</sup> if the money is collected by the officer making the sale,<sup>41</sup> whether he

thereof is withheld, does not operate to satisfy the judgment upon which such execution issued. *Gooch v. Atkins*, 14 Mass. 378.

32. *Eames v. Wheeler*, 19 Pick. (Mass.) 442; *Lawrence v. Pond*, 17 Mass. 433; *M'Lellan v. Whitney*, 15 Mass. 137; *Moore v. McMillan*, 54 Vt. 27.

33. *Hinesly v. Hunn's Admr.*, 5 Harr. (Del.) 236; *Thomas v. Platts*, 43 N. H. 629.

34. *McCabe v. Goodwine*, 65 Ind. 288; *Lindley v. Kelley*, 42 Ind. 294, 306; *Miller v. Ashton*, 7 Blackf. (Ind.) 29; *First Nat. Bank of Hastings v. Rogers*, 13 Minn. 407, 97 Am. Dec. 239.

35. **Payment by joint debtor as satisfaction of judgment**, see *supra*, I, B, 1.

36. *Ala.*—*Johnson v. Motlow*, 137 Ala. 405, 47 So. 568. *Mich.*—*Boardman v. Acer*, 13 Mich. 77, 87 Am. Dec. 736. *Miss.*—*Kershaw v. Merchants' Bank*, 7 How. 386, 40 Am. Dec. 70. *Pa.*—*Bowser's Appeal*, 101 Pa. 466. *S. C.*—*Davis v. Barkley*, 1 Bailey 140.

37. *Slater's Appeal*, 28 Pa. 169; *Hyde v. Rogers*, 59 Wis. 154, 17 N. W. 127.

38. *Cal.*—*Mulford v. Estudillo*, 23 Cal. 94. *N. Y.*—*La Farge v. Herter*, 4 Barb. 346. *Pa.*—*Bank v. Fordyce*, 9 Pa. 275, 49 Am. Dec. 561; *Mortland v. Himes*, 8 Pa. 265. *Tenn.*—*Finley v. King*, 1 Head 123; *Brown v. McDonald*, 8 Yerg. 158, 29 Am. Dec. 112.

39. **Sale on execution generally**, see

the title "**Judgments and Decrees, Enforcement of.**"

**Payment of execution as satisfaction of judgment**, see *supra*, I, A, 4.

40. *U. S.*—*United States v. Dashiell*, 3 Wall. 688, 18 L. ed. 268. *Ala.*—*Niolin v. Hamner*, 22 Ala. 578. *Ark.*—*See Sturdivant v. Ward*, 90 Ark. 321, 119 S. W. 247, 134 Am. St. Rep. 32. *D. C.*—*Davis v. Sanders*, 25 App. Cas. 26. *Ind.*—*Ray v. Ferrell*, 127 Ind. 570, 27 N. E. 159. *N. Y.*—*Hamlin v. Boughton*, 4 Cow. 65. *Can.*—*Massey-Harris Co. v. Mollond*, 15 Man. 364.

[a] **Sale for Less Than Appraised Value.**—Where real estate upon which appraisement has not been waived is sold for less than the required two-thirds of its appraised value, it will operate as a satisfaction of the judgment up to two-thirds of the appraised value thereof, where, under subsequent proceedings of the case, title to the property passes from the judgment debtor to the purchaser thereof. *De Jarnette v. Verner*, 40 Kan. 224, 19 Pac. 666.

41. *Ind.*—*State ex rel. Wilber v. Salvers*, 19 Ind. 432. *La.*—*Daboval v. Escurix*, 8 La. (O. S.) 96. *Pa.*—*McDevitt's Appeal*, 70 Pa. 373.

**Effect of failure to make return on execution generally**, see *infra*, VI, C.

**Levy on personal property as satisfaction whether return made or not**, see *supra*, VI, A, 1, b.

**Payment to officer as satisfaction whether proper return made or not**, see *supra*, I, A, 4, a.

makes proper return thereof or not, or if the money be paid into court.<sup>42</sup>

**2. Effect of Purchase by Creditor.**—A purchase by the judgment creditor at his execution sale is a satisfaction of his judgment to the amount of his bid.<sup>43</sup> This is true notwithstanding any defect in or failure of the debtor's title thereto, in the absence of fraud, imposition or surprise perpetrated upon the plaintiff,<sup>44</sup> and notwithstanding the failure of the creditor to realize the amount of his judgment from the property purchased,<sup>45</sup> unless the sale is afterwards canceled and set aside by judgment of the court in another action,<sup>46</sup> or upon

42. **N. J.**—*Jones v. Schmidt*, 55 N. J. L. 504, 27 Atl. 902. **Pa.**—*Cake v. Bird*, 15 Atl. 774. **Tex.**—*Hamburger v. Kosminsky* (Tex. Civ. App.), 61 S. W. 958.

Payment to clerk of court as satisfaction of judgment, see *supra*, I, A, 4, b.

43. **U. S.**—*Walker v. Powers*, 104 U. S. 245, 26 L. ed. 729. **Ala.**—*Womack v. Sanford*, 37 Ala. 445. **Ga.**—*Simmons v. Cates*, 56 Ga. 609. **Ill.**—*Graham v. Holloway*, 44 Ill. 385. **Ind.**—*Boos v. Morgan*, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237; *Johnston v. Watson*, 7 Blackf. 174. **Ia.**—*Miller v. Felkner*, 42 Iowa 458. **Ky.**—*Covington, etc. Bridge Co. v. Walker*, 2 Duv. 150. **La.**—*Bank Commissioners v. Hodge*, 8 Rob. 450; *Zacharie v. Winter*, 17 La. (O. S.) 76. **Me.**—*Keene v. Lord*, 45 Me. 613. **Nev.**—*Tonopah Banking Corp. v. McKane Min. Co.*, 31 Nev. 295, 103 Pac. 230. **N. Y.**—*Kleinhenz v. Phelps*, 6 Hun 568. **Ore.**—*Vaughn v. Canby Canal Co.*, 68 Ore. 566, 137 Pac. 784. **Pa.**—*Sahl v. Wright*, 6 Pa. 433. **Tenn.**—*Gonce v. McCoy*, 101 Tenn. 587, 49 S. W. 754, 70 Am. St. Rep. 714. **Wash.**—*Hanna v. Savage*, 21 Wash. 555, 58 Pac. 1069.

[a] The purchase or acceptance by the creditor of the debtor's goods and chattels at execution sale in lieu and in full of the purchase money bid therefor, will operate to satisfy the judgment. *Jones v. Schmidt*, 55 N. J. L. 504, 27 Atl. 902.

[b] But where the officer resells the property because the creditor refused to pay therefor, a purchase of the debtor's property under execution sale will not operate as a satisfaction of the judgment. *Sweeney v. Hawthorne* 6 Nev. 129.

[c] **Purchase by Creditor's Attorney.**—A purchase of the debtor's prop-

erty at execution sale by the creditor's attorney for the amount of the judgment is a satisfaction thereof, notwithstanding a denial of the attorney's authority by his client to bid in the property for him, where such denial is made nearly two years after such purchase. *Duvall v. Waggener*, 2 Mon. (Ky.) 183.

44. See the following: **Ala.**—*Thomas v. Glazener*, 90 Ala. 537, 8 So. 153, 24 Am. St. Rep. 830; *Goodbar v. Daniel*, 88 Ala. 583, 7 So. 254, 16 Am. St. Rep. 76; *Burns v. Hamilton's Admr.*, 33 Ala. 210, 70 Am. Dec. 570; *McCartney v. King*, 25 Ala. 681; *Worthington v. McRoberts*, 9 Ala. 297. **N. Y.**—*Lansing v. Quackenbush*, 5 Cow. 38. **Ohio.**—*Hollister v. Dillon*, 4 Ohio St. 197; *Beall v. Price*, 13 Ohio 368, 42 Am. Dec. 204; *Vattier v. Lytle's Exrs.*, 6 Ohio 478. **Pa.**—*Freeman v. Caldwell*, 10 Watts 9.

**Effect of unproductive or void sale generally**, see *infra*, VI, B, 3.

45. *Covington & Cincinnati Bridge Co. v. Walker*, 2 Duv. (Ky.) 150; *Tonopah Banking Corp. v. McKane Min. Co.*, 31 Nev. 295, 103 Pac. 230.

[a] But where the judgment creditor merely bids in the land at execution sale, and transfers his bid to another, who takes the title direct from the sheriff, the judgment is not thereby satisfied, when the judgment creditor collects nothing. *Chaonia State Bank v. Sollars*, 190 Mo. App. 284, 176 S. W. 263.

46. **Ala.**—*Boykin v. Cook*, 61 Ala. 472; *McClellan v. Lipscomb*, 56 Ala. 255. **Ariz.**—*Brandt v. Meade*, 17 Ariz. 34, 148 Pac. 297. **Ark.**—*Sturdivant v. Ward*, 90 Ark. 321, 119 S. W. 247, 134 Am. St. Rep. 32; *Jones, McDowell & Co. v. Arkansas Mech. & Agl. Co.*, 38 Ark. 17. **Colo.**—*Copeland v. Colorado State Bank*, 13 Colo. App. 489, 59 Pac. 70. **Ind.**—*Johnson v. State ex rel.*

motion,<sup>47</sup> or the judgment is revived;<sup>48</sup> but a court of equity may grant relief where an execution has been returned satisfied by a sale under which the plaintiff gained nothing because the defendant had no title to the property sold.<sup>49</sup>

**3. Effect of Unproductive or Void Sale.**—An unproductive sale of real estate under an execution, or one void because of defective proceedings, does not operate as a satisfaction in equity of the judgment.<sup>50</sup>

**C. RETURN OF EXECUTION.**—The return of an execution as satisfied is prima facie evidence of its satisfaction,<sup>51</sup> if not indeed, conclusive evidence thereof,<sup>52</sup> unless the recital of some unauthorized or irregular act on the part of the officer shows the contrary to be true.<sup>53</sup>

**Failure To Make Return of Execution.**—The mere absence of an execution unaccounted for is no evidence of the satisfaction of the judgment upon which it issued.<sup>54</sup> A failure by the officer to make return of the execution will not defeat the discharge of the judgment, however, if the officer receives full payment thereof.<sup>55</sup>

Slinkard, 80 Ind. 220; Kercheval v. Lamar, 68 Ind. 442. **Tex.**—Townsend v. Smith, 20 Tex. 465, 70 Am. Dec. 400. **Wash.**—Calhoun v. Quinlan, 86 Wash. 547, 150 Pac. 1132.

[a] Where the property is covered, at the time of the sale, by a mortgage which is subsequently foreclosed, and the judgment creditor realizes nothing, his judgment is not thereby satisfied. *Schneider v. Johnson*, 164 Mo. App. 639, 147 S. W. 538. *Compare Covington & Cincinnati Bridge Co. v. Walker*, 2 Duv. (Ky.) 150.

[b] The levy may be vacated prior to sale, upon application of plaintiff, where it is shown that the defendant has no title to the property levied on. *Tudor v. Taylor*, 26 Vt. 444.

47. *Ritter v. Henshaw*, 7 Iowa 97.

48. **Ark.**—*Sturdivant v. Ward*, 90 Ark. 321, 119 S. W. 247, 134 Am. St. Rep. 32. **Cal.**—*Scherr v. Himmelmann*, 53 Cal. 312. **Conn.**—*Cowles v. Bacon*, 21 Conn. 451, 56 Am. Dec. 371.

49. *Warner v. Helm*, 6 Ill. 220; *Henry v. Keys*, 5 Sneed (Tenn.) 488.

**Injunction against execution generally, see the title "Judgments and Decrees, Enforcement of."**

50. **Ark.**—*Caudle v. Dare*, 7 Ark. 46. **Cal.**—*Smith v. Reed*, 52 Cal. 345. **Ia.** *Farmer v. Sasseen*, 63 Iowa 110, 18 N. W. 714. **Ky.**—*Duvall v. Waggener*, 2 B. Mon. 183; *Wilson v. Percival*, 1 Dana 419. **La.**—*Baham v. Langfield*, 16 La. Ann. 156; *Reboul v. Behren*, 9 La. 90. **Mass.**—*Gooch v. Atkins*, 14

**Mass.** 378. **Minn.**—*Shelby v. Lash*, 14 Minn. 498. **Ohio.**—*Arnold v. Fuller's Heirs*, 1 Ohio 458. **R. I.**—*East Greenwich Inst. for Savings v. Allen*, 22 R. I. 337, 47 Atl. 885.

**Effect of unproductive or void sale where judgment creditor purchases, see supra**, VI, B, 2.

51. **Ark.**—*Ringgold v. Edwards*, 7 Ark. 86. **Md.**—*Parker v. Sedwick*, 5 Md. 281. **S. C.**—*Todd v. Williamson*, 1 McCord 148.

**Evidence and presumptions of payment of judgments, see supra**, I, D.

[a] But a return of satisfaction on an execution, which fails to state by whom the payment was made, does not operate to extinguish the lien of the judgment on the judgment debtor's land, where the record shows the existence of a surety who was entitled to keep the judgment alive. *Downey v. Washburn*, 79 Ind. 242.

52. *Walters v. Moore*, 90 N. C. 41; *Snead v. Rhodes*, 19 N. C. 386; *Estes v. Cooke*, 12 R. I. 6.

53. *Mitchell v. Hockett*, 25 Cal. 538, 85 Am. Dec. 151; *Hawkeye Ins. Co. v. Luckow*, 76 Iowa 21, 39 N. W. 923; *Aultman v. McGrady*, 58 Iowa 118, 12 N. W. 233.

54. **Ga.**—*Sanders v. Etcherson*, 36 Ga. 404. **Mass.**—*Wood v. Mann*, 125 Mass. 319. **N. J.**—*Runyan v. Weir*, 8 N. J. L. 286.

55. **Ala.**—*Houston v. Crutchfield's Admr.*, 22 Ala. 76. **Ind.**—*State v. Sal-yers*, 19 Ind. 432. **N. Y.**—*Dubois v. Du-*

D. BY ARREST OF DEBTOR OR DISCHARGE THEREFROM.—The effect of arrest and imprisonment of the debtor on a *capias* and his discharge from arrest, as a satisfaction of the judgment, is treated elsewhere in this work.<sup>56</sup>

**VII. BY RELEASE OR DISCHARGE.**<sup>57</sup> — A. GENERALLY. — A judgment may be satisfied by the execution of a release thereof, by the legal or equitable owner of the judgment,<sup>58</sup> or by the plaintiff's attorney of record, upon payment to him of the amount of his client's judgment.<sup>59</sup> The form and requisites of the release are governed by the law of the state in which it is executed and delivered, although the judgment may have been rendered in a different state;<sup>60</sup> but whether an instrument or covenant amounts to a release depends upon the facts and circumstances under which it is given,<sup>61</sup> except where a release is required to be executed under seal.<sup>62</sup>

Such a release must be supported by a consideration,<sup>63</sup> even where it extends to only a part of the property bound,<sup>64</sup> unless it is the

bois, 2 Wend. 416; *Jackson v. Bowen*, 7 Cow. 13. **Vt.**—*Fifield v. Richardson*, 34 Vt. 410.

Compare *supra*, VI, A, 1, b; VI, B, 1.

56. See the title "Judgments and Decrees, Enforcement of."

57. See generally the title "Release."

58. *Pease v. Sanderson*, 188 Ill. 597, 59 N. E. 425; *Stilwell v. Carpenter*, 62 N. Y. 639.

[a] A joint owner (1) of a judgment may release the same so far as his interests therein can affect a release. *Penn v. Edwards*, 50 Ala. 63; *Canadian Bank of Commerce v. Tinning*, 15 Ont. Pr. (Can.) 401. (2) Thus a partner may release a judgment rendered in favor of the partnership. *People ex rel. Immerman v. Devlin*, 63 Misc. 363, 118 N. Y. Supp. 478.

59. **U. S.**—*Erwin v. Blake*, 8 Pet. 18, 8 L. ed. 852; *Union Bank of Georgetown v. Geary*, 5 Pet. 99, 8 L. ed. 60. **N. J.**—*Wyckoff v. Bergen*, 1 N. J. L. 214. **N. Y.**—*Beers v. Hendricsson*, 45 N. Y. 665, reversing 6 Robt. 53.

Payment to attorney as satisfaction of judgment, see I, A, 2.

[a] A release of a judgment is void, when entered of record by one who signs the release as attorney of record, but is not such attorney, and has no authority to enter such release, and the judgment has not been paid. *Rounsaville v. Hazen*, 33 Kan. 71, 5 Pac. 422.

60. *Beam v. Barnum*, 21 Conn. 200,

61. **Ind.**—*Plunkett v. Black*, 117 Ind. 14, 19 N. E. 537. **Ky.**—*Scott v. Sanders' Heirs*, 6 J. J. Marsh. 506. **Mo.**—*Hempstead v. Hempstead*, 32 Mo. 134. **N. Y.**—*Agate v. Sands*, 8 Daly 66 (*affirmed* in 73 N. Y. 620); *People ex rel. Immerman v. Devlin*, 63 Misc. 363, 118 N. Y. Supp. 478. **Pa.**—*Chancellor v. Schott*, 23 Pa. 68.

Form and sufficiency of entry of satisfaction, see *infra*, VIII, A.

[a] An entry on the margin of the record of a judgment of revivor, acknowledging satisfaction, will have the effect of releasing the judgment. *Schneider v. Maney*, 242 Mo. 36, 145 S. W. 823.

62. *Davis v. Bowker*, 1 Nev. 487.

[a] Nothing short of a release under seal of one joint wrongdoer, or, satisfaction of the demand, is available as a defense by others jointly liable with him. *Tandrup v. Sampsell*, 234 Ill. 526, 85 N. E. 331, 17 L. R. A. (N. S.) 852.

63. **Ind.**—*Plunkett v. Black*, 117 Ind. 14, 19 N. E. 537; *Wray v. Chandler*, 64 Ind. 146; *McCleary v. Chipman*, 32 Ind. App. 489, 68 N. E. 320. **Ky.**—*Colins v. Fawcett*, 18 Ky. L. Rep. 1052, 39 S. W. 250. **Mo.**—*Winter v. Kansas City Cable Ry. Co.*, 73 Mo. App. 173. **N. Y.**—*VanNess v. Ransom*, 164 App. Div. 483, 150 N. Y. Supp. 251. **Pa.**—*Whitehill v. Wilson*, 3 Penr. & W. 405, 24 Am. Dec. 326. **Can.**—*Maguire v. Carr*, 28 Nova Scotia 431, which may consist of the debtor's note.

64. *Beall v. Elder*, 35 La. Ann. 1022.

purpose of the judgment creditor to abandon or renounce his judgment.<sup>65</sup>

B. ON PARTIAL PAYMENT.<sup>66</sup>—A duly executed release will operate to satisfy and discharge a judgment, upon payment of a part only of the amount due,<sup>67</sup> when a mere receipt for payment “in full” will not,<sup>68</sup> since the law ascribes to the former a conclusive, and to the latter a prima facie, character only.<sup>69</sup> So also, a release from all liability on a judgment, executed and delivered upon payment of a portion only of the amount of the judgment, will operate as a satisfaction of the judgment, on a verbal agreement to that effect,<sup>70</sup> in a voluntary compromise without fraud or imposition;<sup>71</sup> especially where such partial payment is accompanied by some additional consideration,<sup>72</sup> or where a third person furnishes the means of payment.<sup>73</sup>

It is true that at common law, a parol release of a money judgment, in consideration of the payment of a less sum, was invalid,

65. *Ramage v. Clements*, 4 Bush (Ky.) 161; *McPherson v. United States Fidelity & Guaranty Co.*, 33 Ont. L. Rep. (Can.) 524, 8 Ont. W. N. 299, 6 Ont. W. N. 677, 26 Ont. W. R. 620; *Labbe v. Routhier*, 8 Queb. Q. B. (Can.) 263; *Cameron v. Bradbury*, 9 Grant Ch. U. C. (Can.) 67.

66. Partial payment as satisfaction of judgment, see *supra*, I, C, 2.

67. *Del.*—*Maclary v. Reznor*, 3 Del. Ch. 445. *Md.*—*Jones v. Ricketts*, 7 Md. 108; *Hardey v. Coe*, 5 Gill 189; *Geiser v. Kershner*, 4 Gill & J. 305. *N. J.*—*Braden v. Ward*, 42 N. J. L. 518, holding that a release under seal is an exception to the rule “that the payment of a less sum will not satisfy a debt.” *N. Y.*—*Beers v. Hendricson*, 45 N. Y. 665 (*reversing* 6 Robt. 53); *People ex rel. Immerman v. Devlin*, 63 Misc. 363, 118 N. Y. Supp. 478.

68. *Ala.*—*McArthur v. Dane*, 61 Ala. 539. *Colo.*—*Madeley v. White*, 2 Colo. App. 408, 31 Pac. 181. *Me.*—*Bailey v. Day*, 26 Me. 88.

See also, *supra*, I, C, 2.

69. *Md.*—*Jones v. Ricketts*, 7 Md. 108. *Ohio.*—*Patterson v. Wilkins*, Wright 501. *Pa.*—*Kerr's Appeal*, 104 Pa. 282. *Tenn.*—*Brevard v. Summar*, 2 Heisk. 97.

Evidence of payment, see *supra*, I, D.

70. *Conn.*—*Beam v. Barnum*, 21 Conn. 200. *Ind.*—*Jackson v. Olmstead*, 87 Ind. 92; *Wray v. Chandler*, 64 Ind. 146. *Ia.*—*Boardman v. Marshalltown Grocery Co.*,

105 Iowa 445, 75 N. W. 343. *Kan.*—*Walrath v. Walrath*, 27 Kan. 395; *Clay v. Hoysrath*, 8 Kan. 74. *Miss.*—*Case v. Hawkins*, 53 Miss. 702. *N. C.*—*Boyd v. Buie*, 109 N. C. 501, 13 S. E. 879. *Ohio.*—*Harper v. Graham*, 20 Ohio 105. *Pa.*—*Hendrick v. Thomas*, 106 Pa. 327, 15 W. N. C. 72, 3 Kulp 81. *S. C.*—*Pinson v. Puckett*, 35 S. C. 178, 14 S. E. 393. *Tex.*—*Thurmond v. Georgia Bank* (Tex. Civ. App.), 27 S. W. 317. *Wash.*—*Brown v. Kern*, 21 Wash. 211, 57 Pac. 798. *Wis.*—*Reid v. Hibbard*, 6 Wis. 175.

71. *Ackerman v. Ackerman*, 44 N. J. L. 173; *Baggs v. Hale*, 25 Tex. Civ. App. 309, 61 S. W. 525.

[a] But if a debtor conceals his property, and by a false representation of his inability to pay, induces his creditor to compound his debt, a satisfaction piece thus procured will not discharge the judgment. *Ackerman v. Ackerman*, 44 N. J. L. 173.

72. *Ill.*—*Neal v. Handley*, 116 Ill. 418, 6 N. E. 45, 56 Am. St. Rep. 784. *Ind.*—*Bilsland v. McManomy*, 82 Ind. 139. *Me.*—*Keene v. Lord*, 45 Me. 613. *Md.*—*Booth v. Campbell*, 15 Md. 569. *Nev.*—*Davis v. Bowker*, 1 Nev. 487. *Wash.*—*Brown v. Kern*, 21 Wash. 211, 57 Pac. 798.

73. *Ala.*—*Sanders v. Branch Bank at Decatur*, 13 Ala. 353. *Ind.*—*Jones v. Ransom*, 3 Ind. 327. *Ky.*—*Hardesty v. Graham*, 8 Ky. L. Rep. 954, 3 S. W. 909. *N. H.*—*Colburn v. Gould*, 1 N. H. 279. *N. Y.*—*Smith v. Gould*, 84 Hun 325, 32 N. Y. Supp. 373, 65 N. Y. St.

notwithstanding the endorsement of such release upon the original execution issued upon the judgment.<sup>74</sup>

**C. OF ONE OF SEVERAL JOINT DEBTORS.<sup>75</sup>—1. Generally.**—Under the common-law rule, a release of one of several joint debtors under a judgment, operates as a discharge of all;<sup>76</sup> but apparently the majority of the authorities now hold that where the creditor, in releasing one joint debtor, expressly stipulates that his rights against the others shall remain unimpaired, such release does not operate to discharge the judgment as to all.<sup>77</sup>

579; *Roberts v. Brandies*, 44 Hun 468. **N. C.**—*Currie v. Kennedy*, 78 N. C. 91.

74. See the following: **U. S.**—*The Lulle D.*, 4 Biss. 249, 15 Fed. Cas. No. 8,602; *Cavender v. Grove*, 4 Biss. 269, 5 Fed. Cas. No. 2,530. **Cal.**—*Deland v. Hiett*, 27 Cal. 611, 87 Am. Dec. 102. **Ill.**—*Maxton v. Mount*, 86 Ill. App. 187. **Md.**—*Campbell v. Booth*, 8 Md. 107. **Mass.**—*Weber v. Couch*, 134 Mass. 26, 45 Am. Rep. 274; *Stratton v. Hill*, 134 Mass. 27; *Howe v. Mackay*, 5 Pick. 44. **N. J.**—*Terhune v. Colton*, 10 N. J. Eq. 21. **N. Y.**—*Garvey v. Jarvis*, 54 Barb. 179.

Partial payment as satisfaction of judgment, see *supra*, I, C, 2.

75. Payment by one joint debtor as satisfaction of judgment, see *supra*, I, B, 1.

76. **U. S.**—*United States v. Thompson*, Gilp. 614, 28 Fed. Cas. No. 16,487. **Haw.**—*Smithies v. Colburn*, 20 Hawaii 138. **Ill.**—*Winslow v. Leland*, 128 Ill. 304, 21 N. E. 588; *Nickerson v. Suplee*, 174 Ill. App. 136. **Ind.**—*Allen v. Wheatley*, 3 Blackf. 332. **Ia.**—*Stoutenberg v. Huisman*, 93 Iowa 213, 61 N. W. 917. **Md.**—*Booth v. Campbell*, 15 Md. 569. **Mich.**—*Beekman v. Sylvester*, 109 Mich. 183, 66 N. W. 1093, 3 Det. Leg. N. 60. **Mo.**—*Weston v. Clark*, 37 Mo. 568. **Mont.**—*Collier v. Field*, 1 Mont. 612.

[a] **Effect of Release of Administrator.**—A judgment debtor, upon whom the whole of a joint obligation has fallen by reason of the death of his codefendant, is not discharged by the release of the administrator under operation of law for failure to bring the action as to him within the statutory period for suing executors and administrators after the rejection of claims. *Smithies v. Colburn*, 20 Hawaii 138.

77. **U. S.**—*Tillitt v. Mann*, 104 Fed. 421, 43 C. C. A. 617; *U. S. v. Murphy*, 15 Fed. 589, 11 Biss. (C. C.) 415. **Ark.**

*Hadley v. Bryan*, 70 Ark. 197, 66 S. W. 921; *Pettigrew Machine Co. v. Harmon*, 45 Ark. 291. **Cal.**—*Barnum v. Cochrane*, 139 Cal. 494, 73 Pac. 242. **Del.**—*McDowell v. Bank of Wilmington & Bran.*, 1 Harr. 27; *Lockwood v. Bates*, 1 Del. Ch. 435, 12 Am. Dec. 121. **Ill.**—*Nickerson v. Suplee*, 174 Ill. App. 136. **Ia.**—*Gegner v. Warfield*, 72 Iowa 11, 33 N. W. 240, 2 Am. St. Rep. 226; *Bell v. Perry*, 43 Iowa 368. **Kan.**—*Mis-souri, K. & T. Ry. Co. v. Haber*, 56 Kan. 717, 44 Pac. 619; *Meixell v. Kirkpatrick*, 29 Kan. 679. **Ky.**—*Brown's Admr's v. Little*, 160 Ky. 765, 170 S. W. 168; *City of Louisville v. Nicholls*, 158 Ky. 516, 165 S. W. 660; *City of Covington v. Westbay*, 156 Ky. 839, 162 S. W. 91. **Mich.**—*Beekman v. Sylvester*, 109 Mich. 183, 66 N. W. 1093, 3 Det. Leg. N. 60. **Mo.**—*Schneider v. Maney*, 242 Mo. 36, 145 S. W. 823; *Hempstead v. Hempstead*, 32 Mo. 134; *Lewis v. Smith*, 179 Mo. App. 348, 166 S. W. 818. **Neb.**—*Council Bluffs Sav. Bank v. Griswold*, 50 Neb. 753, 70 N. W. 376. **N. Y.**—*Whittemore v. Judd Linseed & S. O. Co.*, 124 N. Y. 565, 27 N. E. 244, 21 Am. St. Rep. 708 (*affirmed* in 16 Daly 290, 10 N. Y. Supp. 737, 32 N. Y. St. 316); *Marx v. Jones*, 36 Hun 290; *Irvine v. Millbank*, 4 Jones & S. 264. **N. C.**—*Smith v. Richards*, 129 N. C. 267, 40 S. E. 5. **S. C.**—*Symmes v. Cauble*, 72 S. C. 330, 51 S. E. 862.

[a] **Reason.**—A release of one joint debtor, wherein the creditor reserves his right against the others, is construed as a covenant not to enforce collection from the one released. *Ill. Nickerson v. Suplee*, 174 Ill. App. 136. **N. Y.**—*Gilbert v. Finch*, 173 N. Y. 455, 66 N. E. 133, 93 Am. St. Rep. 623, 61 L. R. A. 807; *Mecum v. Becker*, 164 App. Div. 852, 149 N. Y. Supp. 974. **Eng.**—*Duck v. Mayeu*, L. R. (1892) 2 Q. B. 511.

**As to Sureties.**—A release of the principal debtor in a judgment,<sup>78</sup> or the suspension, by agreement, of the proceedings against him for its collection,<sup>79</sup> will operate to discharge the surety; and a release of the property of the principal debtor from the lien of the judgment, without the consent of the surety, discharges the latter pro tanto.<sup>80</sup> But the release of a surety from a joint judgment rendered against him and his principal, does not operate to discharge the principal from the debt.<sup>81</sup> There have been some statutory innovations upon this rule, however.<sup>82</sup>

**2. Joint Tort-Feasors.**—A release of one or more joint tort-feasors from a judgment will operate to release the judgment as to all,<sup>83</sup> unless the creditor expressly reserves his right to proceed against those who are not by the express terms of the instrument released,<sup>84</sup> statutes now permitting a judgment against joint tort-feasors to be compromised and discharged as to one, without releasing the others from liability for the unpaid balance.<sup>85</sup> But some

[b] **An unauthorized release of one or more joint debtors does not operate as a satisfaction of the judgment as to the others, and they cannot plead it as a discharge.** *Bilby v. Woodward* (Okla.), 148 Pac. 96. See *Wood v. Tyrrell* (R. I.), 67 Atl. 429.

78. *Boffinger v. Tuyes*, 120 U. S. 198, 7 Sup. Ct. 529, 30 L. ed. 649; *Anthony v. Capel*, 53 Miss. 350.

[a] **After Payment With Misappropriated Funds.**—The release of a judgment upon payment thereof by the debtor, with funds wrongfully appropriated by him, operates to discharge the sureties, although plaintiff is obliged to restore the money paid in satisfaction. *Lewis v. Smith*, 179 Mo. App. 348, 166 S. W. 818.

[b] **A release of one set of sureties upon whom the primary liability rests, will operate to discharge another set whose liability is secondary to the former.** *Hinckley v. Kreitz*, 58 N. Y. 583.

79. *Boffinger v. Tuyes*, 120 U. S. 198, 7 Sup. Ct. 529, 30 L. ed. 649; *Storms v. Thorn*, 3 Barb. (N. Y.) 314.

80. *Drexel v. Pusey*, 57 Neb. 30, 77 N. W. 351; *Pearl v. Deacon*, 24 Beav. 186, 53 Eng. Reprint 328, 1 De G. & J. 461.

81. *Tatlow v. Crawford*, 189 Mo. App. 184, 174 S. W. 439; *Mortland v. Himes*, 8 Pa. 265.

82. *Bunch v. United States*, 40 App. Cas. (D. C.) 156; *Tatlow v. Crawford*, 189 Mo. App. 184, 174 S. W. 439.

83. *Colo.*—*Ducey v. Patterson*, 37 Colo. 216, 86 Pac. 109, 119 Am. St.

Rep. 284, 19 L. R. A. (N. S.) 1066. Ill. *Tandrup v. Sampson*, 234 Ill. 526, 85 N. E. 331, 17 L. R. A. (N. S.) 852. Kan.—*Edens v. Fletcher*, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. (N. S.) 618; *Railway Co. v. McWhorter*, 59 Kan. 345, 53 Pac. 135; *Westbrook v. Mize*, 35 Kan. 299, 10 Pac. 881. Mich.—*McBride v. Scott*, 132 Mich. 176, 93 N. W. 243, 102 Am. St. Rep. 415, 61 L. R. A. 445, 1 Am. & Eng. Ann. Cas. 61. Neb. *Wardell v. McConnell*, 25 Neb. 558, 41 N. W. 548. N. Y.—*Berg v. Bates*, 153 App. Div. 12, 137 N. Y. Supp. 1032. Pa.—*Thomas v. Central R. Co.*, 194 Pa. 511, 45 Atl. 344. Wash.—*Abb v. Northern Pac. Ry. Co.*, 28 Wash. 428, 68 Pac. 954, 92 Am. St. Rep. 864, 58 L. R. A. 293.

84. U. S.—*Carey v. Bilby*, 129 Fed. 203, 63 C. C. A. 361. Ia.—*Bell v. Perry*, 43 Iowa 368. Kan.—*Edens v. Fletcher*, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. (N. S.) 618. N. Y.—*Gilbert v. Finch*, 173 N. Y. 455, 66 N. E. 133, 93 Am. St. Rep. 623, 61 L. R. A. 807; *Matthews v. Chicopee Mfg. Co.*, 3 Robt. 711. Tex. *Robertson v. Trammell*, 37 Tex. Civ. 53, 83 S. W. 258; *Id.* 98 Tex. 364, 83 S. W. 1098. Vt.—*Sloan v. Herrick*, 49 Vt. 327. W. Va.—*Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752.

85. See generally the statutes, and the following: Kan.—*Missouri, K. & T. Ry. Co. v. Haber*, 56 Kan. 717, 44 Pac. 619; *Meixell v. Kirkpatrick*, 29 Kan. 679. Mich.—*Beekman v. Sylvester*, 109 Mich. 183, 66 N. W. 1093, 3 Det. Leg. N. 60. N. Y.—*Walsh v. New York Cent. & H. R. R. Co.*, 204 N. Y.

of the authorities still hold that such a release operates to discharge all the defendants, notwithstanding such stipulation to the contrary.<sup>86</sup>

**D. AS RESULT OF AGREEMENT.**—An agreement by a judgment creditor to release a judgment in consideration of part payment thereof, or of payment in securities, property or services, will be binding upon him, when supported by a consideration,<sup>87</sup> and performed in good faith by the debtor.<sup>88</sup> An agreement to satisfy or discharge a judgment, entered into before it is rendered, will be supported, where there is no design to defraud others thereby, and when it has no such effect.<sup>89</sup>

**E. EFFECT OF RELEASE.**<sup>90</sup>—A judgment, when once paid off or satisfied, cannot thereafter be restored to life or vitality by any agreement of the parties, or one of them and a third party.<sup>91</sup> A release obtained by fraud or false representations, however, may be avoided by the injured party.<sup>92</sup>

A release of one-half of a judgment by the creditor is not a vacation of the judgment, but is a satisfaction pro tanto only.<sup>93</sup>

**F. DISCHARGE IN BANKRUPTCY.**—The effect of a discharge in bank-

58, 97 N. E. 408, 37 L. R. A. (N. S.) 1137; *Marx v. Jones*, 36 Hun 290; *Irvine v. Milbank*, 14 Abb. Pr. N. S. 408.

86. **U. S.**—*O'Shea v. New York, etc. R. Co.*, 105 Fed. 559, 44 C. C. A. 601; *Babcock & Wilcox Co. v. Pioneer Iron Works*, 34 Fed. 338. **Colo.**—*Ducey v. Patterson*, 37 Colo. 216, 86 Pac. 109, 119 Am. St. Rep. 284, 9 L. R. A. (N. S.) 1066. **Ia.**—*Dorgan v. Piehn*, 84 Iowa 564, 51 N. W. 34. **Md.**—*Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504. **N. Y.**—*Delong v. Curtis*, 35 Hun 94; *Mitchell v. Allen*, 25 Hun 543; *Brogan v. Hanan*, 55 App. Div. 92, 66 N. Y. Supp. 1066; *Smith v. Consolidated Gas Co.*, 36 Misc. 131, 72 N. Y. Supp. 1084. **Ohio.**—*Ellis v. Bitzer*, 2 Ohio 89, 15 Am. Dec. 534. **Va.**—*Ruble v. Turner*, 2 Hen. & M. 38. **Wash.**—*Abb v. Northern Pac. Ry. Co.*, 28 Wash. 428, 68 Pac. 954, 92 Am. St. Rep. 864, 58 L. R. A. 293.

87. **Cal.**—*Musser v. Gray*, 31 Pac. 568. **Ia.**—*German Bank v. Iowa Iron Works*, 123 Iowa 516, 99 N. W. 174. **Me.**—*Thayer v. Mowry*, 36 Me. 287. **Md.**—*Booth v. Campbell*, 15 Md. 569. **Minn.**—*Ives v. Phelps*, 16 Minn. 451. **Neb.**—*Bax v. Hoagland*, 13 Neb. 571, 14 N. W. 514. **N. C.**—*Harris v. Mott*, 97 N. C. 103, 1 S. E. 547; *Hardy v. Reynolds*, 69 N. C. 5. **Pa.**—*Fowler v. Smith*, 153 Pa. 639, 25 Atl. 744; *Potter v. Hartnett*, 148 Pa. 15, 23 Atl. 1007.

**Release of judgment on part payment, see supra, VII, B.**

88. **Ala.**—*Pharis v. Leachman*, 20 Ala. 662. **Ind.**—*Plunkett v. Black*, 117 Ind. 14, 19 N. E. 537. **Ky.**—*Casey v. Harris*, 2 Litt. 172. **Minn.**—*Walker v. Crosby*, 38 Minn. 34, 35 N. W. 475. **N. J.**—*Admrs. of Earle v. Earle*, 20 N. J. L. 347. **N. Y.**—*Terrett v. Brooklyn Imp. Co.*, 87 N. Y. 92. **Pa.**—*Maute v. Gross*, 56 Pa. 250, 94 Am. Dec. 62; *Schilling v. Durst*, 42 Pa. 126; *Malone v. Philadelphia, etc. R. Co.*, 1 Clark 380. **Tenn.**—*Young v. Fugett*, 1 Lea 447. **Tex.**—*Thurmond v. Georgia Bank (Tex. Civ. App.)*, 27 S. W. 317. **Can.**—*Maguire v. Carr*, 28 Nova Scotia 431.

89. *Church v. Simpson*, 25 Iowa 408.

90. **Effect of satisfaction on right of appeal, see infra, XI.**

91. See the following: **Cal.**—*McCarty v. Christie*, 13 Cal. 79. **Ia.**—*Weiser v. Ross*, 150 Iowa 353, 130 N. W. 387. **Ky.**—*Thomas' Admr. v. Maysville St. Ry. & Transfer Co.*, 136 Ky. 446, 124 S. W. 398; *Roberts v. Bruce*, 91 Ky. 379, 15 S. W. 872. **Neb.**—*Henry & Coatsworth Co. v. Halter*, 58 Neb. 685, 79 N. W. 616. **Tenn.**—*Finley v. Gaut*, 8 Baxt. 148.

92. **Del.**—*Maclary v. Reznor*, 3 Del. Ch. 445. **Ind.**—*Wray v. Chandler*, 64 Ind. 146; *Ritenour v. Mathews*, 42 Ind. 7. **N. Y.**—*Van Ness v. Ransom*, 164 App. Div. 483, 150 N. Y. Supp. 251.

93. *Carr v. Mason*, 44 Me. 77.

ruptcy as a release or satisfaction of the judgment is fully treated elsewhere.<sup>94</sup>

**VIII. ENTRY OF SATISFACTION.**—A. **GENERALLY.**—When a judgment is satisfied, an acknowledgment or certification of the fact should be entered upon the record thereof by the owner of the judgment or his attorney of record therein.<sup>95</sup> In some jurisdictions such entry may be made by the clerk of the court upon an acknowledgment of satisfaction or order in writing of the judgment creditor or his attorney of record.<sup>96</sup> Such an entry is prima facie evidence of the satisfaction of the judgment;<sup>97</sup> it may be explained or contradicted, however.<sup>98</sup>

**Partial Satisfaction.**—Credit should be entered on the record of any partial payment made on a judgment.<sup>99</sup>

**Form and Sufficiency.**—Generally it is not essential that any particular form of words shall be used to acknowledge satisfaction of a judgment.<sup>2</sup> When the convenience of the parties requires it, how-

94. See the title "Release."

95. **U. S.**—*Naretti v. Scully*, 133 Fed. 828. **Kan.**—*Rounsaville v. Hazen*, 33 Kan. 71, 5 Pac. 422. **Mo.**—*Kansas City v. Forsee*, 168 Mo. App. 213, 153 S. W. 572. **N. Y.**—*Booth v. Farmers' & M. Nat. Bank*, 4 Lans. 301; *Lownds v. Remsen*, 7 Wend. 35. **Pa.**—*Miller v. Preston*, 154 Pa. 63, 25 Atl. 1041 (*affirming* 30 W. N. C. 240); *McIntire v. Irwin*, 1 Chest. Co. Rep. 457.

[a] The nominal plaintiff in whose name a judgment is recovered for the benefit of another cannot satisfy such judgment. *Hutmacher v. Anheuser-Busch Brewing Assn.*, 71 Ill. App. 154.

[b] "A general attorney has not the power to satisfy a judgment obtained by confession without the aid of his professional skill, unless authorized specially to do so." *Zimmerman v. Floyd*, 27 Pa. Co. Ct. 385.

[c] Where a judgment stands in the name of one of the executors of an estate, "as executor, etc.," such words may be considered as descriptive personae, and a co-executor is not authorized to satisfy the judgment. *Melcher v. Harding*, 17 Wkly. Dig. (N. Y.) 368, N. Y. Daily Reg., Oct. 5, 1883.

[d] Entry on appearance docket insufficient; entry upon the judgment docket or judgment roll necessary. *Rounsaville v. Hazen*, 33 Kan. 71, 5 Pac. 422.

Compelling entry of satisfaction, see *infra*, VIII, B.

96. **Md.**—*Waters v. Engle*, 53 Md. 179; *Campbell v. Booth*, 8 Md. 107.

**N. Y.**—*Lownds v. Remsen*, 7 Wend. 35; *Booth v. Farmers' & M. Nat. Bank*, 4 Lans. 301; *Faulkner v. Suydam*, 7 Robt. 614; *Rochester Distilling Co. v. Devendorf*, 72 Hun 622, 25 N. Y. Supp. 529, 54 N. Y. St. 864. **Pa.**—*Harner's Appeal*, 94 Pa. 489, 9 W. N. C. 101.

97. **Ark.**—*Carter v. Adamson*, 21 Ark. 287. **Ind.**—*Downey v. Washburn*, 79 Ind. 242. **Mo.**—*Schneider v. Maney*, 242 Mo. 36, 145 S. W. 823; *Weston v. Clark*, 37 Mo. 568. **N. Y.**—*Packard v. Hill*, 7 Cow. 434; *Rochester Distilling Co. v. Devendorf*, 72 Hun 622, 25 N. Y. Supp. 529; *Fluegelman v. Armstrong*, 59 Misc. 506, 110 N. Y. Supp. 967. **N. C.** *Isler v. Murphy*, 83 N. C. 215. **Pa.** *Kerr's Appeal*, 104 Pa. 282. **Tenn.** *Gentry v. Wagner*, 9 Lea 682. **Wash.** *Carmack v. Drum*, 32 Wash. 236, 73 Pac. 377, 785. **Can.**—*Toronto General Trusts Corp. v. Central Ont. R. W. Co.*, 5 Ont. W. R. 544. And see *Maguire v. Carr*, 28 Nova Scotia 431.

98. See *infra*, IX, A.

99. **Ky.**—*Brandenburg v. Beach*, 17 Ky. L. Rep. 560, 32 S. W. 168. **Minn.** *Wolford v. Bowen*, 57 Minn. 267, 59 N. W. 195. **Mo.**—*Kansas City v. Forsee*, 168 Mo. App. 213, 153 S. W. 572. **Utah.**—*Blake v. Farrell*, 31 Utah 110, 86 Pac. 805.

Compelling entry of partial satisfaction, see *infra*, VIII, B, 1.

1. Form and sufficiency of release, see *supra*, VII, C.

2. *Morriss v. Harveys*, 75 Va. 726.

[a] "It is not essential that any particular form of words shall be used,

ever, a satisfaction piece may be executed by the owner of the judgment or his attorney, acknowledging satisfaction of the judgment, and delivered to the judgment debtor, to be filed for entry upon the judgment record.<sup>3</sup>

**B. COMPELLING ENTRY OF SATISFACTION. — 1. Generally.** — Where a judgment has been paid, or the obligation is otherwise discharged, and the judgment creditor refuses to acknowledge payment or enter satisfaction thereof, the court may order satisfaction to be entered.<sup>4</sup> Such power is conferred on the courts by express provision of statute

as 'full satisfaction,' or 'absolute payment,' but any language will be sufficient, which, with the surrounding circumstances, plainly indicates a satisfaction of the debt by the adoption and acceptance of a new and different security." *Morriss v. Harveys*, 75 Va. 726.

[b] **The term "settled,"** appearing in a docket entry, must be understood to mean "satisfied," and be taken as a judicial act, not open to question in a collateral proceeding. *Tabler v. Castle*, 22 Md. 94.

[c] **A quit-claim deed,** executed for the purpose of releasing the lien of a judgment, will not operate as a satisfaction of the judgment as to a parcel of land which was omitted in recording the deed, so that it did not appear on the record, although it was properly described in the deed. *Huff v. Morton*, 83 Mo. 399.

[d] **Signature of Clerk Necessary.** An entry by the clerk appearing upon the margin of a judgment record stating that plaintiff appeared in open court and acknowledged satisfaction of the judgment, but to which no signature or attestation was affixed, will not suffice to satisfy such judgment of record. *Cummins v. Webb*, 4 Ark. 229.

**3.** *Booth v. Farmers' & Mech. Nat. Bank*, 50 N. Y. 396; *Pettengill v. Mather*, 16 Abb. Pr. (N. Y.) 399; *Lownds v. Remsen*, 7 Wend. (N. Y.) 35; *Earley v. St. Patrick's Church Soc.*, 81 Hun 369, 30 N. Y. Supp. 979; *Matter of Wilcox*, 1 Misc. 55, 21 N. Y. Supp. 780; *Carr v. Coulter*, 2 Ont. Pr. (Can.) 226; *Darling v. Wright*, 3 U. C. L. J. (Can.) 50; *Rudall v. Hurd*, 3 U. C. L. J. (Can.) 14; *Pawson v. Wightman*, 2 U. C. L. J. (Can.) 184.

[a] **A written acknowledgment of satisfaction,** executed by the president of a corporation, is binding upon such corporation even where the instrument

is not executed in its name, if it shows on its face that it was executed by such president in his official capacity. *Booth v. Farmers' & M. Nat. Bank*, 50 N. Y. 396.

**4. U. S.**—*Macrum v. United States*, 154 Fed. 653, 83 C. C. A. 427; *Medford v. Dorsey*, 2 Wash. 467, 16 Fed. Cas. No. 9,390. **Ga.**—*Watts v. Norton, R. M. Charlt.* 353. **Ill.**—*Reid v. O'Brien*, 86 Ill. App. 128. **Ind.**—*Kusler v. Crofoot*, 78 Ind. 597; *Beard v. Millikan*, 68 Ind. 231. **Ia.**—*Dunton v. McCook*, 120 Iowa 444, 94 N. W. 942. **Minn.**—*Warren v. Ward*, 91 Minn. 254, 97 N. W. 886; *Lough v. Pitman*, 26 Minn. 345, 4 N. W. 229; *Ives v. Phelps*, 16 Minn. 451. **Neb.**—*Manker v. Sine*, 47 Neb. 736, 66 N. W. 840. **N. J.**—*Jones v. Schmidt*, 55 N. J. L. 504, 27 Atl. 902; *Delaware & Lackawanna R. Co. v. Blair*, 28 N. J. L. 139; *Van Winkle v. Owen*, 54 N. J. Eq. 253, 34 Atl. 400. **N. Y.**—*Trinity Church v. Higgins*, 48 N. Y. 532; *Holmes v. Van Sickle*, 2 How. Pr. 184; *Hamlin v. Boughton*, 4 Cow. 65; *Briggs v. Thompson*, 20 Johns. 294; *Pabst Brewing Co. v. Rapid S. F. Co.*, 56 Misc. 445, 107 N. Y. Supp. 163. **N. C.**—*Foreman v. Bibb*, 65 N. C. 128. **Ore.**—*Vaughan v. Canby Canal Co.*, 68 Ore. 566, 137 Pac. 784; *Portland Construction Co. v. O'Neil*, 24 Ore. 54, 32 Pac. 764; *Provost v. Millard*, 3 Ore. 370. **Pa.**—*Lindley v. Ross*, 137 Pa. 629, 20 Atl. 944. **Tex.**—*Texas Cent. R. Co. v. Andrews*, 28 Tex. Civ. App. 477, 67 S. W. 923. **Wash.**—*Hanna v. Savage*, 21 Wash. 555, 58 Pac. 1069.

[a] But a court of law is without power, after the term at which the judgment was entered, to order satisfaction for matters which existed at the time the judgment was entered which might have been pleaded and proved in bar. *McDonald v. Holdom*, 208 Ill. 128, 70 N. E. 21; *Jarman v. Saunders*, 64 N. C. 367.

in some jurisdictions.<sup>5</sup> The court may likewise compel the entry of a partial satisfaction, or credit for a partial payment, of a judgment.<sup>6</sup>

**2. Proceedings To Compel Entry.**—a. *Generally.*—A judgment debtor may proceed by motion, entitled as of the original action, in the court having jurisdiction thereof,<sup>7</sup> and duly noticed,<sup>8</sup> or by rule to show cause,<sup>9</sup> to compel the entry of satisfaction of a judgment

**5.** See generally the statutes, and the following: **Ill.**—Nickerson *v.* Supplee, 174 Ill. App. 136. **Minn.**—Ives *v.* Phelps, 16 Minn. 451. **Mont.**—Work *v.* Northern Pac. R. Co., 11 Mont. 513, 29 Pac. 280. **N. J.**—Homan *v.* Taylor, 79 N. J. Eq. 221, 80 Atl. 326. **N. Y.**—Wood *v.* New York, 44 App. Div. 299, 60 N. Y. Supp. 759. **N. C.**—Brown *v.* Hobbs, 154 N. C. 544, 70 S. E. 906. **Pa.**—Felt *v.* Cook, 95 Pa. 247. **Utah.**—Blake *v.* Farrell, 31 Utah 110, 86 Pac. 805.

[a] Such statutes should be strictly complied with. **N. Y.**—Wood *v.* New York, 44 App. Div. 299, 60 N. Y. Supp. 759. **Pa.**—Felt *v.* Cook, 95 Pa. 247. **Utah.**—Blake *v.* Farrell, 31 Utah 110, 86 Pac. 805.

**6. Ala.**—Perrine *v.* Carlisle, 19 Ala. 686. **Ill.**—Hems *v.* Arnold, 188 Ill. 527, 59 N. E. 421. **S. C.**—Coclough *v.* Rhodus, 2 Rich. L. 76. **Utah.**—Blake *v.* Farrell, 31 Utah 110, 86 Pac. 805.

**7.** See the following: **U. S.**—Macrum *v.* United States, 154 Fed. 653, 83 C. C. A. 427. **Ala.**—Pileher *v.* Hickman, 148 Ala. 517, 41 So. 741; Bruce *v.* Barnes, 20 Ala. 219; Chandler *v.* Faulkner, 5 Ala. 567. **Cal.**—Buckeye Refining Co. *v.* Kelly, 163 Cal. 8, 124 Pac. 536, Ann. Cas. 1913E, 840; Wood *v.* Currey, 49 Cal. 359; March *v.* Barnett, 1 Cal. App. 583, 82 Pac. 697. **Ill.**—Harding *v.* Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347; Russell *v.* Hugunin, 2 Ill. 562, 33 Am. Dec. 423; Nickerson *v.* Supplee, 174 Ill. App. 136; People *v.* Weimer, 94 Ill. App. 112; Reid *v.* O'Brien, 86 Ill. App. 128. **Ind.**—Wilson *v.* Brookshire, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792. **Ia.**—Dunton *v.* McCook, 120 Iowa 444, 94 N. W. 942. **Minn.**—Warren *v.* Ward, 91 Minn. 254, 97 N. W. 886; Woodford *v.* Reynolds, 36 Minn. 155, 30 N. W. 757; Laugh *v.* Pitman, 26 Minn. 345, 4 N. W. 229. **Miss.**—The Planters Bank *v.* Spencer, 3 Smed. & M. 305. **Neb.**—Manker *v.* Sine, 47 Neb. 736, 66 N. W. 840. **N. J.**—Coulter *v.* Kaighn, 30

**N. J. L.** 98; Delaware & Lackawanna R. Co. *v.* Blair, 28 N. J. L. 139; Waddle *v.* Dayton, 8 N. J. L. 174; Jones *v.* Oliver, 8 N. J. L. 86; Homan *v.* Taylor, 79 N. J. Eq. 221, 80 Atl. 326. **N. Y.**—Shumway *v.* Cooley, 9 Hun 131; Hamlin *v.* Boughton, 4 Cow. 65; Mumford *v.* Stocker, 1 Cow. 178; Briggs *v.* Thompson, 20 Johns. 294; Gross *v.* Pennsylvania P. & B. R. Co., 65 Hun 191, 20 N. Y. Supp. 28, 47 N. Y. St. 374; Pabst Brewing Co. *v.* Rapid Safety Filter Co., 56 Misc. 445, 107 N. Y. Supp. 163; Pabst Brewing Co. *v.* Rapid Safety Filter Co., 54 Misc. 305, 105 N. Y. Supp. 962; Callanan *v.* Gilman, 23 Jones & S. 511, 2 N. Y. Supp. 702. **N. C.**—Brown *v.* Hobbs, 154 N. C. 544, 70 N. C. 544, 70 S. E. 906; Foreman *v.* Bibb, 65 N. C. 128. **Ohio.**—Harper *v.* Graham, 20 Ohio 105. **Ore.**—Vaughan *v.* Canby Canal Co., 68 Ore. 566, 137 Pac. 784; Portland Construction Co. *v.* O'Neil, 24 Ore. 54, 32 Pac. 764; Provost *v.* Millard, 3 Ore. 370. **Tenn.**—Marsh *v.* Haywood, 6 Humph. 210. **Va.**—Smock *v.* Dade, 5 Rand. 639, 16 Am. Dec. 780. **Wash.**—Hanna *v.* Savage, 21 Wash. 555, 58 Pac. 1069.

**8. Ala.**—Armstrong *v.* Harper, 65 Ala. 523; McKissack *v.* Davis, 18 Ala. 315; Clements *v.* Crawford, 1 Ala. 531. **N. J.**—Waddle *v.* Dayton, 8 N. J. L. 174 (holding that notice to the executor or administrator of plaintiff's attorney of a motion to enter satisfaction of a judgment is not sufficient); Howard *v.* Richman, 1 N. J. L. 139. **N. Y.**—Ward *v.* Beebe, 17 Abb. Pr. 1; Mumford *v.* Stocker, 1 Cow. 176; Briggs *v.* Thompson, 20 Johns. 294.

**9. N. J.**—First Nat. Bank *v.* Hoffman, 68 N. J. L. 245, 52 Atl. 280; Jones *v.* Schmidt, 55 N. J. L. 504, 27 Atl. 902; Hankinson *v.* Hummer, 12 N. J. L. 64. **Ore.**—Day *v.* Larsen, 30 Ore. 247, 47 Pac. 101. **Pa.**—Hottenstein *v.* Haverly, 185 Pa. 305, 39 Atl. 946; Reynolds *v.* Barnes, 76 Pa. 427; Horner *v.* Hower, 39 Pa. 126; M. Berger & Co. *v.* Weiss, 23 Pa. Dist. 349; Heidelbaugh

which he has paid. The same results are sometimes reached by a petition for a supersedeas, especially when the execution is in the hands of an officer for collection.<sup>10</sup> And one interested may even proceed by mandamus to compel the entry of satisfaction of a judgment.<sup>11</sup>

**Separate Action or Suit.** — The judgment debtor may bring an action at law against the judgment creditor or his assignee or legal representative to compel the entry of satisfaction of a judgment which he has paid.<sup>12</sup> So also, he may file a bill in equity to have satisfaction of a judgment decreed, especially where the creditor is attempting to enforce its collection;<sup>13</sup> but such a bill will not lie where an adequate remedy at law is to be had,<sup>14</sup> or where the party, having had in his power the means of defense to the action at law, neglected them, and suffered the recovery to be had against him as a consequence.<sup>15</sup>

b. *Parties.* — In an action or proceeding for entry of satisfaction wherein an issue of fact is raised, all parties interested therein<sup>16</sup> must

*v. Thomas*, 11 Lanc. Bar 49; *Com. v. Huber*, 5 Pa. L. J. 331, 3 Clark 383.

10. *Bower v. Saltmarsh*, 19 Ala. 274; *Marsh v. Haywood*, 6 Humph. (Tenn.) 210; *Hewett v. Hill's Securities*, 3 Yerg. (Tenn.) 241; *Young v. Read*, 3 Yerg. (Tenn.) 296.

11. See *People ex rel. Immerman v. Devlin*, 63 Misc. 363, 118 N. Y. Supp. 478.

[a] Where a clerk of the court refuses to enter satisfaction of a judgment on the judgment records of his office, when authorized and directed so to do by a duly executed satisfaction piece, a mandamus will be granted directing him to make such entry. *People ex rel. Immerman v. Devlin*, 63 Misc. 363, 118 N. Y. Supp. 478.

12. *Ind.*—*Beard v. Millikan*, 68 Ind. 231. *Minn.*—*Warren v. Ward*, 91 Minn. 254, 97 N. W. 886; *Walker v. Crosby*, 38 Minn. 34, 35 N. W. 475; *Woodford v. Reynolds*, 36 Minn. 155, 30 N. W. 757. *N. Y.*—*Hare v. De Young*, 39 Misc. 366, 79 N. Y. Supp. 868.

[a] A separate action, in which all who are interested are made parties, is the only adequate and proper remedy, especially where some in interest were not parties to the original action. *Mayer v. Sparks*, 3 Kan. App. 602, 45 Pac. 249.

[b] Entry may be obtained by an action to compel a set-off, where the party against whom relief is sought is insolvent. *Keightley v. Walls*, 27 Ind. 384.

13. *Ga.*—*Scogin v. Beall*, 50 Ga. 88.

*Ind.*—*McQuat v. Cathcart*, 84 Ind. 567. *Md.*—*Ahl v. Ahl*, 71 Md. 555, 18 Atl. 959. *N. Y.*—*Mallory v. Norton*, 21 Barb. 424, holding that where a defendant cannot obtain relief from the enforcement of execution on a judgment that has been paid, by motion, or order of stay, he may file a bill in equity for a decree to have the judgment satisfied of record. *Ore.*—*Provost v. Millard*, 3 Ore. 370.

Injunction against execution, see the title "Judgments and Decrees, Enforcement of."

[a] The payment, by one not liable therefor, of a part of a judgment against an insolvent debtor, is sufficient consideration to support an agreement on the part of the creditor to satisfy the judgment, and equity will enforce the agreement. *Smith v. Gould*, 84 Hun 325, 32 N. Y. Supp. 373, 65 N. Y. St. 579. Payment by stranger as satisfaction of judgment, see *supra*, I, B, 3.

14. *Macrum v. United States*, 154 Fed. 653, 83 C. C. A. 427. See generally the title "Legal Remedy."

15. *Galena & S. W. R. Co. v. Ennor*, 116 Ill. 55, 4 N. E. 762.

[a] This rule does not apply, however, to the defense of set-off, but only to such defenses as are required to be made in the action in which the judgment is rendered. *Chicago, D. & V. R. Co. v. Field*, 86 Ill. 270.

16. *Ind.*—*Shields v. Moore*, 84 Ind. 440. *Miss.*—*Parchman v. Conway*, 28 Miss. 85; *Long v. Shackelford*, 25 Miss.

be made parties thereto, as otherwise such interested parties will not be bound by the order of the court therein.<sup>17</sup>

c. *Pleadings*.—In an action to compel satisfaction of a judgment, the complaint must not only allege payment, or other facts relied on as constituting a discharge of the judgment,<sup>18</sup> but it must also aver that the judgment creditor accepted such payment in satisfaction of his judgment.<sup>19</sup> Where a joint judgment debtor seeks a release from, or the satisfaction of, a judgment on the ground that it has been paid by his joint tort-feasor, he must allege that the recovery against his joint tort-feasor and that against himself were for the same wrong.<sup>20</sup>

d. *Hearing and Determination*.—A motion or rule for an entry of satisfaction will usually be heard upon the affidavits in support thereof,<sup>21</sup> but not in contradiction of the record.<sup>22</sup> But a court will not grant such motion when there is a controversy of fact, unless the motion is satisfactorily supported by the facts.<sup>23</sup>

The court may, where an issue of fact arises on a motion to enter satisfaction, direct a jury to try the same,<sup>24</sup> or may order a refer-

559. **N. J.**—Van Winkle *v.* Owen, 54 **N. J. Eq.** 253, 34 **Atl.** 400. **N. Y.** Matter of Beers, 5 **Robt.** 643.

[a] In an action against an assignee of a judgment to have satisfaction thereof declared, the assignor and the sheriff are proper parties. Shields *v.* Moore, 84 **Ind.** 440.

17. **Ala.**—Armstrong *v.* Harper, 65 **Ala.** 523. **N. J.**—Howard *v.* Richman, 1 **N. J. L.** 139. **N. Y.**—Wheeler *v.* Emmeluth, 121 **N. Y.** 241, 24 **N. E.** 285. **Pa.**—Riley *v.* Harris, 2 **Pa. Dist.** 231.

18. Blann *v.* Crocheron, 20 **Ala.** 320; Griffin *v.* Hodshire, 119 **Ind.** 235, 21 **N. E.** 741; Holliday *v.* Thomas, 90 **Ind.** 398.

19. Blann *v.* Crocheron, 20 **Ala.** 320. 20. **Kan.**—Story *v.* Lang, 91 **Kan.** 323, 137 **Pac.** 795. **Mass.**—See Cote *v.* New England Navigation Co., 213 **Mass.** 177, 99 **N. E.** 972. **N. Y.**—Berg *v.* Bates, 153 **App. Div.** 12, 137 **N. Y. Supp.** 1032.

21. Faulkner *v.* Chandler, 11 **Ala.** 725. See generally the title "Motions."

[a] A court will refuse to enter a rule to show cause why a judgment should not be satisfied of record, when the affidavits in support of same show only grounds existing before the judgment was rendered. Hawkins *v.* Harding, 35 **Ill. App.** 25.

22. **Ala.**—Faulkner *v.* Chandler, 11 **Ala.** 725. **Cal.**—Haggin *v.* Clark, 71 **Cal.** 444, 9 **Pac.** 736, 12 **Pac.** 478. **Pa.**

Bartikowski *v.* Lambert, 9 **Kulp** 493.

23. **N. J.**—Hankinson *v.* Hummer, 12 **N. J. L.** 64. **N. Y.**—Barker *v.* Crawford, 11 **N. Y. Supp.** 337. **Pa.**—Shaylor *v.* Parsons, 1 **Pa. Super.** 281; Philadelphia Third Nat. Bank *v.* Hunsicker, 8 **Pa. Co. Ct.** 635. **Tex.**—Portis *v.* Ennis, 27 **Tex.** 574. **Can.**—Lewine *v.* Savage, 3 **U. C. L. J.** 89.

24. See the following: **Ill.**—Harding *v.* Hawkins, 141 **Ill.** 572, 31 **N. E.** 307, 33 **Am. St. Rep.** 347, the same as in proceedings by writ of audita querela. **Ind.**—Reeves *v.* Plough, 46 **Ind.** 350, wherein motion took form of regular complaint to which answer was filed forming issue. **Ia.**—Dunton *v.* McCook, 120 **Iowa** 444, 94 **N. W.** 942. **Pa.**—Hottenstein *v.* Haverly, 185 **Pa.** 305, 39 **Atl.** 946; Atkinson *v.* Harrison, 153 **Pa.** 472, 26 **Atl.** 294; Jenkintown National Bank's Appeal, 124 **Pa.** 337, 17 **Atl.** 2; Hess *v.* Frankensfield, 106 **Pa.** 440; McCutcheon *v.* Allen, 96 **Pa.** 319; Reynolds *v.* Barnes, 76 **Pa.** 427; Mahon *v.* Rosenkrantz, 8 **Kulp** 334; Heidelberg *v.* Thomas, 11 **Lanc. Bar** 49; Whitney *v.* Chandler, 2 **Leg. Rec.** 270. **Va.**—Smock *v.* Dade, 5 **Rand.** (26 **Va.**) 639, 16 **Am. Dec.** 780. **Wis.**—Cooley *v.* Gregory, 16 **Wis.** 303.

[a] **Jury Trial Demandable as of Right**.—See Bruce *v.* Barnes, 20 **Ala.** 219; Bower *v.* Saltmarsh, 19 **Ala.** 274; and generally the title "Juries and Jurors."

[b] The only proper issue that may

ence,<sup>25</sup> or remit the parties to an action at law to compel satisfaction.<sup>26</sup>

Such a motion will not be granted when the costs allowed in the suit have not been paid,<sup>27</sup> or where the motion is based upon an agreement that is construed as a covenant not to sue one or more of the defendants.<sup>28</sup>

C. ACTION FOR FAILURE TO SATISFY. — Statutes sometimes provide that the judgment creditor is liable to penalty or damages for neglect or refusal to satisfy of record a judgment which has been paid.<sup>29</sup> A judgment debtor who has paid the debt in full, may maintain an action of trespass on the case against the judgment creditor for refusal to satisfy of record such judgment within a reasonable time.<sup>30</sup>

**IX. VACATING ENTRY OF SATISFACTION.**<sup>31</sup> — A. IN GENERAL. — An entry of satisfaction of a judgment, or a receipt entered on the record for any amount of the judgment, may be explained, qualified, contradicted or vacated.<sup>32</sup>

B. GROUNDS FOR.<sup>33</sup> — Satisfaction of a judgment procured by fraud<sup>34</sup>

be raised in a proceeding to compel an entry of satisfaction is whether the judgment has been paid and satisfied. *Nickerson v. Suplee*, 174 Ill. App. 136.

25. *Dwight v. St. John*, 25 N. Y. 203.

26. **Kan.**—*Mayer v. Sparks*, 3 Kan. App. 602, 45 Pac. 249. **Minn.**—*Woodford v. Reynolds*, 36 Minn. 155, 30 N. W. 757. **N. Y.**—*Van Etten v. Hasbrouck*, 4 N. Y. St. 803.

27. *Bertram v. Petrovsky*, 23 Pa. Dist. 402; *Stakke v. Chapman*, 13 S. D. 269, 83 N. W. 261.

28. *Nickerson v. Suplee*, 174 Ill. App. 136.

29. See generally the statutes, and **Ala.**—*Travis v. Rhodes*, 142 Ala. 189, 37 So. 804. **Pa.**—*Marston v. Tryon*, 108 Pa. 270; *Allen v. Conrad*, 51 Pa. 487; *Henry v. Sims*, 1 Whart. 187; *Bratton v. Leyrer*, 12 Pa. Co. Ct. 651; *Oberholtzer v. Hunsberger*, 1 Monag. 543. **Wis.**—*Johnson v. Huber*, 117 Wis. 58, 93 N. W. 826.

30. *McLaughlin v. First Nat. Bank*, 72 Ill. App. 476; *Field v. Yeaman*, 31 Ky. L. Rep. 12, 101 S. W. 368.

31. Entry of satisfaction of judgment, see *supra*, VIII.

Opening and vacating judgments generally, see 15 STANDARD PROC. 151, et seq.

32. See the following: **Ind.**—*Lapping v. Duffy*, 65 Ind. 229; *Stewart v. Arnel*, 62 Ind. 593. **Mo.**—*Boynton v. Boynton*, 186 Mo. App. 713, 172 S. W. 1175. **N. Y.**—*Marx v. Valley Stone Co.*, 84 Misc. 514, 147 N. Y. Supp. 519. **N. C.**—*Reynolds v. Magness*, 24 N. C.

26. **Can.**—*Boyle v. Rothschild*, 11 Ont. W. R. 963.

[a] Under an agreement of parties to that effect, a satisfaction of judgment may be set aside and the judgment reinstated. *Berdell v. Parkhurst*, 6 N. Y. St. 12.

33. Grounds for opening and vacating judgments generally, see 15 STANDARD PROC. 155, et seq.

34. **U. S.**—*Van Rensselaer v. Kelly*, 2 Hask. 87, 28 Fed. Cas. No. 16,873. **Kan.**—*Bowersock v. Wickery*, 61 Kan. 632, 60 Pac. 317; *State v. Young*, 32 Kan. 292, 4 Pac. 309; *Chapman v. Blakeman*, 31 Kan. 684, 3 Pac. 277. **Minn.**—*Finnish People's Home Co. v. Longyear-Mesaba L. & I. Co.*, 117 Minn. 313, 135 N. W. 990. **Mo.**—*Wand v. Ryan*, 166 Mo. 646, 65 S. W. 1025; *Boynton v. Boynton*, 186 Mo. App. 713, 172 S. W. 1175; *Pannell v. Pannell*, 100 Mo. App. 133, 73 S. W. 289. **Neb.** *Grunden v. Skiles*, 95 Neb. 124, 145 N. W. 341; *Fox v. State*, 63 Neb. 185, 88 N. W. 176. **N. J.**—*Ackerman v. Ackerman*, 44 N. J. L. 173. **N. Y.**—*Kley v. Healy*, 149 N. Y. 346, 44 N. E. 150, (affirming 9 Misc. 93, 29 N. Y. Supp. 3, 59 N. Y. St. 692); *Gray v. Green*, 77 N. Y. 615 (reversing 12 Hun 598); *Hackley v. Draper*, 60 N. Y. 88; *McGregor v. Comstock*, 28 N. Y. 237; *Marx v. Valley Stone Co.*, 84 Misc. 514, 147 N. Y. Supp. 519. **Ohio.**—*Patterson v. Wilkins*, Wright 501. **Ore.**—*Wagner v. Goldschmidt*, 51 Ore. 63, 93 Pac. 689. **Pa.**—*McClurg v. Wilson*, 43 Pa. 439; *Murphy v. Flood*, 2 Grant Cas. 411;

or collusion, or by duress,<sup>35</sup> or through mistake or inadvertence,<sup>36</sup> or by an unauthorized compromise and settlement,<sup>37</sup> or without consideration or on a consideration which has since failed,<sup>38</sup> may be

Philadelphia *v.* Simon, 12 Pa. Super. 159; Bowman *v.* Forney, 15 Pa. Co. Ct. 134; Bullard's Estate, 1 Del. Co. 425. Wis.—Voell *v.* Kelly, 64 Wis. 504, 25 N. W. 536. Eng.—Read *v.* Dupper, 6 T. R. 361, 101 Eng. Reprint 361. Can. Boyle *v.* Rothschild, 11 Ont. W. R. 963.

[a] Satisfaction procured upon a forged receipt, acknowledging satisfaction, may be vacated. Milligan *v.* Bowman, 42 Iowa 414.

[b] Restoration of Payments.—(1) Where the settlement of a judgment, which was obtained by fraud, is set aside, the judgment plaintiff is not required to restore the payments made to secure such settlement, but the payments will be credited on the judgment thus reinstated. Grunden *v.* Skiles, 95 Neb. 124, 145 N. W. 341. See also Winter *v.* K. C. Cable Ry. Co., 73 Mo. App. 173, holding that (2) where a satisfaction of a judgment is obtained through misrepresentation upon part payment thereof, a tender of the part paid is not a condition precedent to bringing an action to set aside the satisfaction. Compare *infra*, note 37.

35. Stewart *v.* Armel, 62 Ind. 593; Hunter *v.* Wabash R. Co., 160 Mo. App. 601, 140 S. W. 930; Hunter *v.* Wabash R. Co., 149 Mo. App. 243, 130 S. W. 103.

36. Ark.—Martin *v.* Bank of the State, 20 Ark. 636. Cal.—Haggin *v.* Clark, 61 Cal. 1. Ia.—State Bank of Indiana *v.* Harrow, 26 Iowa 426; Parks *v.* Davis, 16 Iowa 20. Kan.—McNeal *v.* Hunt, 6 Kan. App. 670, 50 Pac. 63. Md.—Wilmer *v.* Brice, 91 Md. 71, 46 Atl. 322; Waters *v.* Engle, 53 Md. 179. Mo.—Cohen *v.* Camp, 46 Mo. 179. N. Y. Wheeler *v.* Emmeluth, 121 N. Y. 241, 24 N. E. 285; Russell *v.* Nelson, 99 N. Y. 119, 1 N. E. 314; Dundee Nat. Bank *v.* Wood, 9 N. Y. Supp. 351. N. D. Acme Harvester Co. *v.* Magill, 15 N. D. 116, 106 N. W. 563. Pa.—Shoup *v.* Shoup, 205 Pa. 22, 54 Atl. 476; McCune *v.* McCune, 164 Pa. 611, 30 Atl. 577; Paul *v.* Eurich, 3 Pa. Super. 299; Delta Bldg. & L. Assn. *v.* McClune, 6 Pa. Dist. 569.

[a] Where by error of computation, a less sum than the amount due

on the judgment was paid, and the defendant refused to pay the balance, the entry of satisfaction may be vacated. Mechanics' Bank *v.* Minthorne, 19 Johns. (N. Y.) 244; Bernstein *v.* Demmler, 9 Abb. Pr. N. S. (N. Y.) 285; Seattle *v.* Krutz, 78 Wash. 553, 139 Pac. 498.

[b] Where the judgment creditor purchased the debtor's property, thus satisfying the judgment, he is not entitled to have the satisfaction vacated and the judgment reinstated because he only obtained a life estate in the land when he bought in the belief that he was getting a fee simple estate. Gonce *v.* McCoy, 101 Tenn. 587, 49 S. W. 754, 70 Am. St. Rep. 714. Purchase of debtor's property by judgment creditor as satisfaction of judgment, see *supra*, VI, B, 2.

37. Ark.—Moore *v.* Cairo & Fulton R. Co., 36 Ark. 262; Martin *v.* Bank of the State, 20 Ark. 636. Cal.—Haggin *v.* Clark, 61 Cal. 1. Ill.—Turnan *v.* Temke, 84 Ill. 286. Kan.—Bowersock *v.* Wickery, 61 Kan. 632, 60 Pac. 317. Md.—Waters *v.* Engle, 53 Md. 179. Mich.—Potter *v.* Hunt, 68 Mich. 242, 36 N. W. 58. Mo.—Cohen *v.* Camp, 46 Mo. 179. N. J.—Harrison *v.* Maxwell, 44 N. J. L. 316. N. Y.—Lee *v.* Vacuum Oil Co., 126 N. Y. 579, 27 N. E. 1018; Cunningham *v.* City of New York, 141 N. Y. Supp. 1000. Ohio.—Wilson *v.* Stilwell, 14 Ohio St. 464, 468. Pa. Whitesell *v.* Peck, 165 Pa. 571, 30 Atl. 933; Miller *v.* Preston, 154 Pa. 63, 25 Atl. 1041 (*affirming* 30 W. N. C. 240); Sullivan *v.* Gorsline, 17 Pa. Co. Ct. 205. Tenn.—Cody *v.* Roane Iron Co., 105 Tenn. 515, 58 S. W. 850. Wash.—Farnsworth *v.* Town of Wilbur, 49 Wash. 416, 95 Pac. 642, 19 L. R. A. (N. S.) 320.

[a] Where plaintiff has accepted or received the benefits of such settlement, the satisfaction will not be vacated, unless he returns what he has received pursuant to the settlement. Lee *v.* Vacuum Oil Co., 126 N. Y. 579, 27 N. E. 1018.

38. U. S.—Hay *v.* Washington & A. R. Co., 4 Hughes 327, 11 Fed. Cas. No. 6,255a. Mo.—Boynton *v.* Boynton, 186 Mo. App. 713, 172 S. W. 1175; Winter

vacated upon proper proceedings therefor by the injured party.<sup>39</sup> So also, where the satisfaction piece was not delivered until after the death of the person who executed it,<sup>40</sup> or where satisfaction is entered pursuant to a void sale under execution,<sup>41</sup> or when the entry of satisfaction is in derogation of the rights of third persons having an interest therein,<sup>42</sup> the entry of satisfaction may be vacated. But an entry of satisfaction will not be vacated on account of any matter existing prior to the rendition of the judgment.<sup>43</sup> Nor will it be vacated where the judgment debtor makes payment to the judgment plaintiff, without notice of the previous assignment of the judgment to another,<sup>44</sup> or where it conclusively appears that the judgment has in fact been paid, although the entry of satisfaction was improperly entered by the clerk,<sup>45</sup> or where, by reason of special injustice and injury done the defendant by the plaintiff, the parties cannot be restored to the position they occupied before the entry of satisfaction.<sup>46</sup>

C. PROCEEDINGS TO OBTAIN. — 1. In General. — The usual remedy<sup>47</sup> to vacate a satisfaction of judgment wrongfully or improperly entered

v. K. C. Cable Ry. Co., 73 Mo. App. 173. **Tenn.**—Christian v. Clark, 10 Lea 630.

39. As to proper proceeding to vacate satisfaction, see *infra*, IX, C.

40. Earley v. St. Patrick's Church Society, 81 Hun 369, 30 N. Y. Supp. 979, 63 N. Y. St. 235.

41. **Ia.**—Farmer v. Sasseen, 63 Iowa 110, 18 N. W. 714; Darrow v. Darrow, 43 Iowa 411. **Mo.**—Bailey v. Buchanan, 126 Mo. App. 190, 102 S. W. 36. **Tenn.**—Ballard v. Scruggs, 90 Tenn. 585, 18 S. W. 259, 25 Am. St. Rep. 703; Smith v. Taylor, 11 Lea 738; Smith v. Hinson, 4 Heisk. 250; Henry v. Keys, 5 Sneed 488. **Tex.**—Massie v. McKee (Tex. Civ. App.), 56 S. W. 119; Hollon v. Hale, 21 Tex. Civ. App. 194, 51 S. W. 900.

42. **Minn.**—Henry v. Traynor, 42 Minn. 234, 44 N. W. 11. **Mont.**—McGregor v. Wells, Fargo & Co., 1 Mont. 142. **Pa.**—Geissinger's Appeal, 8 Sad. 35, 4 Atl. 344. **Tenn.**—Sommerhill v. Cartwright, 7 Humph. 461.

43. United States v. Biggert, 70 Fed. 38, 16 C. C. A. 616; Read's Appeal, 126 Pa. 415, 17 Atl. 621; Bare's Estate, 5 Lanc. Law Rev. (Pa.) 36.

44. Windsor v. Mourer, 76 Ore. 281, 147 Pac. 533, 1190.

45. Tanner v. Wood, 13 Idaho 486, 90 Pac. 733.

46. **Ind.**—Hannon v. Hilliard, 83 Ind. 362. **Ore.**—Windsor v. Mourer, 76 Ore. 281, 147 Pac. 533, 1190. **S. D.**—Plano Mfg. Co. v. Thompson, 21 S. D.

300, 112 N. W. 149, 130 Am. St. Rep. 722, 11 L. R. A. (N. S.) 396.

47. See the following: **Ala.**—Glass v. Glass, 76 Ala. 368; Aicardi v. Robins, 41 Ala. 541, 94 Am. Dec. 614. **Cal.**—Cramer v. Tittle, 79 Cal. 332, 21 Pac. 750; Haggin v. Clark, 61 Cal. 1. **Idaho.**—Tanner v. Wood, 13 Idaho 486, 90 Pac. 733. **Ill.**—Seymour v. Haines, 104 Ill. 557; Turnan v. Temke, 84 Ill. 286; Bergh v. Crosby, 186 Ill. App. 195. **Idaho.**—Farmer v. Sasseen, 63 Iowa 110, 18 N. W. 714; Parks v. Davis, 16 Iowa 20. **Kan.**—Bowersock v. Wickery, 61 Kan. 632, 60 Pac. 317; Bogle v. Bloom, 36 Kan. 512, 13 Pac. 793; McNeal v. Hunt, 6 Kan. App. 670, 50 Pac. 63. **Md.**—Waters v. Engle, 53 Md. 179; Tabler v. Castle, 22 Md. 94. **Mich.**—Potter v. Hunt, 68 Mich. 242, 36 N. W. 58. **Minn.**—Finnish People's Home Co. v. Longyear-Mesaba L. & I. Co., 117 Minn. 313, 135 N. W. 990. **Mo.**—Cohen v. Camp, 46 Mo. 179; Boynton v. Boynton, 186 Mo. App. 713, 172 S. W. 1175; Hayes v. Sheffield Ice Co. (Mo. App.), 168 S. W. 294. **Mont.**—McGregor v. Wells, Fargo & Co., 1 Mont. 142. **Neb.**—Phillips v. Kuhn, 35 Neb. 187, 52 N. W. 881. **N. J.**—Faughnan v. Elizabeth, 58 N. J. L. 309, 33 Atl. 212. **N. Y.**—Wallace v. Berdell, 105 N. Y. 7, 11 N. E. 274; Bensen v. Perry, 17 Hun 16, *affirmed* in 77 N. Y. 625 (execution issued, and a levy was made. The defendant gave an undertaking to stay execution, and appealed. Judgment was affirmed. Defendant then

of record is by motion, made upon proper notice;<sup>48</sup> but an entry of satisfaction may be vacated on a rule to show cause why such should not be done,<sup>49</sup> or by *scire facias*,<sup>50</sup> or by an action at law,<sup>51</sup> or under certain circumstances by a suit in equity.<sup>52</sup> Where the evidence is

paid plaintiff's other attorney, who caused judgment to be satisfied of record. Later plaintiff moved to set aside the satisfaction to enable the sheriff to collect his fees, which was granted. Held error, without an offer to refund amount paid for satisfaction, and the motion to vacate must be denied; *Romain v. Garth*, 3 Hun 214; *Bernstein v. Demmler*, 9 Abb. Pr. (N. S.) 285; *Mechanics' Bank v. Minthorne*, 19 Johns. 244; *Wardell v. Eden*, 2 Johns. Cas. 121; *Guliano v. Whitenack*, 1 N. Y. Ann. Cas. 75; *Marx v. Valley Stone Co.*, 84 Misc. 514, 147 N. Y. Supp. 519; *Tito v. Seabury*, 18 Misc. 283, 41 N. Y. Supp. 1041. **N. C.**—*Snead v. Rhodes*, 19 N. C. 386. **N. D.**—*Aerne Harvester Co. v. Magill*, 15 N. D. 116, 106 N. W. 563. **Ohio**.—*Wilson v. Stilwell*, 14 Ohio St. 464, 468. **Ore.**—*Wagner v. Goldschmidt*, 51 Ore. 63, 93 Pac. 689. **Pa.**—*Shoup v. Shoup*, 205 Pa. 22, 54 Atl. 476. **Tex.**—*Hollon v. Hale*, 21 Tex. Civ. App. 194, 51 S. W. 900. **W. Va.**—*Cockerell v. Nichols*, 8 W. Va. 159.

48. **Ala.**—*Larkin v. Mason*, 71 Ala. 227; *Armstrong v. Harper*, 65 Ala. 523. **Ark.**—*Martin v. Bank of the State*, 20 Ark. 636. **Cal.**—*Henly v. Hastings*, 3 Cal. 341. **N. Y.**—*Wardell v. Eden*, 2 Johns. Cas. 121. **Pa.**—*Shoup v. Shoup*, 205 Pa. 22, 54 Atl. 476. **Tenn.**—*Wilburn v. McCollom*, 7 Heisk. 267.

[a] Written notice sent by registered letter was sufficient written notice of a motion to set aside satisfaction of a judgment, when a receipt signed by the person so notified, acknowledging receipt of the registered letter, was produced on the hearing of the motion. *People v. Parker*, 231 Ill. 478, 83 N. E. 282.

49. *Faughnan v. Elizabeth*, 58 N. J. L. 309, 33 Atl. 212; *Ackerman v. Ackerman*, 44 N. J. L. 173; *Harrison v. Maxwell*, 44 N. J. L. 316; *Pettis' Appeal*, 126 Pa. 420, 17 Atl. 622; *Read's Appeal*, 126 Pa. 415, 24 W. N. C. 76; *McClurg v. Wilson*, 43 Pa. 439; *Bowman v. Abbott*, 20 Pa. Dist. 596.

50. See the following: **Ohio**.—*Arnold v. Fuller's Heirs*, 1 Ohio 458, where entry procured by fraud. **Tenn.**

*Hayes v. Cartwright*, 6 Lea 139; *Warren v. Farquaharson*, 4 Baxt. 484 (where entry procured by fraud); *Evans v. Holt*, 4 Baxt. 389; *Swaggerty v. Smith*, 1 Heisk. 403; *Henry v. Keys*, 5 Sneed 488; *Curtis v. Bennett*, 11 Humph. 295; *Mays v. Wherry*, 3 Coop. Ch. 80; *Anderson v. Lyons*, 2 Coop. Ch. 61. **W. Va.**—*Renick v. Ludington*, 14 W. Va. 367.

51. See the following: **Ill.**—*Barrett v. Lingle*, 33 Ill. App. 650. **Ind.**—*Kercheval v. Lamar*, 68 Ind. 442; *Stewart v. Armel*, 62 Ind. 593; *Reish v. Thompson*, 55 Ind. 34, a satisfaction obtained by false and fraudulent representations, may be vacated by an action at law. **Ky.**—*Howard v. London Mfg. Co.*, 24 Ky. L. Rep. 1934, 72 S. W. 771. **Mo.**—*Boynton v. Boynton*, 186 Mo. App. 713, 172 S. W. 1175; *Winter v. Kansas City Cable Ry. Co.*, 73 Mo. App. 173. **Neb.**—*Grunden v. Skiles*, 95 Neb. 124, 145 N. W. 341. **N. Y.**—*Conklin v. Taylor*, 68 N. Y. 221; *Slocum v. Freeman*, 6 Abb. Pr. (N. S.) 443; *Lowman v. Elmira, C. & N. R. R. Co.*, 85 Hun 188, 32 N. Y. Supp. 579, 65 N. Y. St. 723. **Tex.**—*Massie v. McKee* (Tex. Civ. App.), 56 S. W. 119.

[a] An action on the judgment may be brought by the plaintiff, if he so desires, to which the defendant may plead the satisfaction as matter of defense, and plaintiff should set up the fraud, by which the satisfaction was procured, in avoidance, by way of reply. *Boynton v. Boynton*, 186 Mo. App. 713, 172 S. W. 1175.

52. See the following: **Ark.**—*Stuart v. Peay*, 21 Ark. 117. **Ill.**—*Kerr v. Kerr*, 81 Ill. App. 35. **Ia.**—*Ross v. Chicago, R. I. & P. R. Co.*, 55 Iowa 691, 8 N. W. 644; *Milligan v. Bowman*, 42 Iowa 414. **Mo.**—*Boynton v. Boynton*, 186 Mo. App. 713, 172 S. W. 1175. **N. Y.**—*Kley v. Healy*, 149 N. Y. 346, 44 N. E. 150 (*affirming* 9 Misc. 93, 29 N. Y. Supp. 3); *Fitzsimmons v. Fitzsimmons*, 79 Hun 13, 29 N. Y. Supp. 510; *Marx v. Valley Stone Co.*, 84 Misc. 514, 147 N. Y. Supp. 519; *Cunningham v. City of New York*, 140 N. Y. Supp. 1000. **Ohio**.—*Welsh v. Childs*,

conflicting upon the material questions of fact arising on a motion to set aside or vacate an entry of satisfaction the party seeking relief should be left to an action.<sup>53</sup>

**2. Time for Instituting.**—In the absence of any limitation of local statute, a court may entertain a motion to vacate a satisfaction of judgment at any time<sup>54</sup> before the expiration of the time provided by statute within which judgments may be modified or vacated.<sup>55</sup> A court may not, after the expiration of the statutory period of appeal, vacate a satisfaction of a judgment for the purpose of increasing its amount.<sup>56</sup>

**3. Parties.**—In a proceeding to vacate satisfaction of a judgment, it is necessary that all parties against whom the judgment or decree was rendered, shall be made parties thereto.<sup>57</sup>

**D. MANDAMUS TO COMPEL.**<sup>58</sup>—Mandamus will not lie to compel the vacation of an entry of satisfaction where the person aggrieved has an adequate remedy otherwise.<sup>59</sup>

**X. SATISFACTION OF ONE OF SEVERAL JUDGMENTS ON SAME CAUSE OF ACTION.**—Where several judgments are rendered on the same cause of action, a satisfaction of one of them will operate to discharge the others, except as to the costs; and it is immaterial whether the judgments are against the same or different persons, or in the same or different courts.<sup>60</sup>

17 Ohio St. 319. **Tenn.**—Cody v. Roane Iron Co., 105 Tenn. 515, 58 S. W. 850; Ballard v. Scruggs, 90 Tenn. 585, 18 S. W. 259, 25 Am. St. Rep. 703; Shannon v. Woollard, 12 Lea 663; Smith v. Taylor, 11 Lea 738; Grubb v. Browder, 11 Heisk. 299; Smith v. Hinson, 4 Heisk. 250; Henry v. Keys, 5 Sneed 488; Mays v. Wherry, 3 Coop. Ch. 80; Anderson v. Lyons, 2 Coop. Ch. 61. **Va.**—Higginbotham v. May, 90 Va. 233, 17 S. E. 941. **Wash.**—Farnsworth v. Town of Wilbur, 49 Wash. 416, 95 Pac. 642, 19 L. R. A. (N. S.) 320. **W. Va.**—Renick v. Ludington, 14 W. Va. 367.

**Grounds for vacating entry of satisfaction,** see *supra*, IX, B.

**53. Ill.**—Barrett v. Lingle, 33 Ill. App. 650. **Kan.**—Chapman v. Blake-man, 31 Kan. 684, 3 Pac. 277. **Miss.**—Yeates v. Mead, 65 Miss. 89, 3 So. 651. **Mo.**—See Boynton v. Boynton, 186 Mo. App. 173, 172 S. W. 1175. **Neb.**—Fox v. State, 63 Neb. 185, 88 N. W. 176. **N. Y.**—Dwight v. St. John, 25 N. Y. 203. **N. D.**—Acme Harvester Co. v. Magill, 15 N. D. 116, 106 N. W. 563. **S. C.**—Alsobrook v. Watts, 19 S. C. 539. **Wis.**—McDonald v. Falvey, 18 Wis. 571.

**54. U. S.**—Van Rensselaer v. Kelly,

2 Hask. 87, 28 Fed. Cas. No. 16,873. **Md.**—Wilmer v. Brice, 91 Md. 71, 46 Atl. 322. **Mo.**—Boynton v. Boynton, 186 Mo. App. 173, 172 S. W. 1175. **N. Y.**—Howett v. Merrill, 1 N. Y. Supp. 894. **N. D.**—Acme Harvester Co. v. Magill, 15 N. D. 116, 106 N. W. 563. **Wis.**—Flanders v. Sherman, 18 Wis. 575.

**55. Seattle v. Krutz,** 78 Wash. 553, 139 Pac. 498.

**Time within which to move to open and vacate a judgment,** see 15 STANFORD PROC. 186, et seq.

**56. Seattle v. Krutz,** 78 Wash. 553, 139 Pac. 498.

**57. Blackburn v. Clarke,** 85 Tenn. 506, 3 S. W. 505; Warren v. Farquharson, 4 Baxt. (Tenn.) 484; Humbert v. Kerr, 8 Baxt. (Tenn.) 291.

**58. As to mandamus to inferior courts and judicial officers,** see generally the title "Mandamus."

**59. People v. Tioga C. Pl.,** 19 Wend. (N. Y.) 73.

**60. See the following: U. S.**—Lynch v. Burt, 132 Fed. 417, 67 C. C. A. 305. **Ala.**—Thompson v. Lassiter, 86 Ala. 536, 6 So. 33; Abercrombie v. Conner, 10 Ala. 293; Lockhart v. McElroy, 4 Ala. 572. **Conn.**—Ayer v.

**Several Judgments Against Joint Tort-Feasors.**—When several actions have been brought against joint tort-feasors, and a judgment recovered against each, the satisfaction of one of them operates as a satisfaction of all.<sup>61</sup> But where separate judgments have been rendered against two persons for the joint commission of a trespass, the injured party may elect upon which he will seek satisfaction,<sup>62</sup> and when he has made such election he is concluded thereby.<sup>63</sup>

## XI. EFFECT OF SATISFACTION ON RIGHT OF APPEAL.

Satisfaction of a judgment is usually regarded as a compulsory act on the part of the debtor, and therefore it is not a waiver of his right of appeal.<sup>64</sup> But even the voluntary payment of a judgment by a

Ashmead, 31 Conn. 447, 83 Am. Dec. 154. **Ga.**—*Tarver v. Rankin*, 3 Ga. 210, 214. **Ill.**—*Frankel v. Stern*, 50 Ill. App. 54; *Everingham v. National City Bank*, 25 Ill. App. 637, affirmed in 124 Ill. 527, 17 N. E. 26. **Ia.**—*Hayes v. Hugel*, 150 Iowa 297, 129 N. W. 958. **Ky.**—*Patterson v. Hobbs*, 1 Litt. 275. **Me.**—*Bartlett v. Sawyer*, 46 Me. 317. **Miss.**—*The Planters' Bank v. Spencer*, 3 Smed. & M. 305. **Mo.**—*Kansas City v. Forsee*, 168 Mo. App. 213, 153 S. W. 572; *Vette v. Merrell Drug Co.*, 137 Mo. App. 229, 117 S. W. 666. **Mont.**—*Work v. Northern Pac. R. Co.*, 11 Mont. 513, 29 Pac. 280. **N. Y.**—*Craft v. Merrill*, 14 N. Y. 456; *Bowne v. Joy*, 9 Johns. 221; *Apfelbaum v. Shaumburgh*, 14 Wkly. Dig. 405. **Pa.**—*Bowser's Appeal*, 101 Pa. 466; *Gross' Estate*, 6 Pa. Co. Ct. 478. **Vt.**—*Stevens v. Briggs*, 14 Vt. 44, 39 Am. Dec. 209. **Wis.**—*Barth v. Loeffelholz*, 108 Wis. 562, 84 N. W. 846.

[a] The payment and satisfaction of a judgment against the principal debtor, renders functus officio, and effectually satisfies a judgment against a garnishee in the same case, except for costs. *Hammett v. Morris*, 55 Ga. 644.

[b] **Where One Judgment Affirmed on Appeal.**—Where two judgments are rendered for the same debt, and one of them is affirmed on appeal, with damages, a subsequent satisfaction of the other operates as a satisfaction of the affirmed judgment, except as to damages and costs. *Thompson v. Lasiter*, 86 Ala. 536, 6 So. 33.

[c] **Where Both Judgments Affirmed on Appeal.**—Where separate judgments are recovered against the maker and endorser of a note, and on appeal both are affirmed with an additional amount

as damages, the payment of one and the damages thereon, is a satisfaction of the other, including the damages. *Hewett v. Hill's Securities*, 3 Yerg. (Tenn.) 241.

[d] **Where two concurrent and consistent remedies** (1) are pressed to judgment, a satisfaction of one is a satisfaction of all. **Ia.**—*Hayes v. Hugel*, 150 Iowa 297, 129 N. W. 958; *Putney v. O'Brien*, 53 Iowa 117, 4 N. W. 891. **Tex.**—*Hartzog v. Sieger Coal Co.* (Tex. Civ. App.), 163 S. W. 1055; *Bull v. Bear-den* (Tex. Civ. App.), 159 S. W. 1177; *Garza & Co. v. Jesse French P. & O. Co.*, 59 Tex. Civ. App. 590, 126 S. W. 906. **Wis.**—*Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773. (2) And this rule applies where separate judgments are recovered against different defendants on the same cause of action. *Hayes v. Hugel*, 150 Iowa 297, 129 N. W. 958; *Vette v. J. S. Merrell Drug Co.*, 137 Mo. App. 229, 117 S. W. 666.

61. See *supra*, I, B, 1, c.

62. **U. S.**—*Power v. Baker*, 27 Fed. 396. **Ala.**—*Blann v. Crocheron*, 20 Ala. 320. **Ia.**—*Putney v. O'Brien*, 53 Iowa 117, 4 N. W. 891. **Ky.**—*United Soc. Shakers v. Underwood*, 11 Bush 265, 21 Am. Rep. 214. **Tenn.**—*Knott v. Cunningham*, 2 Sneed 204.

[a] An election is manifested by either acceptance of payment or suing out execution thereon. *Blann v. Crocheron*, 20 Ala. 320.

63. **U. S.**—*Power v. Baker*, 27 Fed. 396. **Ia.**—*Putney v. O'Brien*, 53 Iowa 117, 4 N. W. 891. **Ky.**—*United Soc. Shakers v. Underwood*, 11 Bush 265, 21 Am. Rep. 214. **Tenn.**—*Knott v. Cunningham*, 2 Sneed 204.

64. **Cal.**—*Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786; *Vermont Marble*

defendant does not, according to the weight of authority, preclude him from taking an appeal therefrom,<sup>65</sup> unless such payment is by way of compromise,<sup>66</sup> or the debtor thereby derives some advantage or benefit not otherwise legally obtainable.<sup>67</sup> But a voluntary acceptance by a judgment creditor of the satisfaction of his judgment operates as a waiver of whatever errors may have been committed in

Co. v. Black, 123 Cal. 21, 55 Pac. 599; Kenney v. Parks, 120 Cal. 22, 52 Pac. 40. **Ill.**—Armstrong v. Douglas Park Bldg. Assn., 176 Ill. 298, 52 N. E. 886; Beardsley v. Smith, 139 Ill. 290, 28 N. E. 1079; Page v. People, 99 Ill. 418; Hatch v. Jacobson, 94 Ill. 584; Richeson v. Ryan, 14 Ill. 74, 56 Am. Dec. 493. **Ia.**—State v. Martland, 71 Iowa 543, 32 N. W. 485; Grim v. Semple, 39 Iowa 570. **La.**—Verges v. Gonzales, 33 La. Ann. 410; Johnson v. Clark, 29 La. Ann. 762. **Miss.**—Gordon v. Gibbs, 3 Smed. & M. 473, 492. **Neb.**—Green v. Hall, 43 Neb. 275, 61 N. W. 605, 47 Am. St. Rep. 761. **N. Y.** Bartholemy v. People, 2 Hill 248, 255. **Wis.**—Hixon v. Oneida, 82 Wis. 515, 52 N. W. 445.

65. **U. S.**—County of Dakota v. Glidden, 113 U. S. 222, 5 Sup. Ct. 428, 28 L. ed. 981; O'Hara v. McConnell, 93 U. S. 150, 23 L. ed. 840; Erwin v. Lowry, 7 How. 172, 12 L. ed. 655; Hoogendorn v. Daniel, 202 Fed. 431, 120 C. C. A. 537. **Ala.**—Shannon v. Mower, 186 Ala. 472, 65 So. 338. **Cal.**—Patterson v. Keeney, 165 Cal. 465, 132 Pac. 1043, Ann. Cas. 1914D, 232. **Fla.**—Burrows v. Mickler, 22 Fla. 572, 1 Am. St. Rep. 217. **Ga.**—Richmond & D. R. Co. v. Buice, 88 Ga. 180, 14 S. E. 205. **Ill.**—Lott v. Davis, 262 Ill. 148, 104 N. E. 199; Page v. People, 99 Ill. 418; Hatch v. Jacobson, 94 Ill. 584. **Ind.**—Belton v. Smith, 45 Ind. 290; Dickensheets v. Kaufman, 29 Ind. 154; Armes v. Chappel, 28 Ind. 469; Hammond W. & E. C. Ry. Co. v. Kaput (Ind. App.), 110 N. E. 109; Beard v. Hosier, 58 Ind. App. 14, 107 N. E. 558. **Ky.**—Madden v. Madden, 169 Ky. 367, 183 S. W. 931. **La.**—Hill v. Caze, 136 La. 625, 67 So. 520. **Mich.** Watson v. Kane, 31 Mich. 61. **Miss.** Currie v. Bennette, 111 Miss. 228, 71 So. 324. **N. Y.**—Hayes v. Nourse, 107 N. Y. 577, 14 N. E. 508, 1 Am. St. Rep. 891; Dyett v. Pendleton, 3 Cow. 325; Schermerhorn v. Wheeler, 5 Daly 472. **N. D.**—Fisk v. Fehrs, 32 N. D. 119, 155 N. W. 676. **Ohio.**—Alban v.

Evans, 2 Ohio Dec. 298. **Ore.**—Edwards v. Perkins, 7 Ore. 149. **Wash.** Hartson v. Dale, 9 Wash. 379, 37 Pac. 475. **Wis.**—Sloane v. Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21.

*Contra.*—**Ia.**—Isaacson v. Mason, 157 N. W. 891; Hipp v. Crenshaw, 64 Iowa 404, 20 N. W. 492; State v. Westfall, 37 Iowa 575; Borgalthous v. Farmers' & M. Ins. Co., 36 Iowa 250. **Kan.** Merriam Mortg. Co. v. St. Paul Fire & Marine Co., 97 Kan. 190, 155 Pac. 17; Round v. Land & Power Co., 92 Kan. 894, 142 Pac. 292; State v. Conkling, 54 Kan. 108, 37 Pac. 992, 45 Am. St. Rep. 270. **R. I.**—Sager v. Moy, 15 R. I. 528, 9 Atl. 847.

[a] In Louisiana it is provided by statute that the voluntary acquiescence in a judgment or decree by paying the money, or otherwise complying with the judgment or decree, bars the party paying or complying in acquiescence from his right of appeal. Buntin v. Johnson, 27 La. Ann. 625; Succession of De Egana, 18 La. Ann. 59.

[b] A payment of the judgment and costs by the defendant to the clerk of the court cannot, without plaintiff's acceptance thereof, defeat his right of appeal. Hesse v. Zaffke, 183 Ill. App. 160.

66. **Dakota County v. Glidden**, 113 U. S. 222, 5 Sup. Ct. 428, 28 L. ed. 981; Hayes v. Nourse, 107 N. Y. 577, 14 N. E. 508, 1 Am. St. Rep. 891; Wells v. Danforth, 1 N. Y. Code Rep. (N. S.) 415; Cock v. Palmer, 19 Abb. Pr. (N. Y.) 372.

[a] There must be clear proof of a compromise and settlement of the judgment before the appellate court will dismiss an appeal. Plano Mfg. Co. v. Rasey, 69 Wis. 246, 34 N. W. 85.

67. **Ill.**—Hatch v. Jacobson, 94 Ill. 584; Austin v. Bainter, 40 Ill. 82. **Mass.** Smith v. O'Brien, 146 Mass. 294, 15 N. E. 645. **N. Y.**—Bennett v. Van Syckel, 18 N. Y. 481. **Wis.**—Webster-Glover Lumber & Mfg. Co. v. St. Croix, 71 Wis. 317, 36 N. W. 864.

the proceedings in which it was rendered,<sup>68</sup> and it therefore follows that he is estopped to appeal from a judgment after he has accepted its benefits,<sup>69</sup> except where it clearly appears that he cannot recover

- 68. Ark.**—*Coston v. Lee Wilson & Co.*, 109 Ark. 548, 160 S. W. 857. **Cal.**—*Nunan v. Valentine*, 83 Cal. 588, 23 Pac. 713. **Ill.**—*Hartshorn v. Potroff*, 89 Ill. 509. **Ind.**—*McGrew v. Grayston*, 144 Ind. 165, 41 N. E. 1027; *Newman v. Kizer*, 128 Ind. 258, 26 N. E. 1006; *McCracken v. Cabel*, 120 Ind. 266, 22 N. E. 136; *Sterne v. Vert*, 108 Ind. 232, 9 N. E. 127, 111 Ind. 408, 12 N. E. 719; *Baltimore O. & C. R. Co. v. Johnson*, 84 Ind. 420; *Clark v. Wright*, 67 Ind. 224; *Patterson v. Rowley*, 65 Ind. 108. **Kan.**—*Zeigler v. Hyle*, 45 Kan. 226, 25 Pac. 568. **Mo.**—*State v. Lubke*, 15 Mo. App. 152, 166. **Wis.**—*Thornton v. Madison Woolen Mills*, 41 Wis. 265.
- 69. U. S.**—*Albright v. Oyster*, 60 Fed. 644, 9 C. C. A. 173, 19 U. S. App. 651. **Ark.**—*Watkins v. Martin*, 24 Ark. 14, 81 Am. Dec. 59. **Conn.**—*Hawley v. Harrall*, 19 Conn. 142. **Ill.**—*Corwin v. Shoup*, 76 Ill. 246; *Holt v. Rees*, 46 Ill. 181; *Ruckman v. Alwood*, 44 Ill. 183; *Thomas v. Negus*, 7 Ill. 700; *Morgan v. Ladd*, 7 Ill. 414. **Ind.**—*Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014; *McGrew v. Grayston*, 144 Ind. 165, 41 N. E. 1027; *Glassburn v. Deer*, 143 Ind. 174, 183, 41 N. E. 376; *Newman v. Kizer*, 128 Ind. 258, 26 N. E. 1006; *McCracken v. Cabel*, 120 Ind. 266, 22 N. E. 136; *State v. Kamp*, 111 Ind. 56, 11 N. E. 960; *Monnett v. Hemphill*, 110 Ind. 299, 11 N. E. 230; *Sterne v. Vert*, 108 Ind. 232, 9 N. E. 127; *Baltimore O. & C. R. Co. v. Johnson*, 84 Ind. 420; *Test v. Larsh*, 76 Ind. 452; *Clark v. Wright*, 67 Ind. 224. **Ia.**—*Weaver v. Stacy*, 93 Iowa 683, 62 N. W. 22; *Anglo-American L. M. & A. Co. v. Bush*, 84 Iowa 272, 50 N. W. 1063; *Hintrager v. Mahoney*, 78 Iowa 537, 43 N. W. 522, 6 L. R. A. 50; *Root v. Heil*, 78 Iowa 436, 43 N. W. 278; *Reichelt v. Seal*, 76 Iowa 275, 41 N. W. 16; *West v. Fitzgerald*, 72 Iowa 306, 33 N. W. 688; *Upton Mfg. Co. v. Huiske*, 69 Iowa 557, 29 N. W. 621; *Tama County v. Melendy*, 55 Iowa 395, 7 N. W. 669; *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 55 Iowa 157, 7 N. W. 474; *Independent Dist. v. Delaware*, 44 Iowa 201; *Mississippi & M. R. Co. v. Byington*, 14 Iowa 572.
- Ky.**—*Brown v. Van Cleave*, 86 Ky. 381, 6 S. W. 25. **La.**—*Campbell v. Orillion*, 3 La. Ann. 115. **Minn.**—*Mastin v. May*, 130 Minn. 281, 153 N. W. 756; *Lamprey v. Henk*, 133 Minn. 405. **Mo.**—*Wolfert v. Reilly*, 136 Mo. 463, 470, 34 S. W. 847; *Robards v. Lamb*, 76 Mo. 192; *Cassell v. Fagin*, 11 Mo. 207, 47 Am. Dec. 151; *Rosenberger v. Jones*, 48 Mo. App. 606. **N. Y.**—*Farmers' L. & T. Co. v. Bankers' & M. Tel. Co.*, 109 N. Y. 342, 16 N. E. 539; *People v. Mills*, 109 N. Y. 69, 15 N. E. 886; *Alexander v. Alexander*, 104 N. Y. 643, 10 N. E. 37; *Bennett v. Van Syckel*, 18 N. Y. 481; *Kelly v. Bloom*, 17 Abb. Pr. 229; *Lewis v. Irving F. Ins. Co.*, 15 Abb. Pr. 140, note; *Radway v. Graham*, 4 Abb. Pr. 468; *Green v. Jereissati*, 151 N. Y. Supp. 989. **N. D.**—*Tyler v. Shea*, 4 N. D. 377, 61 N. W. 468, 50 Am. St. Rep. 660. **Ore.**—*Kellogg v. Smith*, 70 Ore. 449, 142 Pac. 330; *Portland Const. Co. v. O'Neil*, 24 Ore. 54, 32 Pac. 764; *Inverarity v. Stowell*, 10 Ore. 261, 267; *Moore v. Floyd*, 4 Ore. 260. **Pa.**—*Hall v. Laey*, 37 Pa. 366; *Smith v. Jack*, 2 Watts & S. 101. **Tex.**—*Fl v. Bailey*, 36 Tex. 119. **Utah.**—*Sierra Nevada Mill Co. v. Keith O'Brien Co.*, 156 Pac. 943. **Vt.**—*Felch v. Gilman*, 22 Vt. 38, holding that a land owner, who has accepted payment of an award for an easement for a public highway over his land, cannot maintain an action for trespass for the reasonable use thereof. **W. Va.**—*Bright v. Mollohan*, 75 W. Va. 116, 83 S. E. 298. **Wis.**—*Smith v. Coleman*, 77 Wis. 343, 46 N. W. 664; *Wheeler v. Catlin*, 44 Wis. 464; *Cogswell v. Colley*, 22 Wis. 399; *Pulling v. Columbia County*, 3 Wis. 337.
- [a] A statute prohibiting a judgment creditor from appealing from a judgment upon which he has received any money paid or collected, will also preclude a further prosecution of an appeal taken before such payment or collection is made. *Clark v. Wright*, 67 Ind. 224.
- [b] Acceptance for one creditor, of proceeds of a sale, by a trustee, does not waive his right to appeal on behalf of other creditors for whom he is also trustee. *Stanrod & Co. v. Utah Im-*

less than the amount of the judgment appealed from.<sup>70</sup>

plement-Vehicle Co., 223 Fed. 517, 139 C. C. A. 65.

[c] **Where a creditor coerces payment** of his judgment and then appeals his appeal will be dismissed on motion of defendant. *Shannon v. Mower*, 186 Ala. 472, 65 So. 338, *citing* *Smith v. Patton*, 128 Ala. 611, 30 So. 582; *Shingler v. Martin*, 54 Ala. 354; *Knox's Distributees v. Steele*, 18 Ala. 518, 54 Am. Dec. 181; *Beard v. Hosier*, 58 Ind. App. 14, 107 N. E. 558.

70. **U. S.**—*Carson Lumber Co. v. St. Louis & S. F. R. Co.*, 209 Fed. 191,

126 C. C. A. 139, *affirming* 198 Fed. 311. **Ala.**—*McCreeliss v. Hinkle*, 17 Ala. 459. **Ia.**—*Upton Mfg. Co. v. Huiske*, 69 Iowa 557, 29 N. W. 621, *distinguishing* *Independent Dist. v. Dist. Tp.*, 44 Iowa 201. **Miss.**—*Currie v. Benette*, 108 Miss. 854, 67 So. 484. **N. Y.** *Mellen v. Mellen*, 137 N. Y. 606, 33 N. E. 545; *Higbie v. Westlake*, 14 N. Y. 281. **N. D.**—*Tyler v. Shea*, 4 N. D. 377, 61 N. W. 468, 50 Am. St. Rep. 660. **Ore.**—*Brawand v. Home Installment Co.*, 75 Ore. 478, 147 Pac. 391.

# JUDICIAL NOTICE

By the Editorial Staff.

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## CROSS-REFERENCES:

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As to the nature of judicial notice, the matters noticed, its effect, etc., see 7 ENCY. OF EV. 867, et seq.

For further references and cross-references, see the index to this work.

**I. NECESSITY OF PLEADING MATTERS JUDICIALLY NOTICED.**—The rule, as frequently stated, is that it is unnecessary to allege in a pleading facts of which the court will take judicial notice.<sup>1</sup>

1. **U. S.**—United States *v.* Reynes, 9 604, 80 Pac. 1031, 69 L. R. A. 556; How. 127, 147, 13 L. ed. 74; *In re* De Baker *v.* Southern Cal. Ry. Co., 106 Osborne, 115 Fed. 1, 52 C. C. A. 595; Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237; Rogers *v.* Cady, 104 Cal. 288, 38 140 Fed. 75. See Jones *v.* United Pac. 81, 43 Am. St. Rep. 100; Cole *v.* Se-States, 137 U. S. 202, 214, 11 Sup. Ct. graves, 88 Cal. 103, 25 Pac. 1109; 80, 34 L. ed. 691. **Ala.**—Alabama Great Faekler *v.* Wright, 86 Cal. 210, 24 Southern R. Co. *v.* Cardwell, 171 Ala. Pac. 996. **Conn.**—Tweedy *v.* Jarvis, 27 274, 55 So. 185. See Bowling *v.* Mo-Conn. 42. **Fla.**—City of Miami *v.* hile & M. Ry. Co., 128 Ala. 550, 29 Miami Realty Loan & Guaranty Co., 57 So. 584. **Ark.**—St. Louis, I. M. & S. Fla. 366, 49 So. 55. **Ill.**—Goodman *v.* Ry. Co. *v.* State, 68 Ark. 561, 60 S. W. People, 228 Ill. 154, 81 N. E. 830; 654. **Cal.**—French *v.* Senate, 146 Cal. Gunning *v.* People, 189 Ill. 165, 59

This rule is equally applicable to civil actions,<sup>2</sup> criminal prosecutions,<sup>3</sup> suits in equity,<sup>4</sup> and special proceedings.<sup>5</sup> In some jurisdictions, the rule has been incorporated in the statutes.<sup>6</sup> But judicial notice cannot

N. E. 494, 82 Am. St. Rep. 433. **Ind.** State *v. Downs*, 148 Ind. 324, 47 N. E. 670; *Miller v. Miller*, 55 Ind. App. 644, 104 N. E. 588; *Princeton Coal Min. Co. v. Howell*, 46 Ind. App. 572, 92 N. E. 122; *Thorntown v. Fugate*, 21 Ind. App. 537, 52 N. E. 763. **Ia.**—*Clough v. Goggins*, 40 Iowa 325. **Kan.**—*West v. Columbus*, 20 Kan. 633; *Solomon v. Hughes*, 24 Kan. 211; *Ellis v. Reddin*, 12 Kan. 306; *Garfield Twp. v. Dods-worth*, 9 Kan. App. 752, 58 Pac. 565. **Ky.**—*Strode v. Strode*, 3 Bush 227, 96 Am. Dec. 211; *Pedigo v. Com.*, 24 Ky. L. Rep. 1029, 70 S. W. 659. **Mass.** *Cronan v. Woburn*, 185 Mass. 91, 70 N. E. 38; *Read v. Chelmsford*, 16 Pick. 128. **Mich.**—*People v. Mahaney*, 13 Mich. 481, 491. **Minn.**—*Peterson v. Cokato*, 84 Minn. 205, 87 N. W. 615. **Mo.**—*Sessinghaus Milling Co. v. Hane-brink*, 247 Mo. 212, 152 S. W. 354; *Jackson v. Kansas City, Ft. S. & M. R. Co.*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; *Barth v. Kansas City El. Ry. Co.*, 142 Mo. 535, 44 S. W. 778; *Brookfield v. Tooev*, 141 Mo. 619, 43 S. W. 387; *Garth v. Caldwell*, 72 Mo. 622; *Shackleford v. City of Jefferson*, 167 Mo. App. 59, 150 S. W. 1123; *Camp v. Wabash Ry. Co.*, 94 Mo. App. 272, 68 S. W. 96; *Savannah v. Dickey*, 33 Mo. App. 522. **Neb.**—*George v. State*, 59 Neb. 163, 80 N. W. 486. **N. Y.**—*Viemeister v. White*, 179 N. Y. 235, 72 N. E. 97, 103 Am. St. Rep. 859, 70 L. R. A. 796; *Goelet v. Cow-drey*, 1 Duer 132; *Long Sault Dev. Co. v. Kennedy*, 158 App. Div. 398, 143 N. Y. Supp. 454; *Shepherd v. Shepherd*, 51 Misc. 418, 100 N. Y. Supp. 401. **Okl.**—*Carroll v. Durant Nat. Bank*, 38 Okla. 267, 133 Pac. 179; *Barnes v. American Soda Fountain Co.*, 32 Okla. 81, 121 Pac. 250. **Ore.**—*Howe v. Kern*, 63 Ore. 487, 125 Pac. 834, 128 Pac. 818; *Parkersville Drainage Dist. v. Wattier*, 48 Ore. 332, 86 Pac. 775; *Strat-ton v. Oregon City*, 35 Ore. 409, 60 Pac. 905. **Phil. Isl.**—*Marzon v. Udtu-jaan*, 20 Phil. Isl. 232. **S. C.**—*Parker v. Carolina Sav. Bank*, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888. **S. D.**—*Dirks Trust & Title Co. v. Koch*, 32 S. D. 551, 143 N. W. 952. **Tenn.** *Pugh v. State*, 2 Head 227. **Tex.**—See

*Sanchez v. State*, 39 Tex. Crim. 389, 46 S. W. 249. **Vt.**—*Atherton v. Village of Essex Junction*, 83 Vt. 218, 74 Atl. 1118; *Clement v. Graham*, 78 Vt. 290, 63 Atl. 146; *Page v. McClure*, 73 Vt. 83, 64 Atl. 451. **Va.**—*Satterfield v. Com.*, 105 Va. 867, 52 S. E. 979; *Dun-can v. Lynchburg (Va.)*, 34 S. E. 964, 48 L. R. A. 331. **Wash.**—*Green v. Tid-ball*, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879. **Wis.**—*Gray v. Chicago & N. W. Ry. Co.*, 153 Wis. 637, 142 N. W. 505; *John O'Brien Lumber Co. v. Wil-kinson*, 123 Wis. 272, 101 N. W. 1050; *Dureh v. Chippewa*, 60 Wis. 227, 19 N. W. 79.

See 7 ENCY. OF EV. 1033.

[a] **Rule Is Universal.**—"Such is the rule both at common law and under the code." *Stratton v. Oregon City*, 35 Ore. 409, 60 Pac. 905.

[b] **Domestic statute**, which is the basis of the action, need not be pleaded at length. *Ervin v. State*, 150 Ind. 332, 48 N. E. 249; *Swing v. Karges Furni-ture Co.*, 150 Mo. App. 574, 131 S. W. 153. See generally the title "Stat-utes."

2. See cases cited in preceding note.

3. See 12 STANDARD PROC. 347, et seq., and *State v. Downs*, 148 Ind. 324, 47 N. E. 670; *Satterfield v. Com.*, 105 Va. 867, 52 S. E. 979.

4. *Secrist v. Petty*, 109 Ill. 188; *Todtenhausen v. Knox County*, 132 Tenn. 169, 177 S. W. 487.

5. **Cal.**—*French v. Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, man-damus. **Mich.**—*People v. Mahaney*, 13 Mich. 481, 491, quo warranto. **N. Y.** *Viemeister v. White*, 179 N. Y. 235, 72 N. E. 97, 103 Am. St. Rep. 859, 70 L. R. A. 796, mandamus. **Vt.**—*Page v. McClure*, 73 Vt. 83, 64 Atl. 451, man-damus.

[a] **A schedule in bankruptcy pro-ceedings** falls within the general rule. *In re Chope*, 112 Cal. 630, 44 Pac. 1066.

6. See generally the statutes, and the following: **Ark.**—*St. Louis, I. M. & S. Ry. Co. v. State*, 68 Ark. 561, 60 S. W. 654. **Ind.**—*Thorntown v. Fugate*, 21 Ind. App. 537, 52 N. E. 763. **Ia.** *Clough v. Goggins*, 40 Iowa 325. **Kan.** *Fort Leavenworth R. R. Co. v. Lowe*,

be resorted to to raise controversies not presented by the record.<sup>7</sup>

**II. EFFECT OF ALLEGATION AS TO FACTS JUDICIALLY NOTICED.**—An allegation as to a fact which the court is bound to notice judicially does not vitiate the pleading; but the allegation is properly treated as surplusage and may be stricken out on motion on the ground of redundancy.<sup>8</sup> Such an allegation does not control or limit the power of courts to take judicial notice of facts even though the notice thus taken is directly contrary to the allegation.<sup>9</sup>

**On Demurrer.**—While ordinarily when a demurrer is interposed to a pleading all the facts stated in that pleading are to be taken as true,<sup>10</sup> this principle is subject to the exception that allegations which are contrary to facts which will be judicially noticed, are not admitted by the demurrer.<sup>11</sup>

27 Kan. 749, 756; *Smith v. Emporia*, 27 Kan. 528; *Ellis v. Reddin*, 12 Kan. 306. **Ky.**—*Pedigo v. Com.*, 24 Ky. L. Rep. 1029, 70 S. W. 659. **Mo.**—*Barth v. Kansas City El. Ry. Co.*, 142 Mo. 535, 44 S. W. 778; *Garth v. Caldwell*, 72 Mo. 622; *Camp v. Wabash Ry. Co.*, 94 Mo. App. 272, 68 S. W. 96. **Phil. Isl.** *Marzon v. Udtujan*, 20 Phil. Isl. 232.

7. *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 23 Sup. Ct. 375, 47 L. ed. 480, 63 L. R. A. 33, hence not to show that a federal question not raised below, was involved. See also *Mountain View Min., etc. Co. v. McFadden*, 180 U. S. 533, 21 Sup. Ct. 488, 45 L. ed. 656, not to show a federal controversy, dependent upon facts not alleged.

[a] Judicial notice "must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them." *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 22 Sup. Ct. 47, 46 L. ed. 144, quoting *Thayer's Prelim. Treatise on Ev.*, ch. 7, p. 281.

8. **Kan.**—*Fort Leavenworth R. R. Co. v. Lowe*, 27 Kan. 749, "the statement amounts to nothing." **N. Y.** *Goelet v. Cowdrey*, 1 Duer 132. **Ore.** *Parkerville Drainage Dist. v. Wattier*, 48 Ore. 332, 86 Pac. 775. **Wis.**—*Durch v. Chippewa*, 60 Wis. 227, 19 N. W. 79, a case involving pleading a municipal charter.

But see *In re Osborne*, 115 Fed. 1, 52 C. C. A. 595.

9. *Jones v. United States*, 137 U. S. 202, 214, 11 Sup. Ct. 80, 34 L. ed. 691. See **U. S.**—*Texas & Pac. R. Co. v. Cody*,

166 U. S. 606, 609, 17 Sup. Ct. 703, 41 L. ed. 1132. **N. Y.**—*People v. Breese*, 7 Cow. 429. **Ore.**—*State v. Portland General Electric Co.*, 52 Ore. 502, 95 Pac. 722, 729, 98 Pac. 160. **Wis.**—*Huey v. Van Wie*, 23 Wis. 613.

See 7 ENCY. OF EV. 863.

10. See generally 6 STANDARD PROC. 943, et seq.

11. **U. S.**—*Pearcy v. Stranahan*, 205 U. S. 257, 27 Sup. Ct. 545, 51 L. ed. 793; *Ross v. City of Ft. Wayne*, 63 Fed. 466, 11 C. C. A. 288; *Southern Pac. R. Co. v. Groeck*, 68 Fed. 609. *Compare Griffing v. Gibb*, 2 Black 519, 17 L. ed. 353. **Cal.**—*French v. Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556; *Mullan v. State*, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262; *Ohm v. San Francisco*, 92 Cal. 437, 28 Pac. 580. **Ga.** *Southern R. Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219, 62 Am. St. Rep. 312, 40 L. R. A. 253; *Rome Ry. & L. Co. v. Keel*, 3 Ga. App. 769, 60 S. E. 468. **Ia.**—*Cooke v. Tallman*, 40 Iowa 133. **N. Y.**—*Chapman v. Wilber*, 6 Hill 475. **Tenn.**—*Todtenhausen v. Knox County*, 132 Tenn. 169, 177 S. W. 487. **Eng.** *Taylor v. Barclay*, 2 Sim. 213, 221, 57 Eng. Reprint 769.

But see *Tutwiler Coal, Coke & Iron Co. v. Farrington*, 144 Ala. 157, 39 So. 898; *State v. Norcross*, 132 Wis. 534, 112 N. W. 40, wherein the court refused, in the face of a direct averment of the navigability of a certain stream, to take judicial notice that it was non-navigable for any public purpose, or any kind of navigation, though conceding that for some purposes it was to be treated as a non-navigable stream.

[a] Rule Discussed.—"It is con-

### III. IN AID OF COMPLAINT OTHERWISE UNCERTAIN.

A complaint which is indefinite and uncertain in its statement of the facts may be aided to the extent to which judicial notice can be taken of material facts, at least where only a general demurrer has been interposed.<sup>12</sup>

**IV. INSTRUCTIONS AS TO MATTERS JUDICIALLY NOTICED.**<sup>13</sup> — Whenever the knowledge of the court is evidence of a fact, the court should declare such knowledge to the jury by way of an instruction, and the jury is bound to regard such fact as established in the case.<sup>14</sup> But where the sole or controlling facts in a case are established by a resort to the judicial knowledge of the court, a pure question of law remains and the case should not be submitted to the jury.<sup>15</sup>

**V. MATTERS JUDICIALLY NOTICED AS PART OF BILL OF EXCEPTIONS.** — Matters of which the court takes judicial notice, while not formally introduced in evidence, are properly incorporated into a bill of exceptions.<sup>16</sup>

tended on the part of the appellant that the superior court erred in holding that it could look beyond the face of the complaint in ruling upon the demurrer; that the doctrine of judicial notice is only a rule of evidence, and cannot be applied to the construction of a pleading; that a demurrer admits the truth of every fact that is well pleaded, and that a fact may be well pleaded notwithstanding the existence of a valid law establishing conclusively the direct reverse of the matter alleged. We do not think that these propositions are sustainable either upon reason or authority. The allegation of a sound conclusion of law is always regarded as superfluous in pleading, and the allegation of an unsound conclusion is entirely disregarded. . . . Why should a general demurrer to a complaint be overruled and the parties required to proceed to the trial of an issue of fact, when the court, looking to a law of which it is bound to take notice, can clearly see that one of the essential allegations of the complaint can never by any legal possibility be proved? What useful or desirable end could be attained by shutting its eyes to the certain event of the litigation, and putting the parties to the trouble, delay, and expense of framing and preparing to try issues which can have no influence upon the final result? These questions answer themselves and make it entirely clear that there are no considerations of expediency or con-

venience to support the contention of appellant." *People v. Oakland Water Front Co.*, 118 Cal. 234, 50 Pac. 305.

12. *Ark.*—*Harvey v. Douglass*, 73 Ark. 221, 83 S. W. 946, description of land in ejectment thus made certain. *Cal.*—*De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257, 39 Pac. 610, 46 Am. St. Rep. 237. *Ore.*—*Peterson v. Standard Oil Co.*, 55 Ore. 511, 106 Pac. 337. See *supra*, I.

13. As to instructions generally, see the title "Instructions."

14. *Ala.*—*Mobile & B. R. Co. v. Ladd*, 92 Ala. 287, 9 So. 169. *Me.*—See *State v. Wagner*, 61 Me. 178. *Tenn.* *Cash v. State*, 10 Humph. 111.

[a] **Rule Stated.**—"Facts of which the court takes notice may be embraced in instructions to the jury, without invading the province of that body." *City of Topeka v. Zufall*, 40 Kan. 47, 19 Pac. 359, 1 L. R. A. 387.

[b] **Basis of the Rule.**—"It is elemental that any facts which are generally known and accepted, and of which courts take judicial knowledge, are part of the case as facts, and the court may instruct upon them to the same extent as upon other facts." *Spiking v. Consolidated Ry. & Power Co.*, 33 Utah 313, 93 Pac. 838.

15. *State v. Main*, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623.

16. *State v. Scott*, 59 Neb. 499, 81 N. W. 305.

**VI. JUDICIAL NOTICE BY APPELLATE COURTS.**—An appellate court may take judicial notice of facts which the lower court failed to recognize;<sup>17</sup> but where no suggestion of the fact was made in the lower court, whose attention was not called to it, the appellate courts sometimes refuse to consider it.<sup>18</sup> Facts which could not have been judicially noticed by the lower court will not ordinarily be noticed on appeal,<sup>19</sup> but matters of public interest occurring while an appeal is pending and affecting the case, may be judicially noticed.<sup>20</sup>

**17. U. S.**—*De Bearn v. Safe Deposit & Trust Co.*, 233 U. S. 24, 34 Sup. Ct. 584, 58 L. ed. 833; *Pennington v. Gibson*, 16 How. 65, 14 L. ed. 847. **Cal.** *Rogers v. Cady*, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100. **Utah.**—*Salt Lake City v. Robinson*, 39 Utah 260, 116 Pac. 442, Ann. Cas. 1913E, 61, 35 L. R. A. (N. S.) 610.

And see 7 ENCY. OF EV. 882.

**18. Md.**—*Line v. Line*, 119 Md. 403, 86 Atl. 1032, Ann. Cas. 1914D, 192. **N. Y.**—*North Hempstead v. Gregory*, 53 App. Div. 350, 65 N. Y. Supp. 867; *Walton v. Stafford*, 14 App. Div. 310, 43 N. Y. Supp. 1049, 4 N. Y. Ann. Cas. 114. **N. D.**—*Amundson v. Wilson*, 11 N. D. 193, 91 N. W. 37. **Vt.**—*McKane v. Gordon*, 85 Vt. 253, 81 Atl. 637.

**19. Yates v. Milwaukee**, 10 Wall. (U. S.) 497, 19 L. ed. 984; *Woodson v. Metropolitan St. R. Co.*, 224 Mo.

685, 123 S. W. 820, 20 Ann. Cas. 1039, 30 L. R. A. (N. S.) 931.

**20. United States v. Schooner Peggy**, 1 Cranch (U. S.) 103, 2 L. ed. 49 (the enactment of a treaty); *Vance v. Rankin*, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173.

[a] A formal supplemental plea setting up the repeal of a statute under which a case was being prosecuted, need not be filed, as judicial notice of the repeal will be taken. *Vance v. Rankin*, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173.

[b] A court must decide according to existing laws "and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *United States v. Schooner Peggy*, 1 Cranch (U. S.) 103, 2 L. ed. 49.

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### CROSS-REFERENCES:

Courts;	Transfer of Causes;
Justices of the Peace;	References;
Officers;	Trial.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. DEFINITIONS.** — The term “judicial officers” includes justices of all courts as well as all persons exercising judicial powers by virtue of their office.<sup>1</sup>

A judge “at chambers” is a judge sitting out of court for the transaction of such judicial business as is not required to be done in open court.<sup>2</sup> Whenever a judge is presiding in a court other than

1. *Settle v. Van Evrea*, 49 N. Y. 280.

[a] **Distinction Between Judicial and Ministerial Acts.**—(1) “The distinction between ministerial and judicial and other official acts seems to be that where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial.” *Commissioner v. Smith*, 5 Fed. 471. (2) And a “purely ministerial duty is one as to which

nothing is left to discretion. Judicial acts involve the exercise of discretionary power or judgment. Judicial acts are not confined to the jurisdiction of judges.” *City of Biddeford v. Yates*, 104 Me. 506, 72 Atl. 335. See also to the same effect: *Ala.*—*Rainey v. Ridgeway*, 151 Ala. 532, 43 So. 843; *State v. Jenks*, 138 Ala. 115, 35 So. 60. *Cal.*—*People v. Wells*, 2 Cal. 198. *Ind.*—*Jaqua v. Harkins*, 40 Ind. App. 639, 82 N. E. 920. *Mo.*—*State v. Goodier*, 195 Mo. 551, 93 S. W. 928. *S. C.*—*Morton v. Comptroller*, 4 S. C. 430. *Tex.*—*Burnam v. Terrell*, 97 Tex. 309, 78 S. W. 500.

2. *U. S.*—*In re Neagle*, 39 Fed. 833, 5 L. R. A. 78. *Cal.*—*Von Schmidt v.*

the one to which he is regularly assigned he is a judge pro tempore of that court.<sup>3</sup> A special judge or judge pro hac vice is a member of the bar selected to preside at the trial of cases in which the regular judge is unable or disqualified to act,<sup>4</sup> while one who exercises judicial functions under color of right is a judge de facto.<sup>5</sup>

Widber, 99 Cal. 511, 34 Pac. 109. **Colo.** Kirby v. Chicago, R. I. & P. Ry. Co., 51 Colo. 82, 116 Pac. 150. **Ohio.**—Pittsburg, Ft. W. & C. R. Co. v. Hurd, 17 Ohio St. 144. **Wis.**—Whereatt v. Ellis, 65 Wis. 639, 27 N. W. 630, 28 N. W. 333.

[a] "The term 'chambers' means the private room or office of a judge, where, for the convenience of parties, he hears such matters and transacts such business as a judge in vacation is authorized to hear, and which do not require a hearing by the judge sitting as a court. The chambers of a judge are not an element of jurisdiction but of convenience. For the purposes of jurisdiction, the chambers of a judge are wherever he is found within his district, and any business he is authorized to do as a judge in vacation is chamber business." Hoskins v. Baxter, 64 Minn. 226, 66 N. W. 969.

[b] "Expressions such as 'in the judge's chambers,' 'at his chambers,' and the like, have sometimes been construed in the light of general provisions of statutes or constitutions in which they occurred, and the legislative or constitutional intent has been the main point to be arrived at, rather than the exact meaning of the expression 'at chambers' taken alone as characteristic of a certain kind of procedure. Generally the question as to whether a proceeding was at chambers or was a part of the exercise of the jurisdiction of the court as such has arisen in this state in cases where the action complained of took place in vacation. But we cannot declare, as matter of law, that everything which a judge does between the opening of his session of court and its close is essentially a court procedure rather than one at chambers. In some counties the terms of court last for several months at a time. While the term is still continuing the judge may pass orders in the exercise of his powers at chambers. The distinction between the two kinds of acts on the part of the judge is not limited to the mere question of

whether they are done between the general commencement of a term of court and its close, or in vacation. . . . It not infrequently happens that while a judge is holding a term of court in one county of his circuit, applications for temporary injunctions, restraining orders, the appointment of receivers, and the like, in other counties are presented to him and acted upon by him. But such action does not become a part of the proceedings of the court then pending." Morehead v. Allen, 131 Ga. 807, 63 S. E. 507.

For definition of the term "vacation," see 6 STANDARD PROC. 44.

3. Cox v. State, 30 Kan. 202, 2 Pac. 155; In re Millington, 24 Kan. 214; Dobbs v. State, 5 Okla. Crim. 475, 114 Pac. 358, 115 Pac. 370.

4. Ga.—Henderson v. Pope, 39 Ga. 361. La.—State v. Judges First Dist. Ct., 35 La. Ann. 1007. Tex.—Porter v. State, 48 Tex. Crim. 125, 86 S. W. 767.

5. U. S.—McDowell v. United States, 159 U. S. 596, 16 Sup. Ct. 111, 40 L. ed. 271; United States v. Alexander, 46 Fed. 728; In re Ah Lee, 5 Fed. 899. Cal.—People v. Rosborough, 14 Cal. 180. Conn.—Brown v. O'Connell, 36 Conn. 432, 4 Am. Rep. 89. Me.—Woodside v. Wagg, 71 Me. 207. Minn.—Carli v. Rhener, 27 Minn. 292, 7 N. W. 139. N. C.—State v. Turner, 119 N. C. 841, 25 S. E. 810. Pa.—Campbell v. Com., 96 Pa. 344.

[a] "An officer de facto is one who exercises the duties of an office under color of an appointment or election to that office. He differs, on the one hand, from a mere usurper of an office who undertakes to act as an officer without any color of right; and, on the other, from an officer de jure who is in all respects legally appointed and qualified to exercise the office." Plymouth v. Painter, 17 Conn. 585, 44 Am. Dec. 574.

[b] Every person "assuming to exercise the authority of an officer does not thereby necessarily make himself an officer de facto. But when it appears that the person exercising the

The term "court commissioners" as used in this article refers to those judicial officers only who are permanently attached to the various courts.<sup>6</sup>

**II. POWERS OF JUDGES AT CHAMBERS AND IN VACATION.**—A. **GENERALLY.**—It is a fundamental principle of law that judges can exercise judicial functions only at such times and places as are designated by law.<sup>7</sup> Hence, judges at chambers<sup>8</sup> and in

powers of an office, is in by such a color of right, and that he has such possession of the office as makes him in law an officer de facto, then his acts . . . are valid." *In re Boyle*, 9 Wis. 264.

6. A "court commissioner is a subordinate and assistant to the circuit court rather than an independent judicial officer." *In re Burger*, 39 Mich. 203.

[a] He acts, however, "as an independent judicial officer and not as a referee in the cause itself." *Heyn v. Farrar*, 36 Mich. 253.

7. **Cal.**—*Larco v. Casaneuava*, 30 Cal. 560; *Wicks v. Ludwig*, 9 Cal. 173. **Colo.**—*Kirby v. Chicago, R. I. & P. Ry. Co.*, 51 Colo. 82, 116 Pac. 150; *Filley v. Cody*, 4 Colo. 109. **Idaho.**—*Delano v. Logan*, 4 Idaho 83, 35 Pac. 841. **Ill.** *Devine v. People*, 100 Ill. 290; *Blair v. Reading*, 99 Ill. 600; *Keith v. Kellogg*, 97 Ill. 147. **Ind.**—*Pressley v. Harrison*, 102 Ind. 14, 1 N. E. 188; *Newman v. Hammond*, 46 Ind. 119. **Ia.**—*Prosser v. Prosser*, 64 Iowa 378, 20 N. W. 480. **Mo.**—*State v. Rombauer*, 104 Mo. 619, 15 S. W. 850, 16 S. W. 502. **Neb.**—*Johnson v. Bouton*, 56 Neb. 626, 77 N. W. 57; *Fisk v. Thorp*, 51 Neb. 1, 70 N. W. 498; *Browne v. Edwards & M. Lumber Co.*, 44 Neb. 361, 62 N. W. 1070; *Ellis v. Karl*, 7 Neb. 381. **Nev.**—*State v. Atherton*, 19 Nev. 332, 10 Pac. 901. **N. Y.**—*Bangs v. Selden*, 13 How. Pr. 374. **Ohio.**—*Pittsburg, etc. R. Co. v. Hurd*, 17 Ohio St. 144. **S. C.**—*Grierison v. Harmon*, 16 S. C. 618. **Va.** *Tyson's Exrs. v. Glaize*, 23 Gratt (64 Va.) 799. **Wash. Ter.**—*Suffern v. Chisholm*, 1 Wash. Ter. 486.

[a] A judge as an individual has no power to hear and determine any matter involving the exercise of judicial power. *United States Life Ins. Co. v. Shattuck*, 159 Ill. 610, 43 N. E. 389.

[b] He constitutes a court (1) only when performing the functions of a

court at the time and place fixed by the law. *Eichoff v. Caldwell* (Okla.), 151 Pac. 860. (2) Although a judge is often called the "court," yet "he is only so rightly called when the tribunal over which he presides is in session." *State v. Woodson*, 161 Mo. 444, 61 S. W. 252.

*S. Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *Norwood v. Kenfield*, 34 Cal. 329; *Johnson v. Bouton*, 56 Neb. 626, 77 N. W. 57.

[a] "The legislature has, in numerous instances, conferred upon the judges certain powers which ordinarily can be only exercised by a court. In fact we may state the general rule to be that in actions at law, powers given to the court cannot be exercised by a judge at chambers, and that a judge at chambers can exercise no powers unless conferred by statute." *Suffern v. Chisholm*, 1 Wash. Ter. 486.

[b] In the absence of a constitutional restriction of the legislative power in that regard the legislature may confer the powers of a judge of a court of general jurisdiction at chambers on a judge of an inferior court.

[c] **Setting Aside Stipulation.** Where the parties stipulate to dismiss an action, a judge at chambers has no power to set aside such stipulation. *Rogers v. Greenwood*, 14 Minn. 333.

[d] The power to hear a motion at chambers necessarily includes the power to render a decision thereon. *Witherspoon v. Van Dolar*, 15 How. Pr. (N. Y.) 266; *Guignard v. First Baptist Church*, 80 S. C. 491, 61 S. E. 1003.

[e] In Hawaii a distinction is made between the powers of a judge and that of a court at chambers, the latter under the statute having independent jurisdiction in equity and probate matters and the powers of the former being limited to matters incidental or ancillary to causes pending in the

vacation<sup>9</sup> ordinarily possess only such powers as are expressly given to them by the statute.

A statute defining the power of a judge at chambers and in vacation must be strictly construed, and, where the statute confers a judicial authority upon the court as contradistinguished from a judge thereof, such authority can be exercised by a judge only while sitting as a court.<sup>10</sup> The statute, however, must be construed in accordance with its express language, and where a statute conferring upon judges the power to act at chambers and in vacation is devoid of any limitations, none will be implied.<sup>11</sup> Thus, it has been held that where a judge out

court. *Carter v. Second Judge*, 16 Hawaii 242.

9. **Ala.**—*Ex parte Branch & Co.*, 63 Ala. 383. **Cal.**—*Wicks v. Ludwig*, 9 Cal. 173. **Colo.**—*Filley v. Cody*, 4 Colo. 109. **Ga.**—*Tucker v. Huson*, etc. Works, 142 Ga. 83, 82 S. E. 496; *Gullatt v. Thrasher*, 42 Ga. 429. **Idaho.**—*Delano v. Logan*, 4 Idaho 83, 35 Pac. 841. **Ill.**—*Conkling v. Ridgely*, 112 Ill. 36, 1 N. E. 261, 54 Am. Rep. 204; *Devine v. People*, 100 Ill. 290; *Nevitt v. Woodburn*, 45 Ill. App. 417. **Ind.**—*Pressley v. Harrison*, 102 Ind. 14, 1 N. E. 188; *Newman v. Hammond*, 46 Ind. 119; *Ferger v. Wesler*, 35 Ind. 53. **Me.**—*Powers v. Mitchell*, 75 Me. 364. **Mo.**—*State v. Woodson*, 161 Mo. 444, 61 S. W. 252; *State v. Eggers*, 152 Mo. 485, 54 S. W. 498. **Neb.**—*Nebraska C. H. Soc. v. State*, 57 Neb. 765, 78 N. W. 267; *Fisk v. Thorp*, 51 Neb. 1, 70 N. W. 498. **Nev.**—*State v. Atherton*, 19 Nev. 332, 10 Pac. 901. **N. C.**—*Bynum v. Powe*, 97 N. C. 374, 2 S. E. 170. **Ore.**—*Cresap v. Gray*, 10 Ore. 345; *State v. McKinnon*, 8 Ore. 487. **Va.**—*Chase v. Miller*, 88 Va. 791, 14 S. E. 545; *Tyson's Exrs. v. Glaize*, 23 Gratt. (64 Va.) 799; *President v. Hodgson*, 2 Hen. & M. (12 Va.) 557.

[a] When a law authorizes the doing of a judicial act it means that the court in term time may do it and the judge in vacation cannot, unless the power is expressly conferred upon him. *Ferger v. Wesler*, 35 Ind. 53.

[b] "A judge of the supreme court, like any other officer, when acting out of court, is an officer of limited jurisdiction. He may do just what the legislature has authorized him to do, and whatever he does more than this, is done without jurisdiction." *Bangs v. Selden*, 13 How. Pr. (N. Y.) 374.

[c] Rules of the court cannot be

modified or rescinded by a judge in vacation. *Treishel v. McGill*, 28 Ill. App. 68.

10. **Ark.**—See *Sanders v. Plunkett*, 40 Ark. 507. **Idaho.**—*Delano v. Logan*, 4 Idaho 83, 35 Pac. 841. **Ill.**—*Pardridge v. Morgenthau*, 157 Ill. 395, 42 N. E. 74; *Terre Haute, etc. R. Co. v. Bond*, 13 Ill. App. 328. **Ind.**—*Ferger v. Wesler*, 35 Ind. 53. **Mich.**—*Toledo, etc. Ry. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271. **Mo.**—*State v. Woodson*, 161 Mo. 444, 61 S. W. 252. **Neb.**—*Fisk v. Thorp*, 51 Neb. 1, 70 N. W. 498. **N. J.**—*Chadwick v. Reeder*, 19 N. J. L. 156. **N. Y.**—*Mann v. Tyler*, 6 How. Pr. 235. **Okla.**—*Eichoff v. Caldwell*, 151 Pac. 860. **Tex.**—*Hunton v. Nichols*, 55 Tex. 217. **Va.**—*Tyson's Exrs. v. Glaize*, 23 Gratt. (64 Va.) 799. **Wash. Ter.**—*Suffern v. Chisholm*, 1 Wash. Ter. 486.

[a] Court or Judge.—Where the statute reads the court "or judge" and not "or a judge" it refers exclusively to the judge before whom the matter is pending and does not mean any judge. *Merritt v. Slocum*, 6 How. Pr. (N. Y.) 350.

[b] Transferring Cause.—Where the statute provides for a transfer of a cause by a judge while holding a *nisi prius* term, a judge in vacation is not authorized to make an order transferring a cause to another county for trial. *Powers v. Mitchell*, 75 Me. 364.

11. *Delaney v. Brett*, 51 N. Y. 78; *Kennedy v. Simmons*, 1 Hun (N. Y.) 603.

[a] Where the power of a judge to grant an order to show cause out of court is not restricted by statute to cases which may be heard out of court, there is "no reason in policy or in the language of the statute for annexing such a limitation of his pow-

of court possessed certain powers under the common law, such powers are retained by him even though they are not expressly mentioned in the constitution.<sup>12</sup>

A statute providing that a judicial act may be done in vacation includes the power to perform such act at chambers,<sup>13</sup> and a power conferred by the statute upon a judge to hear a matter at chambers implies the power to do so anywhere within the territorial limits of the court.<sup>14</sup> A statute providing that a court shall always be open for the transaction of judicial business does neither enlarge nor abridge the power of judges to act at chambers or in vacation.<sup>15</sup>

Judges have no authority to transact chamber business outside of the geographical limits of the court of which they are members except in cases expressly provided by the statute.<sup>16</sup>

ers." *Matter of Argus Co.*, 138 N. Y. 557, 34 N. E. 388.

[b] Under a statute providing that each judge of a court in vacation shall have the same powers that he might exercise if he were the sole judge of such court, "while one division in special term cannot make an order affecting a case pending in another division, yet, in vacation, whatever order one judge can make another may make." *State ex rel. McCaffery v. Eggers* (Mo.), 54 S. W. 498.

12. *Wisconsin School v. Clark County*, 103 Wis. 651, 79 N. W. 422.

[a] **Common Law Powers Implied.** Courts of record are "courts proceeding according to the course of the common law. . . . And the judges of . . . courts take, under the constitution creating their offices, the powers of judges of such courts at the common law, including the powers commonly possessed by them at chambers, at the time of the adoption of the constitution." *In re Kindling*, 39 Wis. 35.

13. *Chicago & S. E. Ry. Co. v. St. Clair*, 144 Ind. 371, 42 N. E. 225.

14. U. S.—*Murphy v. Herring Safe Co.*, 184 Fed. 495; *In re Neagle*, 39 Fed. 833. Cal.—*Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109. Dak.—*Territory v. Shearer*, 2 Dak. 332, 8 N. W. 135. Ind.—*Chicago & S. E. Ry. Co. v. St. Clair*, 144 Ind. 371, 42 N. E. 225.

15. *Black Hills, etc. Co. v. Grand Island Co.*, 2 S. D. 546, 51 N. W. 342. See 6 STANDARD PROC. 44, 47.

[a] "While the legislature can provide for the continuous transaction of business of the superior courts of which

they have jurisdiction without regard to stated terms thereof except as 'to the trial of issues of fact requiring a jury' because they are always open, it is too well settled to admit of serious question, that it can prescribe . . . that civil actions, with certain exceptions, shall be brought to, proceeded in, tried and disposed of in term time only. . . . And . . . whenever the judge may take . . . action out of term time . . . his authority to do so is exceptional and is prescribed in terms, or by necessary implication. He cannot do so simply upon the ground that the courts are always open for the transaction of all business within their jurisdiction." *Bynam v. Powe*, 97 N. C. 374, 2 S. E. 170.

16. *Kirby v. Chicago, R. I. & P. Ry. Co.*, 51 Colo. 82, 116 Pac. 150.

[a] "Jurisdiction at chambers is incidental to, and grows out of the jurisdiction of the court itself. It is the power to hear and determine, out of court, such questions arising between the parties to a controversy, as might well be determined by the court itself, but which the legislature has seen fit to intrust to the judgment of a single judge, out of court, without requiring them to be brought before the court in actual session. It follows, that the jurisdiction of a judge at chambers can not go beyond the jurisdiction of the court to which he belongs, or extend to matters with which his court has nothing to do. And the constitution, in granting such jurisdiction at chambers to the judges of the several courts of the state as may be directed by law, is to be understood as limiting the jurisdiction of each to

**B. EFFECT OF STIPULATION.** — In some jurisdictions the parties may by stipulation confer upon judges at chambers and in vacation the power to act, although such power is not given to them by the statute;<sup>17</sup> and the parties having agreed to a hearing at chambers cannot raise any objection to the judge's authority to act in the matter,<sup>18</sup> even though the hearing took place outside of the county in which the

such subject matters as are within the jurisdiction of his proper court and to which it is, *ex vi termini* limited." *Pittsburg, etc. Ry. Co. v. Hurd*, 17 Ohio St. 144.

[b] When a judge passes the boundaries of the state the power to exercise judicial functions does not follow him and he cannot sit in chambers in another state and issue a valid restraining order. *Price v. Bayless*, 131 Ind. 437, 31 N. E. 88. *Compare infra*, III, A.

[c] But where the parties participate in the proceedings and fail to object upon the ground that the judge exceeded his territorial jurisdiction, they cannot raise such objection for the first time on appeal. *Horn v. Pere Marquette R. Co.*, 151 Fed. 626.

17. **Ala.**—*Shine v. Bolling*, 82 Ala. 415, 2 So. 533; *Erwin v. Reese*, 54 Ala. 589; *King v. Green*, 2 Stew. 133, 19 Am. Dec. 46. **Fla.**—*Livingston v. Webster*, 26 Fla. 325, 8 So. 442. **Ill.**—*Bruce v. Doolittle*, 81 Ill. 103. **Ia.**—*Clews v. Traer*, 57 Iowa 459, 10 N. W. 838; *O'Hagen v. O'Hagen*, 14 Iowa 264; *Hattenback v. Hoskins*, 12 Iowa 109. **Kan.**—*Rogers v. Traders' Nat. Bank*, 60 Kan. 855, 55 Pac. 463. **N. Y.**—*In re Wadley*, 29 Hun 12. **N. C.**—*Benbow v. Moore*, 114 N. C. 263, 19 S. E. 156; *Bynum v. Powe*, 97 N. C. 374, 2 S. E. 170. **Va.**—*Morriss v. Virginia Ins. Co.*, 85 Va. 588, 8 S. E. 383. **Wis.**—*Dinsmore v. Smith*, 17 Wis. 20; *Beach v. Beckwith*, 13 Wis. 21.

[a] An order of a judge adjourning court to the judge's chambers "for *ex parte* business only" does not preclude the judge from hearing at chambers contested motions presented by consent of the parties. *Matter of Wadley*, 29 Hun (N. Y.) 12.

[b] **Under Statute Allowing Reference.**—"The statute allows all issues to be referred on the written consent of the parties, and they may agree upon a suitable person to act as a referee . . . Now if the parties choose

to stipulate that the judge may act as referee, it is in substance the same as stipulating that he may try the case at chambers. And although there can be no doubt that the statute contemplates that some other person shall be chosen, and, though the judge could never appoint himself where the parties did not agree, yet if they choose expressly to stipulate that he may so act, we do not feel authorized to say that it is legally so impossible, that we can pronounce the judgment void by reason of it." *Dinsmore v. Smith*, 17 Wis. 20.

**Rendition of judgment in vacation by consent**, see 14 STANDARD PROC. 980.

18. **U. S.**—*United States v. Little Charles*, 1 Brock. 380, 26 Fed. Cas. No. 15,613. **Fla.**—*Livingston v. Webster*, 26 Fla. 325, 8 So. 442. **Kan.**—*Rogers v. Traders' Nat. Bank*, 60 Kan. 855, 55 Pac. 463. **Ore.**—*Roy v. Horsley*, 6 Ore. 382.

[a] A stipulation that a case may be tried before a judge at chambers with the same effect as though the trial had been before the court without a jury is valid and "a judgment entered in pursuance of such a stipulation, by parties to a suit actually pending in court, is to be regarded as though it had been actually entered on a trial before the court. The objection coming from one of the parties to such a stipulation, is certainly entitled to no favor. And nothing less than the absolute invalidity of the proceeding should furnish it any sanction. But there seems to be no valid reason why such a practice should not be pursued. It is not an attempt to confer jurisdiction by consent, upon a tribunal that has it not, but is simply the regulation of the mode of trial, by the parties, for their own convenience, and of the manner of entering the judgment in a court which has jurisdiction both of the parties and the subject matter." *Beach v. Beckwith*, 13 Wis. 21.

cause was pending.<sup>19</sup> But the judge can exercise only such judicial functions as clearly come within the terms of the stipulation.<sup>20</sup> In other jurisdictions, however, it is held that where the statute does not confer jurisdiction to act at chambers and in vacation, a stipulation of the parties attempting to give such jurisdiction is unavailing.<sup>21</sup>

C. GRANTING CHANGE OF VENUE. — In some jurisdictions a judge at chambers,<sup>22</sup> or in vacation,<sup>23</sup> has the power under the statute to grant a change of venue.

D. DETERMINATION OF MATTERS PERTAINING TO PLEADINGS. — 1. **Generally.** — A judge, out of court, generally is authorized to extend the time to plead.<sup>24</sup> Under some statutes a judge at chambers or in vacation may grant leave to amend a pleading,<sup>25</sup> otherwise such leave must be obtained in open court.<sup>26</sup> A judge may in some jurisdictions make an order in vacation permitting plaintiff to file a supplemental complaint,<sup>27</sup> or may at chambers, hear and determine a motion to strike out parts of a pleading.<sup>28</sup> But he cannot make an order in vacation to strike a pleading from the files.<sup>29</sup> Unless permitted by

19. *O'Hagen v. O'Hagen*, 14 Iowa 264.

20. *Patterson v. Hendrix*, 72 Ga. 204; *Blair v. Reading*, 99 Ill. 600.

21. *Cal.*—*Bates v. Gage*, 40 Cal. 183; *Wicks v. Ludwig*, 9 Cal. 173. *Colo.* *Francis v. Wells*, 4 Colo. 274; *Kirtley v. Marshall Silver Min. Co.*, 4 Colo. 111; *Fillee v. Cody*, 4 Colo. 109. *N. M.* *Staab v. Atlantic & P. R. Co.*, 3 N. M. 606, 9 Pac. 381.

See 14 STANDARD PROC. 981, note 64.

22. *Utsey v. Charleston S. & N. R. Co.*, 38 S. C. 399, 17 S. E. 141.

23. *Gibson v. Abbott*, 50 Iowa 155, only after issue joined.

[a] **Statute Excludes Authority Not Expressly Granted.**—A statute authorizing a judge to grant a change of venue while holding a term of court by implication negatives his right to do so in vacation. *Powers v. Mitchell*, 75 Me. 364.

24. See generally the title "Time To Plead."

[a] **Time to demur to a complaint** may be extended at chambers. *Davenport v. Sniffen*, 1 Barb. (N. Y.) 223; *Burrall v. Raineteaux*, 2 Paige (N. Y.) 321.

[b] **Time for filing a plea in abatement** may be extended at chambers. *Ross v. Hammond*, 5 N. Bruns. (Can.) 631.

25. *Hughes v. McCoy*, 11 Colo. 591, 19 Pac. 674.

26. See *Young v. Rollins*, 90 N. C. 134.

[a] **An application to withdraw a plea of release and substitute the plea of statute of limitations** cannot be granted at chambers but must be made in open court. *Fraser v. McLeod*, 1 Brev. (S. C.) 198.

[b] **Amending Bill of Particulars.** A judge at chambers has no power to allow an amendment to plaintiff's bill of particulars where the cause is at issue. *Fuller v. Roosevelt*, 4 Cow. (N. Y.) 144.

27. See *Edwards v. Edwards*, 14 S. C. 11, and the title "Supplemental Pleadings."

[a] "If the judges of the superior courts have authority to sanction original bills during vacation, it would seem to include, necessarily, the power of sanctioning a supplemental bill, which is in the nature of an amendment to the original. It must be understood, however, that it is done, with the right of exception to the opposite party." *Cook v. Walker*, 15 Ga. 457.

28. *Guignard v. First Baptist Church*, 80 S. C. 491, 61 S. E. 1003. *Contra*, *Larco v. Casaneuava*, 30 Cal. 560.

29. *People ex rel. Forby v. Sayrs*, 160 Ill. App. 243. See the title "Striking Out and Withdrawal."

[a] **Even though a petition is palpably without merit** a judge in vaca-

statute,<sup>30</sup> a judge at chambers has no authority to pass upon a demurrer.<sup>31</sup>

**2. Motion for Judgment on the Pleadings.**—While, as a rule, a motion for judgment on the pleadings must be made in open court and not at chambers,<sup>32</sup> there is authority apparently to the contrary.<sup>33</sup>

**E. NONSUIT AND DISMISSAL.**—A judge in vacation cannot enter a judgment of nonsuit except by consent of the parties.<sup>34</sup> Nor can a judge upon a demurrer dismiss an action in vacation.<sup>35</sup>

**F. TRIAL.—1. Generally.**—As a rule, a trial of a cause on the merits cannot be held at chambers or in vacation,<sup>36</sup> but in most juris-

tion has no "authority to strike it from the files of the court. It is unquestionably within the power of the judge to strike any proceeding from the files of the court when it is apparent that the same is not within the jurisdiction of his court; but this power to strike must be exercised at the time when the judge is authorized, under the law, to exercise the powers of a judge in reference to the case. He has no more power to strike the case from the files of the court in vacation than he would have to sustain a demurrer or a motion to dismiss; the effect and consequence of these proceedings being the same." *Ivey v. City of Rome*, 129 Ga. 286, 58 S. E. 852.

30. See 6 STANDARD PROC. 979.

[a] Only after the term at which the summons was returnable. *Johnson v. Cravey*, 120 Ga. 1047, 48 S. E. 424; *Murphy v. Tallulah Co.*, 72 Ga. 196.

31. *Price v. Grice*, 10 Idaho 443, 79 Pac. 387; *Champion v. Sessions*, 1 Nev. 478.

32. *Campbell Print. Press & Mfg. Co. v. Manhattan E. Ry. Co.*, 48 Fed. 344; *Champion v. Sessions*, 1 Nev. 478.

As to motions for judgment on pleadings generally, see 14 STANDARD PROC. 946, et seq.

[a] While a judge at chambers may adjudge a pleading frivolous, he cannot render a judgment on the pleadings out of court. *Badham v. Brabham*, 54 S. C. 400, 32 S. E. 444. But see *Clapp v. Preston*, 15 Wis. 543.

33. *Fales v. Hicks*, 12 How. Pr. (N. Y.) 153; *Aymar v. Chace*, 1 Code Rep. N. S. (N. Y.) 330, 12 Barb. 301. See *Witherspoon v. Van Dolar*, 15 How. Pr. (N. Y.) 266.

[a] The power to hear a motion for

judgment on the ground of frivolousness of an answer necessarily includes "the power to make such decision upon it as the court would make in term. . . . To hold otherwise seems . . . calculated . . . needlessly to increase the burden of the court by a double hearing. . . ." *Witherspoon v. Van Dolar*, 15 How. Pr. (N. Y.) 266.

34. *Bynum v. Powe*, 97 N. C. 374, 2 S. E. 170.

[a] A motion to dismiss an action involves "a decision of the merits of the bill, in other words a trial of the merits of the case as made by complainant, and should be heard only at term time; or in vacation by virtue of an order passed in term time, authorizing the hearing in vacation. *Solomon v. Peters*, 37 Ga. 251, 92 Am. Dec. 69.

35. *Ala.*—*Goodlett v. Kelly*, 74 Ala. 213; *Yonge v. Hooper*, 73 Ala. 119; *Stoudenmire v. De Bardelaben*, 72 Ala. 300; *Kingsbury v. Milner*, 69 Ala. 502. *Ga.*—*Ivey v. City of Rome*, 129 Ga. 286, 58 S. E. 852; *Johnson v. Cravey*, 120 Ga. 1047, 48 S. E. 424. *Ill.*—*Cain v. Wyoming*, 104 Ill. App. 538. *Neb.* *Johnson v. Bouton*, 56 Neb. 626, 77 N. W. 57; *Browne v. Edwards*, etc. Co., 44 Neb. 361, 62 N. W. 1070. *Tex.* *Price v. Bland*, 44 Tex. 145; *Coleman v. Goyne*, 37 Tex. 552; *Grant v. Chambers*, 34 Tex. 573.

[a] **Frivolous Demurrer.**—A judge at chambers may render judgment upon a frivolous demurrer. *Clapp v. Preston*, 15 Wis. 543. But see *Badham v. Brabham*, 54 S. C. 400, 32 S. E. 444.

As to dismissal of an injunction suit out of court, see *infra*, II, N. 1.

36. *Shold v. Van Treeck*, 82 Neb. 99, 117 N. W. 113; *Hornesby v. Burdell*, 9 S. C. 303. See generally the title "Trial."

dictions the parties may stipulate to a hearing in vacation,<sup>37</sup> though there is authority to the contrary.<sup>38</sup> Where the statute authorizes a judge in term to continue the hearing of a cause to a certain day in vacation, such order in reference to the cause so continued operates as a continuation of the term of the court.<sup>39</sup>

**2. Findings, Costs and Attorney's Fees.**—The time when findings may be made is discussed elsewhere in this work.<sup>40</sup> A judge out of court ordinarily has no authority to grant costs.<sup>41</sup> Nor can a motion to retax costs be heard out of court.<sup>42</sup> So too, attorney's fees cannot be allowed by a judge at chambers.<sup>43</sup>

**G. SUPERSEDEAS AND STAY OF PROCEEDINGS.**<sup>44</sup>—A judge at chambers or in vacation in some jurisdictions is empowered by statute to issue writs of supersedeas,<sup>45</sup> and to stay proceedings on a judgment

[a] **A statute conferring upon judges at chambers the power to try a cause is clearly unconstitutional.** *Risser v. Hoyt*, 53 Mich. 185, 18 N. W. 611.

[b] A judge at chambers cannot without notice order a party to turn over to the adverse party certain documents the right of possession to which involves a determination of the issues in the case. *Clark v. Pigeon Roost Min. Co.*, 29 Ga. 29.

**37. U. S.**—*Doggett v. Emerson*, 1 Woodb. & M. 1, 7 Fed. Cas. No. 3,961. **Ala.**—*Falley v. Falley*, 163 Ala. 626, 50 So. 894; *King v. Green*, 2 Stew. 133, 19 Am. Dec. 46. **Fla.**—*Livingston v. Webster*, 26 Fla. 325, 8 So. 442. **Ill.** *Bruce v. Doolittle*, 81 Ill. 103. **Ia.** *Clews v. Traer*, 57 Iowa 459, 10 N. W. 838. **Va.**—*Morriss v. Virginia Ins. Co.*, 85 Va. 588, 8 S. E. 383. **Wis.** *Dinsmore v. Smith*, 17 Wis. 20; *Beach v. Beckwith*, 13 Wis. 21.

[a] An "agreement for a decision in vacation implies that the judge will decide it at his chambers, or wherever he may be when he finally considers the case." *Johnson v. Mantz*, 69 Iowa 710, 27 N. W. 467.

[b] A decree in a cause submitted to the chancellor in term may by consent be rendered during vacation. *Shine v. Bolling*, 82 Ala. 415, 2 So. 533.

[c] Where the parties agree to submit a case in vacation and a decree to be entered as of term, it operates as a "waiver of time and place of trial and an estoppel to any objection thereto. . . . While it is true, as a legal proposition, that consent cannot confer

jurisdiction, yet where the court has jurisdiction of the subject-matter, every prerequisite to the exercise of such jurisdiction, may be waived by consent." *O'Hägen v. O'Hagen*, 14 Iowa 264.

**As to rendition and entry of judgments in vacation**, see 14 STANDARD PROC. 978, et seq.; 1001, et seq.

**38.** *Norwood v. Kenfield*, 34 Cal. 329; *Wicks v. Ludwig*, 9 Cal. 173.

[a] An objection to a hearing in vacation is jurisdictional in its character, consequently it cannot be removed by stipulation. *Filley v. Cody*, 4 Colo. 109.

**39.** *Atlanta K. & N. Ry. Co. v. Strickland*, 114 Ga. 998, 41 S. E. 501.

**40.** See 8 STANDARD PROC. 1017, 1018, and supplement thereto.

**41.** *Brevort v. Warner*, 8 How. Pr. (N. Y.) 321; *Mann v. Tyler*, 6 How. Pr. (N. Y.) 235, 1 Code Rep. (N. S.) 382; *Schauble v. Tietgen*, 31 Wis. 695.

**42.** *Schauble v. Tietgen*, 31 Wis. 695.

[a] But where the statute provides for a hearing of a motion to retax costs out of court before a judge thereof a rule of such court requiring all such motions to be made at a term cannot be sustained. *Lakey v. Cogswell*, 3 Code Rep. (N. Y.) 116.

**43.** *Gaffney v. Piper*, 5 Idaho 490, 51 Pac. 99; *Bank of Genesee v. Denning*, 5 Idaho 482, 51 Pac. 406.

**44.** See generally the title "Supersedeas and Stay of Proceedings."

**45. Ind.**—*Northern Ind. Rd. Co. v. Michigan C. R. Co.*, 2 Ind. 670. **N. Y.** See *Ward v. Bundy*, 43 How. Pr. 330.

during the pendency of an appeal,<sup>46</sup> or on execution.<sup>47</sup> In other jurisdictions a stay of proceedings can be granted only in open court.<sup>48</sup>

Tenn.—*Marsh v. Haywood*, 6 Humph. 210. Wis.—*State v. Taylor*, 19 Wis. 566; *Waterman v. Raymond*, 5 Wis. 185.

[a] **For Limited Time.**—But a stay may be granted by a judge out of court only for a limited period of time. "A judge of the supreme court, like any other officer, when acting out of court, is an officer of limited jurisdiction. He may do just what the legislature has authorized him to do and whatever he does more than this, is done without jurisdiction. Any judge, anywhere, may make an order, out of court, and without notice, staying the proceedings in an action to enable a party to apply for some ulterior relief, provided the time shall not exceed twenty days. But if the stay go beyond that limit, the order is void." *Bangs v. Selden*, 13 How. Pr. (N. Y.) 374.

46. *Ward v. Bundy*, 43 How. Pr. (N. Y.) 330, 30 N. Y. Supp. 893; *Laney v. Rochester R. Co.*, 81 Hun 346, 30 N. Y. Supp. 893, 24 Civ. Proc. 156, 63 N. Y. St. 148. But compare *Steam Navig. Co. v. Weed*, 8 How. Pr. (N. Y.) 49, where it is said: "The court may, if it think fit, make the order without requiring notice to the adverse party, but when the application is made to a judge out of court, the most he is authorized to do is to make an order that the adverse party show cause before himself or some other judge, or some court having authority to entertain the application, why the proceedings should not be stayed until the case can be heard and decided upon the appeal, and staying proceedings in the meantime."

47. *Robinson v. Yon*, 8 Fla. 350.

[a] A statute authorizing a judge at chambers or in vacation to stay proceedings on an execution "enacts a means by which a party may take the initiatory steps in vacation to have the further proceedings on an execution stayed till he can be heard in court as to whether it should be set aside or quashed. But the proceeding is not exclusive, and does not prevent the usual resort to a motion to set aside or quash at the return term in

open court." *Parker v. Hannibal & St. Joseph R. Co.*, 44 Mo. 415.

[b] "The authority that a judge exercises at chambers in a cause pending is the authority of the court itself. . . . It is said, that, upon any other principle than that of delegated authority, it would be difficult to demonstrate the validity of many of the acts done by judges in cases and under circumstances in which the legislature has not specially invested them with power, in their individual capacities. This species of jurisdiction is exercised ex necessitate rei to prevent injustice and oppression, and to facilitate and direct the interlocutory proceedings of suits at law. . . . Among the subjects which reasonably fall within the circle of this jurisdiction, the power of staying an execution issued in vacation, has been repeatedly recognized and acted on." *Com. v. Magee*, 8 Pa. 240, 49 Am. Dec. 509.

[c] **On Motion.**—*Robinson v. Cheseldine*, 5 Ill. 332.

[d] **But the statute refers only to parties to the action.** "The statute can never have been intended to authorize third persons to assert adverse rights by the summary means of a motion and have them adjusted without the aid of regular pleadings. If this proceeding can be sustained, then we should be obliged to hold that the claimant of personal property which has been levied on under an execution to which he is not a party, may have his title tried by means of a motion instead of being driven to an action of replevin or a trial before a jury of the right of property." *Bonnell v. Neely*, 43 Ill. 288.

48. *Scribner v. Rutherford*, 65 Iowa 551, 22 N. W. 670.

[a] The "statute gives to the court the power to stay proceedings upon execution and prescribes the manner in which it shall be exercised. The terms of the act evidently contemplate the action of the court in session; a rule is to be entered in the minutes of the court, and a copy certified by the clerk, served upon the constable. The court can no more delegate this power to a single judge, to be exer-

H. CORRECTION OF MINUTES.—In some jurisdictions the power to correct the minutes of the court may be exercised at chambers as well as in term, provided that notice is given to the opposing party,<sup>49</sup> while in other jurisdictions the minutes, in the absence of express statute can be corrected only by the court as such.<sup>50</sup>

I. SETTING ASIDE JUDGMENT.—A judge out of court, as a rule, is not empowered to set aside a judgment of the court<sup>51</sup> unless authorized to do so by statute.<sup>52</sup>

J. BILL OF EXCEPTIONS.—In some jurisdictions a judge out of court has no authority to extend the time for settlement<sup>53</sup> or to settle<sup>54</sup>

cised in vacation, at his chambers, than they can the power of trying the appeal upon the merits and pronouncing judgment." *Chadwick v. Reeder*, 19 N. J. L. 156.

49. *Picard v. Prival*, 35 La. Ann. 370; *State v. Revells*, 31 La. Ann. 387; *Falkner v. Hunt*, 68 N. C. 475.

50. *Hegeler v. Henckell*, 27 Cal. 491; *Terre Haute & I. R. Co. v. Bond*, 13 Ill. App. 328; *Hall v. Mills*, 5 Ill. App. 495.

[a] "It is a well recognized principle that judges can exercise no judicial functions in vacation, except such as they are specially authorized to do by statute. . . . If what purports to be a record has been so made up by the clerk or other official as to not speak the real facts, it must be amended so as to conform to them, and this can only be done by the court whose record is sought to be amended and must, as a general rule, be done on due notice to all such as will be affected by the amendment. It would certainly be competent for the legislature to authorize judges to hear and determine questions of this character in vacation, but we are aware of no statute that authorizes them to do so." *Devine v. People*, 100 Ill. 290.

51. *Releford v. State*, 45 Okla. 433, 146 Pac. 27; *Moody & Co. v. Freeman*, 24 Okla. 701, 104 Pac. 30; *Beckwith v. Martin*, 98 S. C. 183, 82 S. E. 414; *Turner v. Foreman*, 47 S. C. 31, 24 S. E. 989. See 15 STANDARD PROC. 195.

[a] "The court only is authorized to consider and determine a motion to vacate its judgment or order; and the district judge, as contradistinguished from the court, has no such power."

*Eichhoff v. Caldwell* (Okla.), 151 Pac. 860.

[b] **Surprise and Excusable Neglect.** A circuit judge has no power at chambers to set aside a judgment on the ground of surprise or excusable neglect. *Sarratt v. Gaffney Mfg. Co.*, 77 S. C. 85, 57 S. E. 616.

52. See 15 STANDARD PROC. 195.

53. *Myrick v. Merritt*, 21 Fla. 799; *Hawes v. People*, 129 Ill. 123, 21 N. E. 777; *Hake v. Strubel*, 121 Ill. 321, 12 N. E. 676; *Treishel v. McGill*, 28 Ill. App. 68.

[a] "Without a statute permitting the court to fix the time after the term within which the bill of exceptions might be settled and signed, this could not have been done except in term time, and we fail to see wherein the act extending the time after the lapse of the term differs in character from the act originally fixing the time. If one was a judicial act, so must be the other." *Van Duzer v. Towne*, 12 Colo. App. 4, 55 Pac. 13.

[b] **An order extending time for the presentation of a bill of exceptions after expiration of the time allowed therefor cannot be made at chambers but the only relief which a party has in such a case is by motion to the court.** *Doty v. Brown*, 3 How. Pr. (N. Y.) 375. See also *Hawkins v. Dutches & O. S. Co.*, 7 Cow. (N. Y.) 467.

54. **Ala.**—*Markland v. Albes*, 81 Ala. 433, 2 So. 123. **Colo.**—*Jordan v. Finley*, 4 Colo. 189. **Ill.**—*Village of Marseilles v. Howland*, 136 Ill. 81, 26 N. E. 495; *Estate of Nester v. Carney Bros. Co.*, 98 Ill. App. 630; *Terre Haute, etc. R. Co. v. Bond*, 13 Ill. App. 328. **Ia.**—*Claggett v. Gray*, 1 Iowa 19. **Ky.**—*Allard v. Smith*, 2 Mete. 297; *Biggs v. McIlvain's Exrx.*, 3 A.

a bill of exceptions, unless such action be authorized by statute,<sup>55</sup> or stipulation of the parties;<sup>56</sup> though in this respect a distinction has been drawn between settling and signing the bill of exceptions.<sup>57</sup>

In the absence of express statutory provision a judge in vacation has no power to strike a bill of exceptions from the files,<sup>58</sup> and a bill of exceptions signed in term time cannot be amended in vacation.<sup>59</sup>

K. Marsh. 360. **Neb.**—*Mewis v. Johnson Harvester Co.*, 5 Neb. 217. **Tex.** *Franco-Texan L. Co. v. Chaptive*, 3 S. W. 31.

[a] "If the practice were allowed of preparing and filing bills of exception in vacation, they might be prepared and signed at any place within, and perhaps out of the circuit. Such a practice would be attended with great inconvenience to litigants, and might result in much mischief and injustice, especially to the successful party in the court below. When bills of exceptions are allowed to be filed in term time only, the parties will have an opportunity of having their attorneys present, who attended to the trial of the cause, and perhaps their witnesses also, who testified at the trial, as they generally reside within the vicinity of the court house." *Freeman v. Brenham*, 17 B. Mon. (Ky.) 603.

[b] A certificate of the judge who tried a case given in vacation after the bill of exceptions was signed and without notice to the opposite party cannot be considered part of the record or used to enlarge the bill of exceptions or change it in any way. *Goodrich v. Minonk*, 62 Ill. 121.

55. See *Edwards v. Tracy*, 2 Mont. 22.

[a] Where the statute uses the word "judge" instead of "court" a judge in vacation is authorized to settle a bill of exceptions. *Edwards v. Tracy*, 2 Mont. 22.

56. *Jordan v. Finley*, 4 Colo. 189; *Vicksburg & M. R. Co. v. Ragsdale*, 51 Miss. 447. But see *contra*, *Hawes v. People*, 129 Ill. 123, 21 N. E. 777.

57. As to settling and signing the bill, see the title "Bills of Exceptions."

[a] "The settling and allowance, signing and sealing, a bill of exceptions, under the law, considered as a single act, is, in its nature, both judicial and ministerial. It is judicial in this, that the trial judge must ad-

judge whether the bill presented is, under the law, a proper bill for him to sign, and he alone must decide whether, in its recital and contents, it conforms to the fact; while the mere act of signing and sealing a bill, after the judicial act of settling and allowing it has been performed by the judge, is purely ministerial. . . . The . . . judge is powerless to perform this complex act except during the term of court at which the alleged erroneous ruling or judgment was made, or within such time thereafter as the parties may have agreed in the record, or as may have been by the court, in term time, allowed by its order of record. . . . We do not intend to be understood as holding that the mere ministerial act of signing and sealing a bill that has been presented to, and settled and allowed by, the judge in apt time, may not be lawfully performed out of term or after the expiration of the time fixed in the order, and the same be filed as of the time of its settlement and allowance; nor to hold that the rights of the exceptor presenting his true bill in apt time, can be affected by the neglect or refusal of the judge to perform the duty imposed upon him by the statute within the time limited; but to hold, that where . . . the bill is not presented to the judge, nor settled and allowed by him, nor filed, until after the term has ended and the time fixed in the order has expired, the act of settling and allowing the bill is a nullity, and the matters contained in such bill do not become a part of the record; and where this appears affirmatively from the record, . . . advantage may be taken thereof by motion to strike the bill of exceptions from the record." *Hake v. Strubel*, 121 Ill. 321, 12 N. E. 676.

58. *Ford v. Liner*, 24 Tex. Civ. App. 253, 59 S. W. 943.

59. *Terre Haute & I. R. Co. v. Bond*, 13 Ill. App. 328; *Hall v. Mills*, 5 Ill. App. 495.

Nor is a judge out of court authorized to order an exception entered of record *nunc pro tunc*.<sup>60</sup> Where an order is made in term extending the time for the settlement of a bill of exceptions beyond the term, the bill may be settled by the judge in vacation,<sup>61</sup> but such order cannot be modified or rescinded out of term time.<sup>62</sup>

K. NEW TRIAL. — A judge at chambers or in vacation, as a rule, has no power to hear a motion for a new trial,<sup>63</sup> even though the motion is based upon the ground of newly discovered evidence.<sup>64</sup> In some jurisdictions, however, motions for a new trial may be heard by a judge at chambers or in vacation,<sup>65</sup> and in others an order may be made in term time providing for a hearing of the motion out of term.<sup>66</sup>

L. PROCEEDINGS TO PERFECT APPEALS. — It has been held that a judge out of court has no power to extend the time for filing an appeal bond,<sup>67</sup> to fix the amount of the appeal bond,<sup>68</sup> or require the

60. *Young v. Rann*, 111 Iowa 253, 82 N. W. 785; *State v. Hathaway*, 100 Iowa 225, 69 N. W. 449.

61. *Colo.*—*Jordan v. Finley*, 4 Colo. 189. *Ill.*—*Treishel v. McGill*, 28 Ill. App. 68. *Miss.*—*Vicksburg & M. R. Co. v. Ragsdale*, 51 Miss. 447.

[a] The "settling of a bill of exceptions, and also the extension of the time for filing the same, are judicial acts, and it follows that such acts can be performed only while the court or judge performing them has jurisdiction of the subject-matter and of the parties. Where an order is entered at the term at which the judgment is rendered, extending the time for presenting the bill of exceptions to some day beyond the term, jurisdiction to settle and sign the bill is retained until the expiration of the time thus limited. If no bill of exceptions is presented to the judge within that time, the jurisdiction to settle and sign such bill has expired." *Village of Marseilles v. Howland*, 136 Ill. 81, 26 N. E. 495.

62. *Hawes v. People*, 129 Ill. 123, 21 N. E. 777; *Treishel v. McGill*, 28 Ill. App. 68.

[a] Even though a statute provides that judges are authorized to exercise in vacation any power which they may exercise in term time. *Myrick v. Merritt*, 21 Fla. 799.

63. *Ga.*—*Wood v. Wiley Mfg. Co.*, 117 Ga. 517, 43 S. E. 983; *Napier v. Heilker*, 115 Ga. 168, 41 S. E. 689; *Ferrill v. Marks*, 76 Ga. 21; *Brinkley v. Buchanan*, 55 Ga. 342. *Ind.*—*Green-*

*up v. Crooks*, 50 Ind. 410. *Md.*—*Hays v. Philadelphia*, etc. R. Co., 99 Md. 413, 58 Atl. 439. *Neb.*—*Hodgin v. Whitecomb*, 51 Neb. 617, 71 N. W. 314. *S. C.*—*State v. Chavis*, 34 S. C. 132, 13 S. E. 317; *Grierson v. Harmon*, 16 S. C. 618; *Clawson v. Hutchinson*, 14 S. C. 517; *Charles v. Jacobs*, 5 S. C. 348.

[a] Fixing Hearing at Next Term. So too, a judge at chambers has no authority to make an order assigning the motion for a new trial to be heard at the next term. *Donly v. Fort*, 42 S. C. 200, 20 S. E. 51.

64. *Donly v. Fort*, 42 S. C. 200, 20 S. E. 51.

65. *Com. v. McLaughlin*, 122 Mass. 449; *In re Korman's Application*, 162 Pa. 151, 29 Atl. 861.

66. *McGee v. Ancrum*, 33 Fla. 499, 15 So. 231; *Helmly v. Davis*, 111 Ga. 860, 36 S. E. 927; *Johnston v. Simmons*, 77 Ga. 298, 2 S. E. 469; *Dickinson v. Mann*, 74 Ga. 217; *Hardison v. Burr*, 73 Ga. 125; *Rust v. McLaren*, 54 Ga. 111.

[a] Whenever an order is made in term to hear a motion for a new trial upon a named day in vacation, such motion must be heard on that day or by written order continued to a day certain; or else it goes over by operation of law to the next regular term of the court. *Atlanta*, etc. Ry. Co. v. *Strickland*, 114 Ga. 998, 41 S. E. 501.

67. *Pardridge v. Morgenthau*, 157 Ill. 395, 42 N. E. 74.

68. *Pardridge v. Morgenthau*, 157 Ill. 395, 42 N. E. 74.

giving of a new bond.<sup>69</sup> In some jurisdictions a judge out of court may allow a writ of error,<sup>70</sup> or an appeal,<sup>71</sup> while in others an appeal cannot be granted in vacation.<sup>72</sup>

**M. IN COLLATERAL PROCEEDINGS. — 1. Attachment.** — In some jurisdictions judges at chambers or in vacation may, under the statute, issue writs of attachment<sup>73</sup> as well as dissolve such writs,<sup>74</sup> and such power necessarily carries with it the right to hear and dispose of all intermediate questions arising upon such motions.<sup>75</sup>

69. *Chase v. Miller*, 88 Va. 791, 14 S. E. 545.

70. *Foote v. Silsby*, 1 Blatchf. 542, 9 Fed. Cas. No. 4,917; *Stebbins v. Niles*, 13 Smed. & M. (Miss.) 307.

71. *Nesbit v. Rodewald*, 43 Miss. 304.

72. **Ill.**—*Pardridge v. Morgenthau*, 157 Ill. 395, 42 N. E. 74; *Hake v. Strubel*, 121 Ill. 321, 12 N. E. 676. **Ohio.**—*Mitchell v. State*, 78 Ohio St. 347, 85 N. E. 561. **Va.**—*President v. Lee's Exrs.*, 2 Hen. & M. (12 Va.) 557.

73. **Ill.**—*Dutcher v. Crowell*, 10 Ill. 445; *Beecher v. James*, 3 Ill. 462. **Neb.** *Strickler v. Hargis*, 34 Neb. 468, 51 N. W. 1039. **N. Y.**—*Woodruff v. Imperial Fire Ins. Co.*, 90 N. Y. 521; *Conklin v. Dutcher*, 5 How. Pr. 386.

See also 3 STANDARD PROC. 468.

[a] Under a statute conferring upon judges of the superior court of the city of New York the authority to perform all duties of a justice of a supreme court out of term, a judge of such court at chambers may issue an attachment on a vessel. *Delaney v. Brett*, 51 N. Y. 78.

74. **U. S.**—*United States v. Little Charles*, 1 Brock. 380, 26 Fed. Cas. No. 15,613. **Kan.**—*Yoakam v. Howser*, 37 Kan. 130, 14 Pac. 438; *Swearingen v. Howser*, 37 Kan. 126, 14 Pac. 436; *Merchants' Nat. Bank v. Danford*, 28 Kan. 512; *Quinlan v. Danford*, 28 Kan. 507; *Shedd v. McConnell*, 18 Kan. 594. **Mich.**—*Rowe v. Kellogg*, 54 Mich. 206, 19 N. W. 957; *Genesee Sav. Bank v. Michigan Barge Co.*, 52 Mich. 164, 17 N. W. 790; *Vinton v. Mead*, 17 Mich. 388. **N. Y.**—*Ruppert v. Haug*, 87 N. Y. 141. **Okla.**—*Bash v. Howald*, 27 Okla. 462, 112 Pac. 1125. **S. C.**—*Bray Clothing Co. v. Shealy*, 53 S. C. 12, 30 S. E. 620; *Segler v. Coward*, 24 S. C. 119. **Wash. Ter.**—*Suffern v. Chisholm*, 1 Wash. Ter. 486. **Wis.**—*Cohen v. Burr*,

6 Wis. 200. **Wyo.**—*First Nat. Bank v. Moorcroft Ranch Co.*, 5 Wyo. 50, 36 Pac. 821.

[a] "The strongest reasons exist why motions to discharge orders of this class should be facilitated by being heard at chambers during the vacations of the court in which the action is triable. Such orders are granted ex parte and on affidavits alone and . . . may be granted by the clerk. . . . In such cases, to allow an improperly obtained process against the property or the person of the defendant to remain in force until a court is convened in the county where the action is triable, would invite parties to sue out such orders . . . in the hope that the defendants would offer security for the payment of the debt claimed, rather than submit to the loss of . . . the control of their property." *Cureton v. Dargan*, 12 S. C. 122.

[b] A statute authorizing a judge in vacation or at chambers to discharge attachments and to grant all necessary interlocutory orders "carries with it the right to hear and dispose of all intermediate questions arising upon such a motion. Thus a judge at chambers has the right to hear and determine upon a motion to dissolve or discharge an attachment, the question of the continuance of the hearing, and likewise of an application for amendments." *Wells, Fargo & Co. v. Danford*, 28 Kan. 487.

[c] **In Admiralty.**—*United States v. Little Charles*, 1 Brock. 380, 26 Fed. Cas. No. 15,613.

75. See *Wells, Fargo & Co. v. Danford*, 28 Kan. 487.

[a] **Leave To Amend Affidavit.** Under a statute authorizing a judge at chambers to dissolve attachments he may at chambers grant leave to amend an affidavit for attachment. *Wells, Fargo & Co. v. Danford*, 28 Kan. 487.

2. **Arrest and Bail.**—In some jurisdictions a judge, out of court, may make an order of arrest<sup>76</sup> and vacate such order,<sup>77</sup> or permit an amendment of the affidavit on which it is based.<sup>78</sup> So too he may make an order admitting a prisoner to bail<sup>79</sup> or exonerating the bail.<sup>80</sup>

3. **Physical Examination.**—An order for the physical examination of a party cannot be made at chambers.<sup>81</sup>

4. **Reference.**—In some jurisdictions a judge out of court may order a reference in the case,<sup>82</sup> while in others such order can be made only in open court.<sup>83</sup> But a report of a referee may not be confirmed at chambers or in vacation.<sup>84</sup>

76. *Berry v. State, Dudley* (S. C.) 215.

[a] Judges of the first judicial district of New York may make an order of arrest out of court by virtue of the statute providing that motions which elsewhere must be made in court may in that district be made to a judge out of court. *Lachenmeyer v. Lachenmeyer*, 26 Hun (N. Y.) 542. See to the same effect, *Boucicault v. Boucicault*, 21 Hun (N. Y.) 431, 59 How. Pr. 131.

77. *Berry v. State, Dudley* (S. C.) 215.

[a] "What a judge may do at chambers, he may undo at chambers; and if he can order an arrest, there would seem to be no objection, on the score of power, to his ordering a release from the arrest. . . . Moreover it is well settled that a judge at chambers for new and sufficient reasons could discharge from custody under the order or process of the court. He could never make an order, in opposition to the order or process of the court, which would amount to or have the effect of a final adjudication upon any substantial right, but he could control the execution of process of the court, and even its judgments, until the parties could be again heard in court." *In re Kindling*, 39 Wis. 35.

[b] **Restoring Order of Arrest.**—*In re Suppe*, 33 Kan. 588, 7 Pac. 268, it is said: "The district judge at chambers, can only exercise such power as is expressly conferred by law. Power is given the judge at chambers to vacate orders of arrest, but no provision of statute has been cited or found that would authorize the district judge to review and correct the action of the district court, or restore process that has been discharged

by the court. When the order of arrest was vacated it became *functus officio*, and it is questionable whether it was within the power of the district court to recall and change its order annulling the order of arrest after the term in which it was made, and to revive process that it had vacated; . . . certainly no such revisory power exists in the judge at chambers."

78. *Baker Mfg. Co. v. Knotts*, 30 Kan. 356, 2 Pac. 510.

79. *Crandall v. State*, 6 Blackf. (Ind.) 284; *State v. Wilson*, 12 La. Ann. 189.

80. *De Myer v. McGonegal*, 32 Mich. 120. See *Smith v. Newell*, 7 Wend. (N. Y.) 484.

81. *Ellsworth v. Fairbury*, 41 Neb. 881, 60 N. W. 336, personal injury case. See generally the title "Physical Examination," and 9 ENCY. OF EV. 783, et seq.

82. *Wilkes Co. v. Arthur*, 85 S. C. 299, 67 S. E. 297; *Pratt v. Timmerman*, 69 S. C. 186, 48 S. E. 255; *First Nat. Bank v. Lee*, 68 S. C. 116, 46 S. E. 771; *Muckenfuss v. Fishburne*, 65 S. C. 573, 44 S. E. 77; *Bank of Hampton v. Fennell*, 55 S. C. 379, 33 S. E. 485; *Moore v. Bruce*, 85 Va. 139, 7 S. E. 195.

83. *Scudder v. Snow*, 29 How. Pr. (N. Y.) 95. See generally the title "References."

84. *McConaughy v. Baxter*, 55 Ala. 379. But see *Boegler v. Eppley*, 40 Hun (N. Y.) 523; *Robertson v. Robertson*, 9 Daly (N. Y.) 44.

[a] A chancellor has no authority to confirm the report of a referee in vacation. "The . . . rule requires the report . . . to be read in open court, at least one day before being confirmed, so as to allow the parties to the cause to file exceptions. . . .

**5 Supplemental Proceedings.**—In some jurisdictions, under the statute, a judge out of court as well as the court may make orders in supplementary proceedings<sup>85</sup> directing the examination of judgment debtors,<sup>86</sup> as well as orders pertaining to the manner of sale of property under execution.<sup>87</sup> But otherwise judges out of court have no power over supplementary proceedings.<sup>88</sup>

**6. Contempt Proceedings.**—Judges at chambers and in vacation have the inherent power to punish for contempt,<sup>89</sup> and a statutory authority to perform a judicial act at chambers and in vacation necessarily includes the power of a judge out of court to enforce his orders by contempt proceedings.<sup>90</sup> But, in the absence of an express statute, such power does not extend to contempt proceedings for a failure to obey orders made in open court.<sup>91</sup>

**N. IN PARTICULAR MATTERS AND PROCEEDINGS.—1. Injunction.**  
A temporary injunction, as a rule, may be issued by the judge at

This right was never intended to be waived, and was not waived.” *Shine v. Bolling*, 82 Ala. 415, 2 So. 533.

85. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104.

86. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104.

87. *Herriman v. Moore*, 49 Iowa 171.

88. *Cushman v. Johnson*, 13 How. Pr. (N. Y.) 495.

[a] “Proceedings supplementary to execution are in no sense identical with ordinary chamber business; they are of a special and higher nature; they are regarded as a substitute for an action in chancery.” *Cushman v. Johnson*, 13 How. Pr. (N. Y.) 495.

89. *Ga.*—*Cobb v. Black*, 34 Ga. 162. *Ia.*—*McLane v. Granger*, 74 Iowa 152, 37 N. W. 123. *Kan.*—*State v. Cutler*, 13 Kan. 131. *N. M.*—*In re Sloan*, 5 N. M. 590, 25 Pac. 930. *S. C.*—*Harmon v. Wagener*, 33 S. C. 487, 12 S. E. 98.

90. *Wicker v. Dresser*, 13 How. Pr. (N. Y.) 331; *Powhatan C. & C. Co. v. Ritz*, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1225.

[a] “There can be no doubt of the power and the duty, when occasion demands, of a judge in vacation allowing, hearing and determining a writ of habeas corpus; but that power would be nugatory were he not also vested with the power to compel obedience to such preliminary orders as may be necessary for the purpose of enabling him to exercise the power granted. Authority to allow, hear, and

determine a writ of habeas corpus is vested in a judge at chambers, because the remedy is of a summary character which is to be administered without delay. And it never was intended, and never could have been intended, that this prime object should be defeated through the inability of a judge in chambers to compel obedience to his orders.” *Nebraska C. H. Soc. v. State*, 57 Neb. 765, 78 N. W. 267.

[b] Where a judge is expressly authorized by statute to appoint a receiver at chambers he is thereby empowered to make in the same manner an order to enforce obedience to the appointment by punishing for contempt. *Harmon v. Wagener*, 33 S. C. 487, 12 S. E. 98.

91. *People v. Brennan*, 45 Barb. (N. Y.) 344.

[a] “We cannot find any authority given by the statute for holding a proceeding like this for contempt in disobeying a judgment of the court, before the judge of the court, in vacation, and he had no such power at common law.” *State v. McKinnon*, 8 Ore. 487.

[b] A statute authorizing judges at chambers to punish for contempt persons guilty of misbehavior in the presence of or so near the judge or court as to obstruct the administration of justice does not include the power to punish for contempt for disobedience of a writ of mandamus. *Davis v. State*, 50 Ohio St. 194, 33 N. E. 926.

chambers<sup>92</sup> and in vacation.<sup>93</sup> While such power whenever conferred by the statute is not confined to the county in which the action is pending,<sup>94</sup> a judge out of court has no power to grant a temporary injunction within the boundaries of another court,<sup>95</sup> unless permitted

92. **Ark.**—*Sanders v. Plunkett*, 40 Ark. 507. **Cal.**—*Sullivan v. Triunfo Gold & S. Min. Co.*, 33 Cal. 385. **Ga.**—*Burchard v. Boyce*, 21 Ga. 6; *Semmes v. Columbus*, 19 Ga. 471. **Kan.**—*Foote v. Forbes*, 25 Kan. 359; *State v. Cutler*, 13 Kan. 131. **La.**—*State v. Judge*, 41 La. Ann. 557, 6 So. 514. **Mo.**—*Oliver v. Snider*, 176 Mo. 63, 75 S. W. 591. **Neb.**—*Browne v. Edwards & McCollough Lumb. Co.*, 44 Neb. 361, 62 N. W. 1070. **N. M.**—*In re Sloan*, 5 N. M. 590, 25 Pac. 930. **N. Y.**—*Wilcox v. Wilcox*, 14 N. Y. 575. **Okla.**—*Brown v. Donnelly*, 19 Okla. 296, 91 Pac. 859. **S. C.**—*Salinas v. Aultman & Co.*, 49 S. C. 325, 27 S. E. 385; *Hornesby v. Burdell*, 9 S. C. 303. **Va.**—*Smith v. Butcher*, 28 Gratt. (69 Va.) 144.

93. **Ala.**—*Ex parte Henderson*, 43 Ala. 392. **Ga.**—*Edmondson v. Edmondson*, 128 Ga. 53, 57 S. E. 308; *Lowell Mach. Shop v. Atlanta Cotton Factory Co.*, 60 Ga. 233; *Crawford v. Ross*, 39 Ga. 44. **Ill.**—*Welch v. People*, 38 Ill. 20; *Watts v. McCleave*, 16 Ill. App. 272. **Ind.**—*Merrifield v. Weston*, 68 Ind. 70. **Ia.**—*Young v. Preston*, 131 Iowa 292, 108 N. W. 463; *Curtis v. Crane*, 38 Iowa 459. **La.**—*State v. Judges*, 35 La. Ann. 1075. **Miss.**—*Hiller v. Cotten*, 54 Miss. 551. **Ohio.**—*Chapman v. Mad River, etc. Co.*, 1 Ohio Dec. (Reprint) 565. **Tex.**—*Coleman v. Goyne*, 37 Tex. 552; *Byrd Irr. Co. v. Smythe* (Tex. Civ. App.), 146 S. W. 1064. **Va.**—*Muller v. Bayly*, 21 Gratt. (62 Va.) 521. **W. Va.**—*Hart v. Larkin*, 66 W. Va. 227, 66 S. E. 331; *Logan v. Ballard*, 61 W. Va. 526, 57 S. E. 143.

94. **Ky.**—*Mason v. Chambers*, 4 J. J. Marsh. 401. **Miss.**—*Hiller v. Cotten*, 54 Miss. 551. **Tex.**—*Wier v. Hill*, 58 Tex. Civ. App. 370, 125 S. W. 366.

[a] "The object in giving the judge in vacation power to dissolve an injunction, was to prevent delay, and if it were held that he could only dissolve the injunction upon notice within the county, where the cause is pending, the object of the legislature in enacting the law would be to a material extent defeated. The judges of the

respective judicial circuits, each composed of the several counties fixed by the constitution and the law, are absent, or may be absent, from each county of their circuit a large portion of each year, holding the terms of the circuit court required to be held in each county of their circuit. While they are holding a term of court in one county, there is a vacation of the circuit court of each of the other counties composing the circuit. And if the judge of the circuit court in which a case is pending, wherein an injunction is awarded, could only hear a motion to dissolve an injunction within the county, in which such case is pending, then during the greater part of each year a motion to dissolve an injunction could not be heard, and the plain object of the law would be defeated . . . while a judge of a circuit court has general jurisdiction in awarding injunctions whether the judgment or proceeding enjoined be in or out of his circuit, etc., the judge of a circuit court in which a case is pending, wherein an injunction is awarded, only has authority to dissolve such injunction in vacation." *Hayzlett v. McMillan*, 11 W. Va. 464.

95. *Wallace v. Helena El. R. Co.*, 10 Mont. 24, 24 Pac. 626, 25 Pac. 278; *Ellis v. Karl*, 7 Neb. 381.

[a] While "it is true that our laws give to the circuit judges the power to grant injunctions in cases beyond the bounds of their districts, that power is given with reference to cases not then pending in any court of competent jurisdiction, or to cases where it may become necessary, in aid of the jurisdiction already acquired by such court, and for the purpose of justice, that such writs should be granted. But the power was never intended to be given to judges of other courts to interfere with the jurisdiction already acquired, by modifying or setting aside the orders made by the court having acquired jurisdiction of a cause." *Martin v. O'Brien*, 34 Miss. 21.

[b] But where the statute reads that "circuit courts in term time,

by statute.<sup>96</sup> A power given by statute to issue a temporary injunction out of court implies the power to recall it,<sup>97</sup> and by statute, a judge at chambers and in vacation may dissolve a temporary injunction even though it had been granted in open court.<sup>98</sup>

A judge, out of court, as a rule, has no authority to decide an injunction suit on its merits,<sup>99</sup> unless the consent of the parties to such

and any judge thereof in vacation, shall have power to grant writs of . . . injunction," such power is not limited in any manner and where one circuit judge "has refused an application for the writ, and indorsed his refusal upon the bill, it is a question of courtesy, merely, with another circuit judge to whom application may be made, whether he will look into the case and allow the writ. His power to allow it, cannot, we think, be questioned, under the statute." *Welch v. People ex rel. Byrus*, 38 Ill. 20.

[c] It is "erroneous to hear the motion to dissolve the injunction and sustain it at a place out of the district in which the suit was pending. Chancellors are appointed for chancery districts, and are confined to them in the performance of judicial acts, except as authorized by law, and we are not aware of any law providing for hearing a motion to dissolve an injunction outside of the district in which the cause is pending." *Adams v. Kyzer*, 61 Miss. 407.

96. See the statutes.

[a] It must appear from the record that the judge of the court in which the action is pending was unable to act. *Sharman v. Thomaston*, 67 Ga. 246; *Hornesby v. Burdell*, 9 S. C. 303.

97. *Ala.*—*Griffin v. Branch Bank*, 9 Ala. 201. *Ark.*—*Sanders v. Plunkett*, 40 Ark. 507. *Ill.*—*Watts v. McCleave*, 16 Ill. App. 272. *Ia.*—*Curtis v. Crane*, 38 Iowa 459. *Kan.*—*Foote v. Forbes*, 25 Kan. 359. *Miss.*—*Hiller v. Cotten*, 54 Miss. 551. *Neb.*—*Browne v. Edwards & McCollough Lumb. Co.*, 44 Neb. 361, 62 N. W. 1070. *Ohio.*—*Chapman v. Mad River, etc. Co.*, 1 Ohio Dec. (Reprint) 565. *Tex.*—*Coleman v. Goyne*, 37 Tex. 552. *Va.*—*Muller v. Bayly*, 21 Gratt. (62 Va.) 521. *W. Va.*—*Hart v. Larkin*, 66 W. Va. 227, 66 S. E. 331, 135 Am. St. Rep. 1027; *Logan v. Ballard*, 61 W. Va. 526, 57 S. E. 143; *Horn v. Perry*, 11 W. Va. 694; *Hayzlett v. McMillan*, 11 W. Va. 464.

[a] "The hearing of a motion to dissolve an injunction is no more the trial of the case, than the hearing of an application for an injunction; and the argument may be heard at chambers." *Semmes v. Mayor of Columbus*, 19 Ga. 471.

[b] **Injunction Issued by Another Judge.**—An express statutory power "given to a chancellor to dissolve an injunction ordered by a county judge, would not give him power to dissolve one ordered by another chancellor, because there might be a clash of discretions between co-ordinate authorities." *Sanders v. Plunkett*, 40 Ark. 507.

98. *Brown v. Donnelly*, 19 Okla. 296, 91 Pac. 859. See *Chapman v. Mad River, etc. R. Co.*, 1 Ohio Dec. (Reprint) 565.

[a] A statutory authority to dissolve injunctions ordered by county judges cannot be construed to include injunctions granted by a chancellor. *Sanders v. Plunkett*, 40 Ark. 507.

99. *Kan.*—*Henderson v. Marcell*, 1 Kan. 137. *Neb.*—*Browne v. Edwards & McCollough Lumb. Co.*, 44 Neb. 361, 62 N. W. 1070. *S. C.*—*Atlantic Coast Line R. Co. v. Moise*, 85 S. C. 530, 67 S. E. 785.

[a] "We know of no law which authorizes a judge of the superior court, acting as a chancellor, to make a decree in vacation for a specific performance of a contract, however plain and undisputed the same may be and know of no decision or precedent in this state to that effect. The judge acting as chancellor, has authority to grant injunctions in vacation to prevent injury and injustice from being done, until the cause can be heard on its merits at the regular term of the court to which it is made returnable. It was insisted on the argument here, that the complainant did not ask for any decree for a specific performance of the contract, but only asked for an order enjoining the defendant from

a hearing appears of record.<sup>1</sup> Hence, he cannot at chambers or in vacation dismiss such suit,<sup>2</sup> or grant a permanent injunction.<sup>3</sup>

**2. Receivers.**<sup>4</sup>—In a number of jurisdictions judges at chambers<sup>5</sup> and in vacation<sup>6</sup> are empowered to appoint receivers, but in others a

refusing to permit the complainant to enter its premises and take possession of the machinery and to remove it. The complainant was not entitled to that order (which, for all practical purposes, would have been a specific performance of the contract) until it had been shown, upon the final hearing of the cause, that there had been a breach of that contract, and that the complainant was equitably entitled, in view of the facts of the case, to have it specifically performed by the defendant." *Lowell Machine Shop v. Atlanta C. F. Co.*, 60 Ga. 233.

[b] But obviously a judge can and ought to look into the merits to the extent necessary to enable him to exercise his discretion. *Alston v. Board of Health*, 93 S. C. 553, 77 S. E. 727.

1. *Mount v. Radford Trust Co.*, 93 Va. 427, 25 S. E. 244.

2. *Coleman v. Goynes*, 37 Tex. 552; *Grant v. Chambers*, 34 Tex. 573; *Logan v. Ballard*, 61 W. Va. 526, 57 S. E. 143.

[a] A judge has no authority "to make an order dismissing an injunction suit or to make any other final disposition of such cause. . . . The fact that the parties to the injunction suit stipulated that the decision on the merits should be entered by the judge in vacation is unimportant. That jurisdiction of the subject-matter cannot be conferred by agreement of parties is elementary. The record before us fails to show that any order was ever entered vacating or dissolving the temporary order of injunction, either in term time or in vacation. The order of dismissal entered by the judge at chambers is void." *Johnson v. Bouton*, 56 Neb. 626, 77 N. W. 57.

[b] An order made by a judge at chambers dismissing a petition upon the dissolution of an injunction formerly granted in the cause, is, so far as it purports to dismiss the action, without lawful authority "and cannot be regarded as a final judgment, disposing of the case from which an appeal or writ of error can be taken." *Price v. Bland*, 44 Tex. 145.

3. *Atlantic Coast Line R. Co. v. Moise*, 85 S. C. 530, 67 S. E. 785.

[a] "While it is undoubtedly true that a circuit judge may, in a case of which he has jurisdiction, upon a proper showing, grant an interlocutory or temporary injunction, at chambers, to continue until the final hearing of the case on its merits, it is very clear that a perpetual injunction cannot be granted until the case is fully heard upon its merits and the issues raised determined by the tribunal having authority to make such determination. . . . Now if, as we have seen, the issues in this action were not properly triable by the judge at chambers against the consent of one of the parties, the judgment granting a perpetual injunction was erroneous and must be set aside." *Hornesby v. Burdell*, 9 S. C. 303.

4. See generally the title "Receivers."

5. **U. S.**—*Horn v. Pere Marquette R. Co.*, 151 Fed. 626. **Cal.**—*Real Estate Assn. v. Superior Court*, 60 Cal. 223. **Ohio.**—*Cincinnati S. & C. R. Co. v. Sloan*, 31 Ohio St. 1. **S. C.**—*State v. Port Royal & A. Ry. Co.*, 45 S. C. 413, 23 S. E. 363; *Pelzer v. Hughes*, 27 S. C. 408, 3 S. E. 781; *Kilgore v. Hair*, 19 S. C. 486.

6. **Ala.**—*Ensley Development Co. v. Powell*, 147 Ala. 300, 40 So. 137; *Moritz v. Miller*, 87 Ala. 331, 6 So. 269. **Ark.**—*Franklin v. Meyer*, 36 Ark. 96. **Cal.**—*Real Estate Associates v. Superior Court*, 60 Cal. 223. **Ga.**—*Dougherty v. Jones*, 37 Ga. 348; *Cobb v. Black*, 34 Ga. 162. **Ind.**—*Chicago & S. E. Ry. Co. v. Kenney*, 159 Ind. 72, 62 N. E. 26; *Chicago & S. E. Ry. Co. v. St. Clair*, 144 Ind. 371, 42 N. E. 225; *First Nat. Bank v. United States Encaustic Tile Co.*, 105 Ind. 227, 4 N. E. 846. **Ia.**—*McKee v. Murphy*, 138 Iowa 322, 113 N. W. 499; *Clark v. Raymond*, 84 Iowa 251, 50 N. W. 1068; *French v. Gifford*, 30 Iowa 148. **Mo.**—*State v. McQuillin*, 260 Mo. 164, 168 S. W. 924; *State v. Phoenix Loan Assn.*, 159 Mo. 102, 60 S. W. 74; *Wilson v. Hays*, 139 Mo. App. 513, 123 S. W. 540. **N. Y.**

receiver cannot lawfully be appointed by the judge in vacation.<sup>7</sup>

It has been held in some cases that whenever the statute confers upon a court the powers of a court of chancery it implies the power of a judge of such court to appoint receivers at chambers or in vacation,<sup>8</sup> and that a statutory authority to issue temporary injunctions out of court carries with it the power to appoint receivers out of court.<sup>9</sup>

*Webber v. Hobbie*, 13 How. Pr. 382. S. C.—*State v. Port Royal & A. Ry. Co.*, 45 S. C. 413, 23 S. E. 363; *Harmon v. Wagener*, 33 S. C. 487, 12 S. E. 98. **Tex.**—*Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 88 Tex. 468, 27 S. W. 100; *Williams v. Odell* (Tex. Civ. App.), 47 S. W. 151; *New Birmingham I. & L. Co. v. Blevens*, 12 Tex. Civ. App. 410, 34 S. W. 828. **Va.** *Smith v. Butcher*, 28 Gratt. (69 Va.) 144; *Penn v. Whiteheads*, 12 Gratt. (53 Va.) 74.

[a] **Out of County.**—While the powers of a court ordinarily must be exercised within the territorial jurisdiction of the court, a judge who under the statute is empowered to appoint a receiver in vacation "may exert that power (at least within his circuit) out of, as well as in, the county where the cause is pending, unless there is something in the statutory authority to forbid such action." *St. Louis, K. & S. R. Co. v. Wear*, 135 Mo. 230, 36 S. W. 357, 33 L. R. A. 341.

7. *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77, 26 L. ed. 1111 (under Illinois statute); *Hervey v. Illinois Midland Ry. Co.*, 28 Fed. 169, same.

8. **U. S.**—*Walters v. Anglo-American M. & T. Co.*, 50 Fed. 316. **Ala.**—*Ensley Development Co. v. Powell*, 147 Ala. 300, 40 So. 137. **Ga.**—*Crawford v. Ross*, 39 Ga. 44. **Mo.**—*State v. McQuillin*, 260 Mo. 164, 168 S. W. 924.

[a] "It must be borne in mind that the authority of the judge at chambers, and I speak altogether of a judge exercising equity powers and not of a common-law judge, or a judge administering law, as distinguished from equity, is that of the court itself. . . . When there is no settled practice to guide a judge, the limitations upon his powers at chambers must be found in the distinction between those steps, in an equity cause, which tend to prepare the cause for hearing or preserve the subject-matter until such a hearing, and those judgments which adjudicate the ultimate merits. That

which does not adjudicate the merits is interlocutory. . . . Thus, in *Vose v. Reed*, 1 Woods 647, Fed. Cas. No. 17,011, where Mr. Justice Bradley entertained at chambers a contempt matter, and a motion to appoint a receiver, the question of his authority to deal with the question of contempt in disobeying process was debated and sustained, while the other matter was treated as of course. The scarcity of express ruling is due to the interlocutory character of the subject. The practice in the matter has, to my knowledge, never been questioned in this circuit. Why such a motion may not be entertained at chambers, in view of the conceded chamber powers of an equity judge in matters just as important, does not occur to me. The matter of a hearing on notice is no more important in court than at chambers. In both cases there must be notice and an opportunity to be heard, unless the matter be so plainly urgent as not to afford opportunity for either." *Horn v. Pere Marquette R. Co.*, 151 Fed. 626.

9. *Smith v. Butcher*, 28 Gratt. (69 Va.) 144.

[a] The "power to appoint a receiver is incidental to the power to award an injunction. And as the latter may be awarded by a judge in vacation, so may the power to appoint a receiver as incidental thereto, in a proper case, be exercised by a judge in vacation." *Smith v. Butcher*, 28 Gratt. (69 Va.) 144.

[b] *Contra.*—A statute empowering judges to issue "writs of habeas corpus, mandamus, certiorari, super-sedeas, and attachment, grant orders of injunction, and all other unexecuted writs," does not include "the appointment of a receiver, which is not the issuance of a remedial writ, but the exercise of judicial authority pertaining alone, in the absence of statutory provision, to the court or to the judge in which or before whom the matter is pending. Whether it would

The power to appoint a receiver out of court, however, does not include the right to order a sale of the property involved in the action,<sup>10</sup> or imply the power to decide the cause upon the merits.<sup>11</sup>

It is essential to the validity of an appointment of a receiver that an action is pending in the court at the time of such appointment out of court,<sup>12</sup> and that notice of the application is duly given,<sup>13</sup> except in

be admissible even for the presiding chancellor to make such an order otherwise than in term time, if not specially authorized by statute, may well admit of doubt." *Alexander v. Manning*, 58 Miss. 634.

10. *Wilson v. Aultman & Taylor Co.*, 91 Ky. 299, 15 S. W. 783; *Hurst v. Nicola Bros. Co.*, 23 Ky. L. Rep. 1406, 65 S. W. 364.

[a] A receiver appointed in vacation cannot with safety "go beyond the limit of collecting and preserving the estate and such necessary acts of administration as the immediate emergency demanded, even though the order appointing them, essayed to take upon itself the force of a final decree. The order is their warrant of authority; such an order may be valid to some extent, but may be not valid as to its whole purport, and to the extent that it is valid it is a legal warrant for what is done in pursuance of it, but not further. To the extent that the judge in vacation had jurisdiction to confer power, the power conferred was valid; to the extent, if any, that he essayed to confer power not within his jurisdiction, his act was in vain." *State ex rel. Gray v. Phoenix Loan Assn.*, 159 Mo. 102, 60 S. W. 74.

11. *State v. Woodson*, 161 Mo. 444, 61 S. W. 252.

[a] "By our constitution the judicial power of the state as to matters of law and equity . . . is vested in certain courts therein named. . . . Our statute confers upon circuit judges the power to perform certain acts in vacation, judicial in their character, among which is the power to appoint a receiver to hold and preserve property, the subject of litigation, until the court can dispose of it. . . . It is contended that our statutes confer on the judge the authority to hear and determine the whole issue in a case of this kind in vacation. If there is such a statute, it is in violation . . .

of our constitution. . . . What is here said is in reference to judicial power in its strict sense. There are quasi-judicial powers conferred upon quasi-judicial bodies, and powers to do certain acts in vacation, judicial in character, but subsidiary to a suit pending or about to be instituted in court, are conferred on judges of courts; but the power to try issues in a suit at law or in equity, and pronounce judgment or decree upon the facts found or confessed can be conferred, under our constitution, only on a fully organized court." *State ex rel. Ballew v. Woodson*, 161 Mo. 444, 61 S. W. 252.

12. *Pressley v. Harrison*, 102 Ind. 14, 1 N. E. 188; *Guy v. Doak*, 47 Kan. 236, 27 Pac. 968.

[a] **In Pending Suit.**—It "is evident that the power to appoint receivers in vacation can only be exercised in a pending suit. The filing of the bill is the commencement of the suit . . . There was no suit pending at the time the order appointing the receiver was made; and the chancellor was without jurisdiction. . . . It is urged, however, that as the order was made, and the receiver qualified by giving the requisite bond on the day the bill was filed, the order should be allowed to have effect as of that date. As the chancellor was without jurisdiction, the order is void. It did not constitute a foundation on which to predicate any proceedings, and the subsequent filing of the bill did not impart to it any effect or validity." *Harwell v. Potts*, 80 Ala. 70.

13. **Ia.**—*French v. Gifford*, 30 Iowa 148. **Mo.**—*State v. McQuillin*, 260 Mo. 164, 168 S. W. 924. **N. Y.**—*Verplanck v. Mercantile Ins. Co.*, 2 Paige 438.

[a] *Contra*, under statute. *Real Estate Assn. v. Superior Court*, 60 Cal. 223.

[b] "As receivers are ordinarily appointed without requiring of the ap-

cases of emergency, where defendant cannot be found.<sup>14</sup> The power to appoint receivers at chambers and in vacation includes the power to vacate such an appointment although there be no express statutory provision conferring such power.<sup>15</sup>

3. **Extraordinary Legal Remedies.**—a. *Mandamus.*—In some jurisdictions neither a peremptory nor an alternative writ of mandate can be issued out of court.<sup>16</sup> In other jurisdictions judges at cham-

plieant bond indemnifying the other party against damages which may be caused by a wrongful appointment, the utmost care and circumspection should be observed in administering this extraordinary remedy. The court should ever be reluctant to summarily take property from the possession of a defendant claiming right or title thereto, and putting it into the control and management of an appointee of the court, without affording the claimant and possessor opportunity to be heard in opposition. . . . By the established practice, independent of statute, courts of equity, being averse to interference *ex parte*, will entertain, in ordinary cases, an application for the appointment of a receiver only after notice or rule to show cause." *Moritz v. Miller*, 87 Ala. 331, 6 So. 269.

14. *Moritz v. Miller*, 87 Ala. 331, 6 So. 269; *French v. Gifford*, 30 Iowa 148.

[a] "By the settled practice of the court in ordinary suits, a receiver cannot be appointed, *ex parte*, before the defendant has had an opportunity to be heard in relation to his rights, except in those cases where he is out of the jurisdiction of the court, or cannot be found; or where, for some other reason, it becomes absolutely necessary for the court to interfere, before there is time to give notice to the opposite party, to prevent the destruction or loss of property. . . . In every case where the court is asked to deprive the defendant of the possession of his property without a hearing, or an opportunity to oppose the application, the particular facts and circumstances which render such a summary proceeding proper, should be set forth in the bill or petition on which such application is founded." *Verplanck v. Mercantile Ins. Co.*, 2 Paige (N. Y.) 438.

[b] And when "a judge in vacation deems the exigency sufficiently great to warrant an *ex parte* order for a receivership of property, such as that in question here, he should by the same order appoint a very early day for the showing of cause against the order by defendants, so that the latter may then have opportunity for the motion to vacate which the statute permits. Our law confers, indeed, power to appoint a receiver in vacation; but it also allows an appeal from an order refusing to vacate an interlocutory appointment. A reasonable construction of this law would appear to permit in vacation a motion to revoke the appointment in vacation; otherwise one of the chief remedial objects of the appeal statute on this subject would be frustrated." *St. Louis K. & S. R. Co. v. Wear*, 135 Mo. 230, 36 S. W. 357, 33 L. R. A. 341.

15. *Nisbet v. Tindall*, 115 Ga. 374, 41 S. E. 569; *Cincinnati S. & C. R. Co. v. Sloan*, 31 Ohio St. 1. See also *St. Louis K. & S. R. Co. v. Wear*, 135 Mo. 230, 36 S. W. 357.

16. *Price v. Harned*, 1 Iowa 473.

[a] It "is difficult to see how such a jurisdiction could be conveniently exercised in view of the fact that the proceeding by *mandamus* is substantially an action which may involve pleadings, issues, trial and final judgment upon the right, unless the power of the judge acting in chambers and not as a court should be restricted to issuing the writ returnable before the court, as is the procedure in some of the states. . . . We find it impossible to avoid the conclusion that a judge at chambers in the city of New York, or elsewhere within the state, has no jurisdiction to issue a writ of *mandamus*." *People ex rel. Lower v. Donovan*, 135 N. Y. 76, 31 N. E. 1009. See also *In re Manning*, 71 Hun 236, 24 N. Y. Supp. 1039.

bers<sup>17</sup> and in vacation<sup>18</sup> may issue an alternative writ of mandamus returnable, pursuant to the statute, in vacation,<sup>19</sup> or in term.<sup>20</sup> A statutory authority to issue such writ does not empower a judge to determine the matter on its merits out of court.<sup>21</sup> In some states, however, judges at chambers<sup>22</sup> and in vacation<sup>23</sup> may issue a peremptory writ of mandamus, particularly so, in the absence of any controversy as to

17. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *Payne v. Perkerson*, 56 Ga. 672. But see *Gay v. Gilmore*, 76 Ga. 725.

18. Ala.—*McConnell v. Goodwin*, 189 Ala. 390, 66 So. 675. La.—*State v. Judge*, 22 La. Ann. 581. Mo.—*State v. Weeks*, 93 Mo. 499, 6 S. W. 266; *Ex parte Miller*, 12 Mo. App. 592. Mont.—*State v. Choteau County*, 13 Mont. 23, 31 Pac. 879.

[a] "Power is given to the judges of the circuit court, in term time or in vacation, to allow writs of mandamus. . . . Under these provisions, in the absence of further regulations, the practice has been adopted of applying by petition to a judge in vacation for the issuance of an alternative writ of mandamus, returnable to the circuit court having local jurisdiction." *Swann v. Buck*, 40 Miss. 268.

19. *Territory v. Shearer*, 2 Dak. 332, 8 N. W. 135.

20. *Hammond v. Poole*, 58 Ga. 169; *Payne v. Perkerson*, 56 Ga. 672; *Dougherty, etc. Co. v. Walker*, 54 Ga. 595; *Ex parte Miller*, 12 Mo. App. 592.

[a] The writ must be made returnable like any other writ to a term of the court and not to the judge at chambers. *Whitesides v. Stuart*, 91 Tenn. 710, 20 S. W. 245.

[b] Where a money demand is sought to be enforced by mandamus, it is not returnable at chambers but must be made returnable to the regular term of the court. *Ewbank v. Turner*, 134 N. C. 77, 46 S. E. 508; *Rogers v. Jenkins*, 98 N. C. 129, 3 S. E. 821; *Belmont & Co. v. Reilly*, 71 N. C. 260.

21. *State v. Crook*, 123 Ala. 657, 17 So. 334.

22. *Rea v. Montgomery Home Tel. Co.*, 87 Kan. 665, 125 Pac. 27.

23. Dak.—*Territory v. Shearer*, 2 Dak. 332, 8 N. W. 135. Me.—*Hamlin v. Higgins*, 102 Me. 510, 67 Atl. 625. Tex.—*Hines v. Morse*, 92 Tex. 194, 47

S. W. 516; *Dunnagan v. Wingfield* (Tex. Civ. App.), 141 S. W. 288. Va. *Gloucester County v. Middlesex County*, 88 Va. 843, 14 S. E. 660.

[a] "There has been a terminology brought into this state from that employed elsewhere, which recognizes two writs of mandamus, the alternative and the peremptory, or absolute. But the alternative writ has no such real place in our procedure as it has elsewhere. With us all that need precede the final writ is a notice, whatever it may be called, sufficient to give opportunity for the hearing. . . . It is apparent from this that no power but that to issue the absolute writ would be of any efficacy in the hands of the district judge, since that which was formerly called the alternative had been superseded by a mere notice to show cause or to answer. The power given by the constitution to the judge to issue a mandamus cannot be frittered away by holding it to be a mere power to issue a notice which the clerk can issue as well as he. . . . But it is said that the existence of such a power in the district judges would not consist with the right of trial by jury preserved in the bill of rights. The right of trial by jury exists only with respect to disputed questions of fact. It could not be said to exist in all cases of mandamus, many of which, as does this one, depend upon pure questions of law arising upon admitted facts. Therefore this right, given its broadest scope, does not conflict with the existence of the power in question. If it be conceded for the purpose of this case that a respondent is entitled to a jury trial whenever, in such a case, a disputed question of fact essential to its decision arises, and that the judge cannot lawfully provide such a trial in vacation, the only consequence would be that the judge could not then grant the writ because of the constitutional right thus arising as an impediment." *Thorne v. Moore*, 101 Tex. 205, 105 S. W. 985.

the essential facts involved,<sup>24</sup> or where the parties consent to a hearing in vacation.<sup>25</sup>

b. *Habeas Corpus*.—A writ of habeas corpus may be issued out of term time and made returnable before a judge at chambers,<sup>26</sup> even though petitioner is held by an order made by the court in term time,<sup>27</sup> without making the case a matter of record,<sup>28</sup> and the writ may run into any part of the state.<sup>29</sup>

c. *Quo Warranto*.—In some jurisdictions quo warranto may be

24. *Hopkins v. State*, 64 Neb. 10, 89 N. W. 401; *Byrum v. Peterson*, 34 Neb. 237, 51 N. W. 829; *Linch v. State*, 30 Neb. 740, 47 N. W. 88.

[a] "When the right is clear, there is no doubt under our statute that a judge at chambers within his district may grant a peremptory writ of mandamus. The statute expressly confers this power and its exercise is frequently necessary to prevent a failure of justice." *Clark v. State*, 24 Neb. 263, 38 N. W. 752.

25. *Camilla v. Norris*, 134 Ga. 351, 67 S. E. 940.

26. **U. S.**—*In re Urzua*, 188 Fed. 540; *In re Bennett*, 3 Fed. Cas. No. 1,315. **Ala.**—*Ex parte Chaney*, 8 Ala. 424. **Ark.**—*Wright v. Johnson*, 5 Ark. 687. **Cal.**—*In re Perkins*, 2 Cal. 424. **Md.**—*Ex parte O'Neill*, 8 Md. 227. **Mass.**—*Wyeth v. Richardson*, 10 Gray 240. **Mich.**—*Goodehild v. Foster*, 51 Mich. 599, 17 N. W. 74. **Minn.**—*State v. Hill*, 10 Minn. 63. **Miss.**—*Steele v. Shirley*, 9 Smed. & M. 382. **Mo.**—*Martin v. State*, 12 Mo. 471; *State v. Simmons*, 112 Mo. App. 535, 87 S. W. 35. **N. J.**—*Peltier v. Pennington*, 14 N. J. L. 312. **N. Y.**—*People v. Wilcox*, 22 Barb. 178. **Ohio.**—*Ex parte Collier*, 6 Ohio St. 55. **Pa.**—*Com. v. Gibbons*, 9 Pa. Super. 527. **Tex.**—*Thorne v. Moore*, 101 Tex. 205, 105 S. W. 985. **Wis.**—*Potter v. Frohbach*, 133 Wis. 1, 112 N. W. 1087; *In re Booth*, 3 Wis. 1.

See also 10 STANDARD PROC. 925.

[a] A "district judge, as contradistinguished from the court, may perform all acts required in proceedings under the provisions of the statute in regard to writs of habeas corpus as legally and effectually as the court itself." *In re Dowling*, 4 Idaho 715, 43 Pac. 871.

[b] Judges of the supreme court have full jurisdiction over the writ of

habeas corpus in their individual capacity, but they have no power to act thereon in the first instance as a court. *Ex parte Hickey*, 4 Smed. & M. (Miss.) 751.

[c] This power may be exercised in equity as well as at law. *In re Poole*, 2 McArthur (D. C.) 583, 29 Am. Rep. 628; *People v. Osborne*, 6 N. Y. Civ. Proc. 299. See also *People v. Corey*, 46 Hun (N. Y.) 408.

27. *Ex parte Chaney*, 8 Ala. 424. But see *Peltier v. Pennington*, 14 N. J. L. 312.

[a] "Our statute relating to the subject gives to the judges of the courts, separately, at chambers, jurisdiction of the subject-matter in all cases, except when the person is convicted of a crime or offense and stands committed for it; or where he is committed for treason or felony, the punishment whereof is capital. . . . In the exercise of this power by a single judge or a court every case of unlawful imprisonment may be reached and examined into. . . . The true test of jurisdiction is, whether the relator is detained or imprisoned without legal authority? The source from which the imprisonment emanates or the authority by which it is sought to be enforced, operates as no barrier to the allowance and validity of the writ." *Ex parte Collier*, 6 Ohio St. 55.

28. *Wyeth v. Richardson*, 10 Gray (Mass.) 240.

29. *State v. Porter*, 78 Neb. 811, 112 N. W. 286.

[a] A justice of the supreme court at chambers may issue a writ of habeas corpus which shall run into any part of the state. *People v. Cooper*, 8 How. Pr. (N. Y.) 288. To the same effect, *People v. Hanna*, 3 How. Pr. (N. Y.) 39.

issued by a judge at chambers and in vacation,<sup>30</sup> while in others such writ can be issued only by the court as such.<sup>31</sup>

d. *Prohibition*.—The power to issue writs of prohibition ordinarily is vested in the court and not a judge at chambers or in vacation,<sup>32</sup> unless such authority is conferred upon him by express statutory provision,<sup>33</sup> or he is invested by the statute with the power of a chancellor under the common law.<sup>34</sup> Where the application for such writ is made in vacation an order to show cause why the writ should not issue may be made by a judge returnable to the next term of the court.<sup>35</sup>

4. *Probate Proceedings*.—Ordinarily unless otherwise provided by statute, appointment of personal representatives, such as administrators or guardians, cannot be made in chambers or vacation.<sup>36</sup> A judge

30. Cal.—*Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237. Ill.—*People v. Moore*, 73 Ill. 132. Miss.—*Bowen v. Gilleylen*, 58 Miss. 813. Ohio. *State v. Buckland*, 5 Ohio St. 216.

[a] "There is nothing in the essential nature of quo warranto proceedings to furnish a reason why they should not be had in vacation. On the contrary they are peculiarly such as are most advantageously conducted by the courts in chambers." *Territory ex rel. Hubbell v. Armijo*, 14 N. M. 205, 89 Pac. 267.

31. *McDonald v. Aleona*, 91 Mich. 459, 51 N. W. 1114; *State v. Conklin*, 33 Wis. 685.

32. *Ex parte Boothe*, 64 Ala. 312; *Ex parte Ray*, 45 Ala. 15; *People v. District Court*, 28 Colo. 485, 69 Pac. 1066.

33. *State v. Judges, etc.*, 35 La. Ann. 1007.

34. *Lincoln, etc. Min. Co. v. District Court*, 7 N. M. 486, 38 Pac. 580.

[a] The jurisdiction of chancery to issue writs of prohibition was expressly placed on the ground of necessity for the purpose of preventing a failure of justice during the vacation of the law courts. *State v. Rombauer*, 104 Mo. 619, 15 S. W. 850, 16 S. W. 502.

35. Ala.—*Ex parte Boothe*, 64 Ala. 312; *Ex parte Ray*, 45 Ala. 15. Mo. *State v. Dearing*, 184 Mo. 647, 84 S. W. 21; *State v. Rombauer*, 105 Mo. 103, 16 S. W. 695. N. M.—*Lincoln, etc. Mining Co. v. District Court*, 7 N. M. 486, 38 Pac. 580.

[a] The "necessity of cases may require the application for this writ to be made in vacation, but the writ

itself should only be issued in term time. When the application is made in vacation, a rule to show cause should first be issued, returnable to the next term of the court and this rule should be served upon the judge or court, and the parties to be affected by it . . . and, when served, the rule to show cause will operate as a prohibition until the further order of the court." *Ex parte Ray*, 45 Ala. 15. But compare *People ex rel. Adams v. District Court (Colo.)*, 69 Pac. 1066, where the court says: "An order to show cause why a writ of prohibition should not issue is one of the steps leading up to the issuance of the writ, and, inasmuch as the judges have no authority to issue that writ, they certainly are not vested with the power to take any initial steps in the matter in vacation."

36. See the cases and notes following, and generally the titles "Decedents' Estates;" "Guardian and Ward."

[a] The statute expressly prohibits the issuance of letters of guardianship except at a regular term of the court. *Bell v. Love*, 72 Ga. 125.

[b] Under a statutory provision authorizing all motions except for a new trial on the merits to be heard out of court, a judge at chambers has the power to appoint a guardian. *Disbrow v. Folger*, 5 Abb. Pr. (N. Y.) 53.

[c] A provisional order for the appointment of a guardian until the court acts upon the matter in term, may be made in vacation. *Garrison v. Lyle*, 38 Mo. App. 558.

[d] Where the bill is filed for that

of a probate court has no power in vacation to compel an administrator to give additional security,<sup>37</sup> or make an order settling the account of an administrator,<sup>38</sup> or directing the sale of property.<sup>39</sup> But in some jurisdictions a judge at chambers or in vacation may make an order directing a guardian to deposit moneys of the ward,<sup>40</sup> or to deliver the minor into the custody of a parent,<sup>41</sup> or, by statute, discharging a guardian.<sup>42</sup>

**5. Trust Estates.** — Under a statute providing that courts of equity shall always be open, a judge at chambers or in vacation may make such orders as are necessary for the protection of trust estates;<sup>43</sup> thus, under such statute a judge out of court may appoint and remove trustees,<sup>44</sup> grant leave to mortgage the trust property,<sup>45</sup> and make an order for the sale of trust property.<sup>46</sup>

**6. Divorce Proceedings.** — In some jurisdictions a judge at chambers may order the payment of alimony pendente lite,<sup>47</sup> and prohibit

purpose only, a judge in vacation may appoint an administrator of the estate of a debtor. *Barry v. Frayser*, 10 Heisk. (Tenn.) 206.

37. *Wingate v. Wallis*, 5 Smed. & M. (Miss.) 249.

38. *Succession of Bougere*, 29 La. Ann. 378.

39. *Webb v. Hicks*, 117 Ga. 335, 43 S. E. 738; *Hunton v. Nichols*, 55 Tex. 217.

[a] Except by consent of the parties interested in the estate. *Sharp v. Findley*, 71 Ga. 654.

[b] Permissible by Statute.—*State v. Dickson*, 213 Mo. 66, 111 S. W. 817; *Stewart v. Daggy*, 13 Neb. 290, 13 N. W. 399.

40. *Succession of Wegmann*, 110 La. 930, 34 So. 878.

41. *Wilcox v. Wilcox*, 14 N. Y. 575.

42. See *Warder v. Elkins*, 38 Cal. 439.

[a] The power to discharge necessarily implies that the judge has authority at chambers to perform any act preliminary to such order of discharge. *Warder v. Elkins*, 38 Cal. 439.

43. *Obear v. Little*, 79 Ga. 384, 4 S. E. 914.

[a] "Under our statute . . . a court of equity is always open for the protection of the wards of chancery. When a proper petition was presented to the judge at chambers, he had the power, and it was his duty, to pass such orders as might be necessary to protect the interests of a cestui que

trust, and provide for his support. . . . There can be no doubt that in term, or even in chambers, the superior court has the power to enforce, by attachment for contempt against a defaulting trustee, its own order which he has failed to obey, when he presents no sufficient excuse for his disobedience." *Obear v. Little*, 79 Ga. 384, 4 S. E. 914.

44. *Heath v. Miller*, 117 Ga. 854, 44 S. E. 13; *White v. McKeon*, 92 Ga. 343, 17 S. E. 283; *Milledge v. Bryan*, 49 Ga. 397.

[a] Upon hearing of an application for discharge of a trustee in vacation a judge may by consent of the parties make an order that the trustee pay a certain sum belonging to the trust estate. *Guthrie v. Guthrie*, 71 Iowa 744, 30 N. W. 779.

45. *Pease v. Wagon*, 93 Ga. 361, 20 S. E. 637; *Weems v. Coker*, 70 Ga. 746, overruling on this point *Iverson v. Saulsbury Co.*, 68 Ga. 790.

46. *Webb v. Hicks*, 117 Ga. 335, 43 S. E. 738; *Askew v. Patterson*, 53 Ga. 209.

47. *Edmondson v. Edmondson*, 128 Ga. 53, 57 S. E. 308; *In re Gill*, 20 Wis. 686.

[a] Such order, however, cannot be made on an ex parte motion of the wife and in the absence of notice of any kind to the husband of the intended application. *Coger v. Coger*, 48 W. Va. 135, 35 S. E. 823.

[b] A statute providing that motions may be made to a judge out of

the husband from imposing any restraint on the personal liberty of his wife.<sup>43</sup> And the statute may authorize the rendition of a decree of divorce in vacation.<sup>49</sup> But in other jurisdictions a motion for alimony pendente lite can be heard only in open court.<sup>50</sup>

**7. Partition Suits.** — A judge at chambers is sometimes authorized to make all necessary orders in a partition suit,<sup>51</sup> and may even render judgment where the statute authorizes it.<sup>52</sup>

**8. Condemnation Proceedings.** — A judge at chambers or in vacation has no power to hear a proceeding for the condemnation of lands unless expressly authorized by statute so to do.<sup>53</sup> But where a judge under a statute is authorized to hear and determine at chambers applications for condemning rights of way he is thereby empowered to award costs.<sup>54</sup>

**9. Foreclosure Proceedings.** — Under a statute empowering judges in vacation to make all such orders as may be necessary to carry into effect decrees previously entered, a judge in vacation may in foreclosure proceedings issue a writ of possession of the mortgaged premises,<sup>55</sup> or a writ of assistance,<sup>56</sup> or order a return of property taken in the course of foreclosure proceedings,<sup>57</sup> and confirm a sale under a decree of foreclosure.<sup>58</sup>

**10. Election Contests.** — Under some statutes election contests may

court except for a new trial, gives to a judge the power at chambers to award alimony pendente lite. *Brunson v. Brunson*, 94 S. C. 11, 77 S. E. 704; *Messervy v. Messervy*, 80 S. C. 277, 61 S. E. 442; *Smith v. Smith*, 51 S. C. 379, 29 S. E. 227.

48. *In re Gill*, 20 Wis. 686.

49. *Falley v. Falley*, 163 Ala. 626, 50 So. 894.

50. *Larco v. Casaneuava*, 30 Cal. 560.

51. *Marvin v. Titworth*, 10 Wis. 320.

[a] **Order for Publication.**—But where the petition merely sets forth the petitioner's intention to apply for a partition of land, such petition is not sufficient to authorize the judge to make an order in vacation for service by publication. *Lochrane v. Equitable L. & S. Co.*, 122 Ga. 433, 50 S. E. 372.

52. *Woodward v. Elliott*, 27 S. C. 368, 3 S. E. 477; *Marvin v. Titworth*, 10 Wis. 320. See generally the title "Partition."

53. *Washington, etc. R. Co. v.*

*Coeur d'Alene R. & N. Co.*, 3 Idaho 263, 28 Pac. 394.

54. *Granite M. M. Co. v. Weinstein*, 7 Mont. 440, 17 Pac. 113.

55. *Kessinger v. Whittaker*, 82 Ill. 22.

56. *Murchison v. Miller*, 64 S. C. 425, 42 S. E. 177.

57. *Otis v. May*, 30 Ill. App. 581.

58. *Hartsuff v. Huss*, 2 Neb. (Unof.) 145, 95 N. W. 1070.

[a] "The subsequent proceedings on the decree, the sale and its confirmation, are merely modes of enforcing the rights of the mortgagee and for the benefit of the mortgagor. The sale, when made in pursuance of the decree, is incomplete; the decree of foreclosure and sale is not executed until the confirmation by the court. . . . Such being the character of the sale and of the decree of confirmation, it seems to us that its confirmation is . . . a matter for which the court of chancery must be 'deemed always open.' " *Ex parte Branch & Co.*, 63 Ala. 383.

be heard and determined at chambers,<sup>59</sup> but otherwise such practice is not permissible.<sup>60</sup>

**11. Insolvency Proceedings.**—A judge has no authority to hear an insolvent proceeding and discharge an insolvent except when sitting as a court.<sup>61</sup> Nor can a judge at chambers make an order for allowance of an attorney's fee to the assignee of the insolvent debtor.<sup>62</sup>

**12. Judicial Sales.**—In the absence of statute the court cannot at chambers order a judicial sale.<sup>63</sup> The statute sometimes authorizes confirmation of such sales in chambers.<sup>64</sup>

**O. APPEALS FROM ORDERS AT CHAMBERS OR IN VACATION.**<sup>65</sup>—Orders made at chambers or in vacation in the absence of a statute generally are not appealable,<sup>66</sup> and a statute providing that an order of a judge at chambers may be enforced as an order of the court does not alter the nature of the order so as to authorize an appeal therefrom.<sup>67</sup> But if the statute gives the court the same authority in vacation as he has in open court with respect to a particular matter, his acts in chambers as to such matter are appealable to the same extent as though done in open court.<sup>68</sup> In some jurisdictions an appeal may be taken from

59. *Stewart v. Mahoney* Min. Co., 54 Cal. 149; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *Myers v. Warner*, 3 Ore. 212.

60. See 8 STANDARD PROC. 94.

61. Cal.—*Turner v. McIlhany*, 6 Cal. 287. Ill.—*People v. Wilkinson*, 13 Ill. 660. N. Y.—*Bennett v. Cooper*, 57 Barb. 642; In the Matter of *Walker*, 2 Duer 655.

[a] But objections to discharge may be heard at chambers. *Clarke v. Ray*, 6 Cal. 600.

62. *Bank of Genesee v. Denning*, 5 Idaho 482, 51 Pac. 406.

63. See the title "Judicial Sales."

Order of probate court for sale, see *supra*, II, N, 4.

64. See *Hartsuff v. Huss*, 2 Neb. (Unof.) 145, 95 N. W. 1070.

[a] A statute conferring jurisdiction upon a judge to confirm a sale at chambers necessarily includes the power to pass upon everything affecting its regularity. *Hartsuff v. Huss*, 2 Neb. (Unof.) 145, 95 N. W. 1070, objections to appraisement.

65. As to appealable orders generally, see the title "Appeals," and also specific titles.

66. Cal.—*In re Perkins*, 2 Cal. 424. Mass.—*Wyeth v. Richardson*, 10 Gray 240. Okla.—*School Dist. No. 8 v. Eakin*, 23 Okla. 321, 100 Pac. 528.

Tex.—*Dunnagan v. Wingfield* (Tex. Civ. App.), 141 S. W. 288. Wash. Ter. *Suffern v. Chisholm*, 1 Wash. Ter. 486.

[a] Statutes authorizing an appeal from orders made at chambers "are in contravention of established rules of long standing and should be strictly construed. . . . Such orders are not a final determination of the rights of the parties but are only interlocutory and the entire subject-matter is subject to determination in the final trial of the cause." *Herring v. Wiggins*, 7 Okla. 312, 54 Pac. 483.

67. *Black Hill, etc. Co. v. Grand Island R. Co.*, 2 S. D. 546, 51 N. W. 342. But see *Clark v. Raymond*, 84 Iowa 251, 50 N. W. 1068, where the court said: "There is no reason why the order of appointment (of receiver) is not appealable if made in vacation the same as if made in term time. The effect of the appointment and the rights of the parties are affected in one case the same as in the other."

68. *Pressley v. Lamb*, 105 Ind. 171, 4 N. E. 682.

[a] In "every section of the civil code in relation to receivers, it will be seen that the judge of the court in vacation is clothed with exactly the same power and authority, no greater and no less, as is the court itself when in regular and open session. In the vacation of his court the judge therefore has the power and authority to ap-

an order granting at chambers a temporary injunction,<sup>69</sup> while in others no appeal lies from such order.<sup>70</sup>

**III. JUDICIAL ACTION OUTSIDE TERRITORIAL LIMITS OF JURISDICTION.**—A judicial officer cannot perform official functions outside of the territorial limits of his jurisdiction, except in instances expressly designated by the statute.<sup>71</sup>

**IV. EXCHANGE OF, OR TEMPORARY TRANSFER OF JUDGES TO ANOTHER COURT.**—A. **GENERALLY.**—Under some statutes judges are authorized to alternate and preside for each other,<sup>72</sup>

point receivers. . . . When the judge of a court, in vacation, is engaged in doing these acts and making these orders, it is clear, we think, that he is exercising quoad hoc 'the judicial power of the state' and that his acts, orders and proceedings in the premises, although had in vacation, are the judicial proceedings of the court whereof he is a judge. . . . It will be observed that this section of the civil code makes no provision, in express terms, for any appeal from the orders of the judge in vacation either appointing or refusing to appoint a receiver. Yet it cannot be doubted, as it seems to us, that in the enactment of this section of the code, the general assembly intended to and did provide that whenever the court or judge, either in term or vacation, in any case thereafter commenced or then pending, might appoint or refuse to appoint a receiver, the party aggrieved might, within ten days thereafter, appeal from the decision of the court or judge, either in term or vacation, without awaiting the final determination of the case." *Pressley v. Lamb*, 105 Ind. 171, 4 N. E. 682.

69. *Sullivan v. Triunfo*, G. & S. M. Co., 33 Cal. 385.

70. *Sanders v. Plunkett*, 40 Ark. 507, 508, 509.

71. *Ala.*—*Rainey v. Ridgeway*, 151 Ala. 532, 43 So. 843. *Cal.*—*Turner v. McIlhany*, 6 Cal. 287. *Colo.*—*Kirby v. Chicago, etc. Ry. Co.*, 51 Colo. 82, 116 Pac. 150. *Ill.*—*Jones v. Albee*, 70 Ill. 34. *Ind.*—*Price v. Bayless*, 131 Ind. 437, 31 N. E. 88. *N. C.*—*State v. Parsons*, 115 N. C. 730, 20 S. E. 511; *Godwin v. Monds*, 101 N. C. 354, 7 S. E. 793; *McNeill v. Hodges*, 99 N. C. 248, 6 S. E. 127. *Ohio.*—*Pittsburg, etc. Ry. Co. v. Hurd*, 17 Ohio St. 144.

*Okla.*—*Bedwell v. Ross*, 12 Okla. 507, 73 Pac. 267; *Stanley v. United States*, 1 Okla. 336, 33 Pac. 1025. *P. I.* *Castano v. Lobingier*, 7 Phil. Isl. 91.

See *infra*, IV.

[a] "Judicial power is necessarily local in its nature and its exercise to be valid must be local also." *Lynde v. The County*, 16 Wall. (U. S.) 6, 21 L. ed. 272.

[b] *Chancellor.*—See *Griffin v. Branch Bank*, 9 Ala. 201; *Adams v. Kyzer*, 61 Miss. 407.

As to jurisdiction over subject-matter outside territorial limits of the court's jurisdiction, see the title "Jurisdiction."

72. *Ala.*—*Spradling v. State*, 17 Ala. 440. *Ark.*—*Knox v. Beirne*, 4 Ark. 460. *Colo.*—*Prudential Ins. Co. v. Hummer*, 36 Colo. 208, 84 Pac. 61; *Bigerft v. People*, 30 Colo. 298, 70 Pac. 417. *Ill.* *Beach v. People*, 157 Ill. 659, 41 N. E. 1117; *Salomon v. Chicago T. & T. Co.*, 115 Ill. App. 194. *Ia.*—*Howe v. Jones*, 66 Iowa 156, 23 N. W. 376; *State v. Stingley*, 10 Iowa 488. *Ky.*—*Pollard v. Yoder*, 2 A. K. Marsh. 264; *Banks v. Oden*, 1 A. K. Marsh. 546. *Mich.* *Donovan v. Bromley*, 113 Mich. 53, 71 N. W. 523. *Miss.*—*First Nat. Bank v. Bloch*, 82 Miss. 197, 33 So. 849. *Neb.*—*Candy v. State*, 8 Neb. 482, 1 N. W. 454. *N. C.*—*Bear v. Cohen*, 65 N. C. 511. *N. D.*—*Gould v. Duluth & D. Elec. Co.*, 3 N. D. 96, 54 N. W. 316. *Tenn.*—*Stuart v. State*, 1 Baxt. 178. *Tex.*—*Munzesheimer v. Fairbanks*, 82 Tex. 351, 18 S. W. 697; *Miller v. State (Tex. Crim.)*, 91 S. W. 582. *Wash.*—*King County v. Hill*, 1 Wash. 63, 23 Pac. 926.

[a] Judges even in the absence of an express statute "may exchange districts when they deem it expedient

and to call in another judge in case of disability or disqualification.<sup>73</sup> The record in the cause should disclose the reason for the calling in of a judge from another court,<sup>74</sup> as well as that the requirements of the statute in regard thereto have been complied with,<sup>75</sup> but in some jurisdictions it is held that, nothing to the contrary appearing, it must be presumed that the judge had proper authority to hold court outside of his district.<sup>76</sup>

Where a judge of one court sits in another, the court held by him constitutes a session of the court in which he presides,<sup>77</sup> and his acts are acts of that court and not of the court over which the judge regularly presides.<sup>78</sup> A judge who is called in from another court is vested with all the powers of the regular judge<sup>79</sup> whose authority is superseded

and discharge the functions of their office in districts other than those for which they were elected." *Kitchen v. Crawford*, 13 Tex. 516.

73. *Ala.*—*Thornton v. Moore*, 61 Ala. 347. *Fla.*—*Swepton v. Call*, 13 Fla. 337. *Ga.*—*Ivey v. State*, 112 Ga. 175, 37 S. E. 398; *Wells v. Newton*, 101 Ga. 141, 28 S. E. 640. *Ind.*—*Hutts v. Hutts*, 51 Ind. 581. *La.*—*State v. Judge*, 37 La. Ann. 253; *State v. Debailion*, 36 La. Ann. 828; *State v. Lazarus*, 33 La. Ann. 1425. *Me.*—*State v. Thomas*, 56 Me. 490. *Mo.*—*State v. McCarver*, 194 Mo. 717, 92 S. W. 684; *State v. Fort*, 178 Mo. 518, 77 S. W. 741; *State v. Hunter*, 171 Mo. 435, 71 S. W. 675. *Mont.*—*Farleigh v. Kelly*, 24 Mont. 369, 62 Pac. 495. *Nev.*—*State v. Mack*, 26 Nev. 430, 69 Pac. 862. *N. Y.*—*In re Rhinebeck*, 19 Hun 346. *Ore.*—*Baisley v. Baisley*, 15 Ore. 183, 13 Pac. 888. *Pa.*—*Com. v. White*, 161 Pa. 576, 29 Atl. 283; *In the Application of the President Judges*, 64 Pa. 33. *S. D.*—*State v. Palmer*, 4 S. D. 543, 57 N. W. 490. *Wis.*—*Haley v. Jump River Lumb. Co.*, 81 Wis. 412, 51 N. W. 321; *Rines v. Boyd*, 7 Wis. 155.

As to disqualification of judge, see *infra*, IX.

[a] There are "certain writs, such as certiorari, mandamus, habeas corpus, injunction and quia timet, as also certain specified powers which each judge must grant or exercise in his own circuit, and no non-resident judge is permitted to do so, except in the absence, sickness, or disqualification of the judge of the circuit." *Harrison & Co. v. Hall S. & L. Co.*, 64 Ga. 558.

74. *Ga.*—*Worsham v. Murchison*, 66 Ga. 715. *Pa.*—*In re Application of the President Judges*, 64 Pa. 33; *Foust v.*

*Com.*, 33 Pa. 338. *Va.*—*Gresham v. Ewell*, 85 Va. 1, 6 S. E. 700.

75. *Bear v. Cohen*, 65 N. C. 511.

[a] The authority of a judge of another court to hear a criminal case must appear of record and it should not be left to presumption in any case. *Low v. State*, 111 Tenn. 81, 78 S. W. 110.

76. *Ark.*—*Caldwell v. Bell*, 3 Ark. 419. *Cal.*—*People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933; *In re Newman's Estate*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146; *People v. Mellon*, 40 Cal. 648. *Colo.*—*Means v. Stow*, 29 Colo. 80, 66 Pac. 881; *Empire L. & C. Co. v. Engley*, 14 Colo. 289, 23 Pac. 452. *Mo.*—*Riggs v. Owen*, 120 Mo. 176, 25 S. W. 356. *Neb.*—*Cox v. Peoria Mfg. Co.*, 42 Neb. 660, 60 N. W. 933. *S. D.*—*Williams v. Williams*, 6 S. D. 284, 61 N. W. 38. *Wash.*—*State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887. *Wyo.*—*Ross v. State*, 8 Wyo. 351, 57 Pac. 924.

77. *Collins v. Johnston*, 237 U. S. 502, 35 Sup. Ct. 649, 59 L. ed. 1071; *Paulk v. State*, 2 Ga. App. 660, 58 S. E. 1108.

78. *Ark.*—*Knox v. Beirne*, 4 Ark. 460. *Fla.*—*State v. Hocker*, 35 Fla. 19, 16 So. 614; *Swepton v. Call*, 13 Fla. 337. *Ind.*—*Lee v. Hills*, 66 Ind. 474. *Ia.*—*Williams v. Dean*, 134 Iowa 216, 111 N. W. 931, 11 L. R. A. (N. S.) 410. *N. C.*—*Howes v. Mauney*, 66 N. C. 218. *Tex.*—*National Bank v. Lone Star Mill. Co.* (Tex. Civ. App.), 152 S. W. 663.

79. *U. S.*—*McDowell v. Kurtz*, 77 Fed. 206, 23 C. C. A. 119; *Industrial & Min. G. Co. v. Elec. Supply Co.*, 58 Fed. 732, 7 C. C. A. 471; *Harmon v. United States*, 43 Fed. 817. *Idaho.*

by that of his substitute during the term and in respect to the causes in which the latter presides.<sup>80</sup>

A judge temporarily presiding in another court cannot exercise judicial functions performable only in open court, in respect to cases

*Morris v. Lemp*, 13 Idaho 116, 88 Pac. 761. *Ind.*—*Lerch v. Emmett*, 44 Ind. 331. *Mo.*—*Bower v. Daniel*, 198 Mo. 289, 95 S. W. 347. *N. C.*—*Henry v. Hilliard*, 120 N. C. 479, 27 S. E. 130; *Bear v. Cohen*, 65 N. C. 511. *Pa.* *Com. v. Johnson*, 236 Pa. 412, 84 Atl. 424. *Tenn.*—*Elms v. State*, 10 Humph. 128.

[a] Where "judges exchange districts, each has the constitutional authority to perform all the duties imposed upon the district judge in the district over which he has been requested to preside. Certainly the statute does not mean that . . . he is disqualified from sitting in any other case that may be filed during the term while he is holding court in that county." *Miller v. State* (Tex. Crim.), 91 S. W. 582.

[b] A judge of a court of inferior jurisdiction who is called to hear a cause in a court of general jurisdiction is a judge ad hoc of the latter court and has all the powers of the regular judge thereof. *Ind.*—*Malady v. McEnary*, 30 Ind. 273. *La.*—*Jarreau v. Choppin*, 6 La. 130; *Ledoux v. Ducote*, 24 La. Ann. 181. *Va.*—*Morris v. Virginia Ins. Co.*, 85 Va. 588, 8 S. E. 383.

[c] A default may be set aside by him. *People v. Campbell*, 18 Abb. Pr. (N. Y.) 1.

80. *Cal.*—*People v. O'Neil*, 47 Cal. 109. *Fla.*—*Clark v. Rugg*, 20 Fla. 861. *Idaho.*—*Morris v. Lemp*, 13 Idaho 116, 88 Pac. 761. *Ind.*—*Bement v. May*, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387; *Lee v. Hills*, 66 Ind. 474.

[a] "It is . . . the law that 'while a judge in one district may preside in another district, in place of the judge of the latter district' . . . 'this does not authorize two judges to hold separate courts in the same district at the same time.' Therefore an order made by a judge presiding out of his district at a time when the judge of the district where the order is made, is also holding court, therein is void." *Bank of Mineo v. Struss*, 4 Okla. 160, 44 Pac. 273.

[b] **Authority of Substitute.**—Whenever a judge is required to hold a term of court, whether regular or special, "for some county outside of his proper district, the authority of the judge is special; the jurisdiction of the proper judge of the district is superseded by that of the substituted judge in that county during the specified term, but not elsewhere, nor for a longer time; the substituted judge has in respect to all cases pending in the specified county during the specified term, all the powers of the proper judge of the district; he still retains those belonging to him as possessed of in his own district." *Bear v. Cohen*, 65 N. C. 511.

[c] **Where a case was tried before a judge pro tem** and at the same time the regular judge held court in an adjacent room and tried other cases and the judge pro tem vacated the bench after the final submission of the case to the jury and the regular judge who was disqualified received and announced the verdict of the jury, it was held that "if the proceedings of either one should be declared void or even erroneous, it would be the proceedings before the regular judge. He having knowledge of his disqualification to try the case in question, and having given way for the trial before a judge pro tem, should take notice of the fact that he was temporarily out of the exercise of his judicial authority, and should know that until the business which justified his temporary retirement from the exercise of his functions had been dispatched, he was disqualified from holding his court. In the interim his judicial authority would be in suspension, so that if objection had been made by the litigating parties that authority could not have been exercised." *List v. Jockheck*, 59 Kan. 143, 52 Pac. 420.

[d] **No Power To Set Case for Trial.** And a judge who is disqualified to hear a case and calls in another judge to try it has no power to set the case down for trial in vacation before the

pending in the court over which he regularly presides,<sup>81</sup> except by consent of the parties;<sup>82</sup> but he is authorized to perform such judicial acts as under the statute may be done by him at chambers or in vacation.<sup>83</sup>

**B. AUTHORITY UPON RETURN TO HIS OWN COURT.**—Upon return to his own court a judge may transact chambers and vacation business in reference to cases tried before him in another court.<sup>84</sup> Thus, he may settle and sign a bill of exceptions heard before him while presiding in another court,<sup>85</sup> but he cannot hear a motion for a new trial in such

judge called to preside. *Ex parte* Skeen, 41 Ind. 418.

[e] **But the regular judge may upon return** to the bench set aside orders made in his absence by another judge. *Ex parte* Simmons, 105 Ark. 19, 150 S. W. 141; *Shepherd v. Gove*, 26 Wash. 452, 67 Pac. 256.

81. **Ill.**—United States Life Ins. Co. v. Shattuck, 159 Ill. 610, 43 N. E. 389. **Ia.**—Williams v. Dean, 134 Iowa 216, 111 N. W. 931, 11 L. R. A. (N. S.) 410. **N. C.**—Moore v. Moore, 131 N. C. 371, 42 S. E. 822. **S. C.**—Barrett v. James, 30 S. C. 329, 9 S. E. 263.

[a] **Motion for Reduction of Alimony.**—A judge holding court in another district has no power to hear a motion for a reduction of alimony pendente lite in an action for divorce pending in his own district. *Moore v. Moore*, 131 N. C. 371, 42 S. E. 822.

82. **N. C.**—Skinner v. Terry, 107 N. C. 103, 12 S. E. 118. **S. C.**—La Motte v. Smith, 50 S. C. 558, 27 S. E. 933. **Wash.**—Shaw v. Spencer, 57 Wash. 587, 107 Pac. 383.

[a] **"Such consent should certainly appear in a writing** signed by the parties or their counsel, or the judge should recite the fact of consent in the order or judgment he directs to be entered of record, which is the better way; or such consent should appear by fair implication from what appears in the record. This is necessary, because, without such consent appearing, the court would have no authority to hear and determine the motion and grant the judgment. The consent is essential to the valid exercise of the authority, and it must appear to have been given." *Godwin v. Monds*, 101 N. C. 354, 7 S. E. 793.

83. **U. S.**—*Ex parte* Harlan, 180 Fed. 119. **Ala.**—Griffin v. Branch Bank, 9 Ala. 201. **Ga.**—Christie v. Whitten, 69 Ga. 765. **Ia.**—Howe v. Jones, 66 Iowa

156, 23 N. W. 376. **La.**—Succession of Weigel, 17 La. Ann. 70. **Neb.**—McCarty v. Hopkins, 61 Neb. 550, 85 N. W. 540. **Ohio.**—Cincinnati S. & C. R. Co. v. Sloan, 31 Ohio St. 1; *Seely v. Blair*, 6 Ohio 448. **Okla.**—Grayson v. Perryman, 25 Okla. 339, 106 Pac. 954; *Enid v. Wigger*, 14 Okla. 176, 77 Pac. 190. **S. C.**—Chafee Co. v. Rainey, 21 S. C. 11. **Wash.**—King County v. Hill, 1 Wash. 63, 23 Pac. 926.

As to what may be done in chambers and vacation, see *supra*, II.

84. *King County v. Hill*, 1 Wash. 63, 23 Pac. 926, settlement of statement of facts.

[a] "Surely it cannot be said that the judge of the second circuit, when assigned under the statute to hold the courts of the third circuit, loses jurisdiction of all causes within that circuit as soon as the last court of such circuit has been adjourned. If so, then it would be necessary for him to file all his judgments before adjourning the last court of such circuit, which in many cases would be a practical impossibility, and hence cannot be a correct construction of the statute. Having . . . jurisdiction to prepare and file his judgments after the adjournment of the last court, when necessary, he must also have the power to put such judgments in proper form by correcting any mere clerical errors that may have crept into them." *Chafee Co. v. Rainey*, 21 S. C. 11.

85. *Ex parte* Harlan, 180 Fed. 119; *Enid v. Wigger*, 14 Okla. 176, 77 Pac. 190. See 4 STANDARD PROC. 334.

[a] Where "judges are designated to hold terms of court in other districts, if it were jurisdictional that the case-made should be signed and settled only in the district in which the cause was tried, that would necessitate the judge's returning to the district for such purpose. . . . Reason

case,<sup>86</sup> or approve a supersedeas bond.<sup>87</sup> A temporary judge, after return to his own court, may render a judgment in a case tried before him in another court.<sup>88</sup>

### V. REVIEW OF JUDICIAL ACTS OF COORDINATE JUDGE.<sup>89</sup>

A judge ordinarily cannot review the rulings of a coordinate judge,<sup>90</sup> unless leave has been previously obtained by the party to renew the mo-

as well as authority supports the rule that the judge may within the state sign and settle the case-made upon reasonable notice at any place in or without the district where the trial was had." *Grayson v. Perryman*, 25 Okla. 339, 106 Pac. 954.

86. *Shaw v. Spencer*, 57 Wash. 587, 107 Pac. 383.

87. *Gay v. Hudson River El. P. Co.*, 190 Fed. 812.

88. *Cal.*—*Estudillo v. Security Loan & T. Co.*, 158 Cal. 66, 109 Pac. 884. *Ga.*—*Early v. Oliver*, 63 Ga. 11. *N. D.* *Gould v. Duluth & D. Elec. Co.*, 3 N. D. 96, 54 N. W. 316, order directing entry of judgment. *Wash.*—*State ex rel. Calhoun v. Superior Court*, 86 Wash. 492, 150 Pac. 1168; *Rice v. Ahlman*, 70 Wash. 6, 126 Pac. 64.

89. As to jurisdiction of co-ordinate courts and its exercise, see the title "Jurisdiction."

90. *U. S.*—*In re Steele*, 156 Fed. 853; *Chafin Co. v. Furtick*, 119 Fed. 429. *Cal.*—*Dorland v. Hanson*, 81 Cal. 202, 22 Pac. 552, 15 Am. St. Rep. 44, another department of same court. *N. Y.*—*Platt v. New York & S. B. Ry. Co.*, 170 N. Y. 451, 63 N. E. 532; *Matter of Livingston*, 34 N. Y. 555; *Norwegian L. T. Church v. Krelso-vitch*, 147 App. Div. 108, 131 N. Y. Supp. 845; *Silver & Co. v. Waterman*, 127 App. Div. 339, 111 N. Y. Supp. 546; *Columbia M. B. Assn. v. Mittenacht*, 62 App. Div. 425, 70 N. Y. Supp. 1098. *N. C.*—*Henry v. Hilliard*, 120 N. C. 479, 27 S. E. 130. *N. D.* *Enderlin State Bank v. Jennings*, 4 N. D. 228, 59 N. W. 1058, 26 L. R. A. 593. *Phil. Isl.*—*Orais v. Escano*, 14 Phil. Isl. 208. *S. C.*—*State v. Price*, 35 S. C. 273, 14 S. E. 490.

[a] "It cannot in practice be tolerated, where a matter has been upon notice to the opposite party once heard and passed upon by one justice, that his decision or order may be reversed, altered, modified or vacated by an-

other justice. Let the principle be once established as the practice of this court that one justice can or may in this manner review the decisions of another in the same cause, then the order I make in this matter today may be modified or vacated by another justice tomorrow, and the order made by him again in turn vacated by me. This would lead to endless confusion in practice and nothing but an unbending statute requiring such a course of practice should induce the members of this court to adopt it." *Follett v. Weed*, 3 How. Pr. (N. Y.) 360.

[b] "It is unavoidable that the opinions of several judges upon the many doubtful questions which are constantly arising should sometimes differ, and a rule of practice which would permit one judge to sustain a demurrer to a complaint, another of co-ordinate jurisdiction to overrule it and to try the case upon the theory that the pleading was sufficient, and the former to then arrest the judgment, upon the ground that his decision upon the demurrer was right, would be intolerable." *Plattner Co. v. International Harv. Co.*, 133 Fed. 376.

[c] And where a demurrer to a petition was overruled by one judge and the cause came for hearing before another judge it is error to sustain an objection "to the introduction of any testimony, on the ground that the petition failed to state a cause of action. This is a practice that cannot be tolerated. There are two judges in the first district, and a ruling made by one must be respected by the other, otherwise confusion and uncertainty will be the result." *Marvin v. Weider*, 31 Neb. 774, 48 N. W. 825.

[d] Upon denial of a motion for a new trial by the judge who tried the case, a party cannot make a motion before another judge to vacate the judgment upon the ground of alleged error in the verdict as the granting of such motion would practically be

tion,<sup>91</sup> though there are cases to the contrary.<sup>92</sup> Where the court consists of several judges any one of them may hear any cause brought before the court,<sup>93</sup> but whenever one of the judges has taken cognizance of a case ordinarily no other judge has the power to interfere in the matter.<sup>94</sup> A judge has no authority to issue a mandamus to another coordinate judge.<sup>95</sup>

the hearing of an appeal from the order denying a new trial. *Wilsey v. Rooney*, 62 Hun 618, 16 N. Y. Supp. 471, 41 N. Y. St. 444.

[e] **Default.**—But a judge may hear a motion to set aside orders of another judge taken by default as there has “been no judicial decision in the matter; for a decision implies the hearing of both parties. The defendants’ failure to appear was a tacit consent to the entering of the orders, and it was unnecessary for the court to pass on the merits of the motions. It is from effects of that tacit consent that the defendants now wish to be relieved, not from any real decision against them.” *Thompson v. Erie R. Co.*, 9 Abb. Pr. N. S. (N. Y.) 233.

[f] **Where a motion is renewed upon different grounds**, however, it is not objectionable for one judge of the same court to make a different order from that made by another judge of the same court. *Belmont v. Erie Ry. Co.*, 52 Barb. (N. Y.) 637.

91. *Chamberlain v. Dumville*, 66 Hun 635, 21 N. Y. Supp. 827.

[a] “The justices of this court do not separately review each other’s decisions upon motions of this description, nor entertain a second motion to the same effect as a former, unless upon leave given to renew in the order which it is, in effect, sought to rehear. If the party be not satisfied with the decision made upon the papers before the judge, he should appeal. . . . If through inadvertence, surprise, or for other reasons, he finds that the merits have been imperfectly or inaccurately exhibited on the hearing, he should procure leave to renew the application upon further papers, and this should be inserted in the order.” *Cazneau v. Bryant*, 4 Abb. Pr. (N. Y.) 402.

92. *Manufacturers’ Mut. Fire Ins. Co. v. Circuit Judge*, 79 Mich. 241, 44 N. W. 604.

[a] “The judges of the same court

are all equal and co-ordinate as to the powers which they possess. An appeal cannot, therefore, be made from one to another, as neither has the power of revision or control over the decisions of the other. But where one makes an order which, in the ordinary course of the administration of justice, may come before another, each has an equal power over the subject-matter, and may, therefore, modify, enlarge or rescind such an order, as circumstances may require.” *Perry v. Williams*, 1 Bailey (S. C.) 10.

[b] **Different Ruling on Demurrer and at Trial.**—The fact that the judge who tried the case ruled differently upon a question from the judge who passed upon the demurrer to the complaint is of no consequence where the last ruling is correct. *Philips & Co. v. Langlow*, 55 Wash. 385, 104 Pac. 610.

93. *Schwing v. Dunlap*, 123 La. 485, 49 So. 134.

94. *State ex rel. Little v. District Court*, 49 Mont. 158, 141 Pac. 151. But see *Niagara Fire Ins. Co. v. Scammon*, 35 Ill. App. 582, holding that a judge of a court consisting of several judges may disregard interlocutory orders made in the case by another judge. It is said there: “When any interlocutory order has been made in a case by one judge, and further proceedings therein are before another, while courtesy to each should prevent, as it does, any captious conflict in rulings, yet each judge has the power to, and if confident he is right, should conduct the proceedings before himself in accordance with his own opinion at the time, whether that conflicts with an earlier interlocutory order or not; and it is immaterial whether that earlier order was made by himself or another judge.”

95. *Shreve v. Pendleton*, 129 Ga. 374, 58 S. E. 880; *Jennett v. Stevens*, 33 Nev. 527, 111 Pac. 1025. See generally the title “**Mandamus.**”

**VI. POWERS AFTER EXPIRATION OF TERM.**—Upon expiration of his term of office the judicial power of a judge ceases and it is not competent for him thereafter to do any judicial act in a cause which was heard before him.<sup>96</sup> Thus a judge whose term has expired cannot make findings in a cause tried before him,<sup>97</sup> although during his incumbency he had made an order for judgment in the cause;<sup>98</sup> nor can he file his decision in a case tried before him,<sup>99</sup> notwithstanding the fact that findings were made by him therein during his term of office.<sup>1</sup>

Where a judge commences to try a case but before rendition of judgment ceases to hold office, his successor must try the case *de novo*,<sup>2</sup> unless the statute expressly provides that the successor is empowered to take up and continue the proceeding at the point where it was left by

96. Cal.—*Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211; *Connolly v. Ashworth*, 98 Cal. 205, 33 Pac. 60. Conn.—*Griffing v. Town of Danbury*, 41 Conn. 96. La.—*Bradford v. Cook*, 4 La. Ann. 229. Mich.—*Ells v. Rector*, 32 Mich. 379. Minn.—*Cain v. Libby*, 32 Minn. 491, 21 N. W. 739. Miss.—*Coopwood v. Prewett*, 30 Miss. 206. Mo.—*State v. Perkins*, 139 Mo. 106, 40 S. W. 650. N. Y. *Hein v. Hein*, 148 App. Div. 249, 132 N. Y. Supp. 112; *Milliman v. New York Cent. R. Co.*, 109 App. Div. 139, 95 N. Y. Supp. 1097.

[a] **Even though the parties consent** (1) thereto. *Coopwood v. Prewett*, 30 Miss. 206. (2) *Compare Babcock v. Wolf*, 70 Iowa 676, 28 N. W. 490, holding that where a decree by consent was to be entered in vacation and it does not appear from the evidence when the decision was rendered by the judge whose term of office expired, it will be presumed that the decision was rendered by him prior to the expiration of his term of office.

[b] **Signing Order.**—The act of a former judge of the county court in attaching his signature to an order in a case long after the term had adjourned and after his term of office had expired is wholly without effect, although it is done pursuant to an order of the county court. *Waite v. People*, 228 Ill. 173, 81 N. E. 837.

[c] **Certiorari**, however, may issue to a judge whose term of office has expired. *People ex rel. Devlin v. Peabody*, 6 Abb. Pr. (N. Y.) 228; *Conover v. Devlin*, 15 How. Pr. 470, 6 Abb. Pr. 228; *Harris v. Whitney*, 6 How. Pr. (N. Y.) 175.

97. *Ells v. Rector*, 32 Mich. 379.

98. *Mace v. O'Reilly*, 70 Cal. 231, 11 Pac. 721.

[a] **But where the judge filed findings during the term at which the cause was heard though after the termination of his term of office, the judgment is not erroneous for that reason.** *Storrie v. Shaw*, 96 Tex. 618, 75 S. W. 20.

99. *Cain v. Libby*, 32 Minn. 491, 21 N. W. 739.

[a] The "trial of a cause by the court is not concluded until the decision is filed with the clerk; and when the term of office of the judge who tried the case expires before such decision is filed, the fact that it was signed by him and ordered by his successor in office to be filed with the clerk and was so filed, is not sufficient to sustain the judgment entered thereon." *Connolly v. Ashworth*, 98 Cal. 205, 33 Pac. 60.

1. *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211.

2. Colo.—*Clanton v. Ryan*, 14 Colo. 419, 24 Pac. 258. Ill.—*Updike v. Armstrong*, 4 Ill. 564. Ohio.—*Mason v. State*, 26 Ohio Cir. Ct. 535.

**Judgment cannot be rendered by a judge whose office has expired unless he is a judge de facto**, see 14 STANDARD PROC. 975.

[a] **Where all the evidence to adjudge a person incompetent was taken before one judge and the matter was subsequently argued and submitted for decision to another judge, the judgment must be reversed.** *Matter of Sullivan*, 143 Cal. 462, 77 Pac. 153.

[b] **Successor Cannot Make Findings.**—"A party to an action is en-

his predecessor,<sup>3</sup> or the parties consent to proceed with the case notwithstanding the change of judges.<sup>4</sup> But any evidence taken and reduced to writing pursuant to law may be used by the succeeding judge.<sup>5</sup> And where a judge upon expiration of his term is re-elected the proceedings had in the case before him may be continued regardless of the fact that his term expired during the trial of the cause.<sup>6</sup>

In some jurisdictions a succeeding judge may sign any records left unsigned by his predecessor.<sup>7</sup> A successor, however, cannot make findings in a case tried before his predecessor,<sup>8</sup> or render a judgment in

titled to a determination of the issue by the . . . judge that heard the evidence, and where a case is tried by the judge and the issues remain undetermined at the death, resignation or expiration of the term of such judge, his successor cannot decide or make findings in the case without a trial de novo." *Wainwright v. Roots Co.*, 176 Ind. 682, 97 N. E. 8.

3. *Clanton v. Ryan*, 14 Colo. 419, 24 Pac. 258; *Matter of Carey's Will*, 24 App. Div. 531, 49 N. Y. Supp. 32 (probate of will); *Matter of Johnson*, 27 Misc. 167, 58 N. Y. Supp. 601; *In re Smith*, 34 N. Y. Supp. 1058, order of surrogate.

4. *Gertz v. Beck*, 7 Kan. App. 654, 53 Pac. 884.

[a] A succeeding judge may by stipulation of the parties hear and determine a demurrer to the evidence. *Gertz v. Beck*, 7 Kan. App. 654, 53 Pac. 884.

5. *In re Nolan*, 71 N. J. Eq. 207, 63 Atl. 618, where it is said: "When a contested case is pending in the orphans court, and testimony has been taken by a master, or by the surrogate, and the orphans court judge has died or resigned, it is not open to doubt . . . that such testimony can be used by his successor in office in disposing of the case. It would be absurd to hold that the succeeding judge must begin de novo, and direct that all the evidence shall be taken again. When the court, instead of directing the evidence to be taken before a master or before the surrogate, takes it in open court, and the evidence is reproduced from a stenographer's notes, I have no doubt that, upon the death or resignation of the judge who sat, his successor may use the proofs thus taken in disposing of the issue."

As to use of depositions, see 7 STANDARD PROC. 400, et seq.

6. *Seale v. Ford*, 29 Cal. 104; *Jewett v. Schmidt*, 185 N. Y. 553, 77 N. E. 1189.

7. *Montgomery v. Viers*, 130 Ky. 694, 114 S. W. 251; *Ewell v. Jackson*, 129 Ky. 214, 110 S. W. 860; *Ryan v. Sanborn*, 104 Me. 458, 72 Atl. 188.

[a] Where the former surrogate, after a trial, rendered a decision and, when his term of office expired, left the findings and decree unsigned, his successor has the power to sign such findings and decree. *Matter of Baird's Estate*, 74 Misc. 34, 133 N. Y. Supp. 729; *Matter of Taylor*, 62 Misc. 442, 116 N. Y. Supp. 1040.

[b] The Kentucky statute "was enacted for the purpose of enabling a judge's successor, no matter how chosen, to sign orders which the presiding judge may for any reason have failed to sign. The statute should be liberally construed to carry out the purpose of the legislature." *Farris v. Matthews*, 149 Ky. 455, 149 S. W. 896.

[c] Where the judge's signature is not essential to the validity of a judgment, the successor may sign a judgment rendered by his predecessor. *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; *Ruckman v. Decker*, 27 N. J. Eq. 244. See as to necessity for signature, 15 STANDARD PROC. 26.

8. *Bahnsen v. Gilbert*, 55 Minn. 334, 56 N. W. 1117.

[a] But conclusions of law from the findings of fact made by a predecessor may be changed by the successor, before the entry of judgment. *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491.

[b] **Signing Findings.**—Where the record showed no findings or judgment in a case tried seven years previously, except an entry by the clerk in the docket opposite the title of the case, "judgment for defendant," but it ap-

such a case.<sup>9</sup> An exception to this rule is made in cases of purely formal judgments not involving the exercise of judicial discretion.<sup>10</sup>

**VII. POWERS OF SUCCESSOR.**—A. **GENERALLY.**—Generally a succeeding judge will not review or overturn the acts of his predecessor involving the exercise of judgment or discretion,<sup>11</sup> the rule in this respect being similar to that applied in the case of coordinate judges.<sup>12</sup> Nevertheless, inasmuch as no change in the court itself results from a mere change in judges, the successor may reverse the rulings of his predecessor on questions of law whenever it would be proper for the latter to reverse himself.<sup>13</sup>

peared from the court reporter's affidavit that he had been directed to and did take down in shorthand the court's findings of fact and conclusions of law, it was held that the transcript of these findings and conclusions annexed to the affidavit might properly be signed by the succeeding judge and judgment entered thereon, since the reporter was an officer of the court and his notes were equivalent to the minutes of the court. *Edmonds v. Riley*, 15 S. D. 470, 90 N. W. 139.

9. *In re Sullivan*, 143 Cal. 462, 77 Pac. 153; *Clanton v. Ryan*, 14 Colo. 419, 24 Pac. 258. See 15 STANDARD PROC. 975, note 43.

As to what constitutes rendition of judgment, see 14 STANDARD PROC. 971.

10. See *Hazard v. McAndrews*, 18 Wash. 392, 51 Pac. 1064.

[a] Where defendant's challenge to the sufficiency of the evidence is granted, a successor may order the entry of a judgment accordingly. *Hazard v. McAndrews*, 18 Wash. 392, 51 Pac. 1064.

[b] After Verdict.—Where the issues of fact in an action for divorce were submitted to a jury and the jury found for plaintiff a judge may render a final decree of divorce although the evidence was taken before his predecessor. *Hedrick v. Hedrick*, 28 Ind. 291. See 14 STANDARD PROC. 974.

11. *Ill.*—*Avery v. Swords*, 28 Ill. App. 202. *S. C.*—*Durant v. Staggers*, 2 Nott & McC. 488; *McCollum v. Massey*, 2 Bailey 606, unless justice requires it. *Wash.*—*Shepherd v. Gove*, 26 Wash. 452, 67 Pac. 256. *Wis.*—*Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

12. *Harrigan v. Gilchrist*, 121 Wis. 127, 429, 99 N. W. 909. See *supra*, V.

13. *Shepherd v. Gove*, 26 Wash. 452,

67 Pac. 256. But see cases in preceding note.

[a] Since a judgment cannot be set aside by the court rendering it for errors of law involving the exercise of judicial discretion (15 STANDARD PROC. 168), a succeeding judge cannot set aside the judgment of his predecessor on this ground. *Cowles v. Cowles*, 121 N. C. 272, 28 S. E. 476; *Twitty v. Logan*, 86 N. C. 712.

[b] Orders constituting a final determination (1) of the rights of the parties cannot be set aside by the successor of the judge making them except for fraud or mistake. *McCollum v. Massey*, 2 Bailey (S. C.) 606. See *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909. (2) Where a judge made an order granting defendant an unconditional right to file an amended answer, his successor at a subsequent term has no right to set the order aside because in such amended answer the defendant for the first time pleaded the statute of limitations. *Hardin v. Greene*, 164 N. C. 99, 80 S. E. 413.

[c] Where the motion is made upon a different state of facts a successor is empowered to set aside an order made by his predecessor. *Crawell v. Littlefield*, 2 Rich. L. (S. C.) 17; *Bordeaux's Exrs. v. Cave*, 2 Bailey (S. C.) 6.

[d] Order of Reference.—A "succeeding circuit judge has the power to alter or modify the order of his predecessor, referring it to the master simply to take and report the testimony. Such an order is merely administrative, and may be changed by a succeeding circuit judge. . . . When, however, an order refers the issues of law or of fact to a master or referee, such order is binding upon the suc-

**B. BILL OF EXCEPTIONS.**—Whether a bill of exceptions may be settled by a successor of the judge before whom the case was heard, is discussed elsewhere in this work.<sup>14</sup>

**C. MOTION FOR NEW TRIAL.**<sup>15</sup>—A succeeding judge may pass upon a motion for a new trial in a case heard before his predecessor,<sup>16</sup> who died after judgment,<sup>17</sup> or whose term of office had expired.<sup>18</sup> This

ceeding judge." *Pratt v. Timmerman*, 69 S. C. 186, 48 S. E. 255.

[e] He may render a final judgment inconsistent with an interlocutory judgment rendered in the case by his predecessor. *Niagara Fire Ins. Co. v. Seamon*, 35 Ill. App. 582; *Bouknight v. Davis*, 33 S. C. 410, 12 S. E. 96.

14. See 4 STANDARD PROC. 332.

15. See generally the title "New Trial."

16. **U. S.**—*Medrum v. United States*, 151 Fed. 177; *Penn Mut. Life Ins. Co. v. Ashe*, 145 Fed. 593. **Ala.**—*Malone v. Eastin*, 2 Port. 182. **Cal.**—*Hausmann v. Sutter St. R. Co.*, 139 Cal. 174, 72 Pac. 905; *Wilson v. California C. R. R. Co.*, 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; *Macy v. Davila*, 48 Cal. 646; *Altschul v. Doyle*, 48 Cal. 535. **Colo.**—*Camelin v. Smith*, 53 Colo. 574, 128 Pac. 1125. **Ga.**—*McKendree v. Sikes*, 40 Ga. 189; *Field v. Thornton*, 1 Ga. 306. **Ill.**—*People v. McConnell*, 155 Ill. 192, 40 N. E. 608; *Chicago P. & S. W. R. Co. v. Town of Marseilles*, 107 Ill. 313; *McChesney v. Davis*, 86 Ill. App. 380. **Mass.**—*Benson v. Hall*, 197 Mass. 517, 83 N. E. 1036. **Mich.** *Manufacturers' Mut. Fire Ins. Co. v. Circuit Judge*, 79 Mich. 241, 44 N. W. 604. **Minn.**—*Hughley v. City of Wabasha*, 69 Minn. 245, 72 N. W. 78. **Mo.**—*Fehlauer v. St. Louis*, 178 Mo. 635, 77 S. W. 843; *Richardson v. Schuyler County, etc. Assn.*, 156 Mo. 407, 57 S. W. 117; *State v. Perkins*, 139 Mo. 106, 40 S. W. 650; *Hendrix v. Wabash R. Co.*, 107 Mo. App. 127, 80 S. W. 970; *Glaves v. Wood*, 78 Mo. App. 351. **Mont.**—*Hill v. Nelson Coal Co.*, 40 Mont. 1, 104 Pac. 876. **Neb.**—*Goos v. Krug Brew. Co.*, 60 Neb. 783, 84 N. W. 258; *Lauder v. State*, 50 Neb. 140, 69 N. W. 776; *State v. Gaslin*, 32 Neb. 291, 49 N. W. 353. **N. Y.**—*Gordon v. Trainor*, 46 Misc. 439, 92 N. Y. Supp. 321. **S. C.**—*State v. Madry*, 93 S. C. 412, 76 S. E. 977. **S. D.**—*Northwestern P. H. Co. v. Zickrick*, 22 S. D. 89, 115 N. W. 525. **Tex.**—*Edwards v.*

*James*, 13 Tex. 52. **Va.**—*Southall v. Evans*, 114 Va. 461, 76 S. E. 929. **W. Va.**—*Ott v. McHenry*, 2 W. Va. 73.

[a] Upon "motion for a new trial it is the duty of the trial court to examine the evidence, even though it be conflicting, and if dissatisfied with the conclusions reached, to grant a new trial. And the rule is the same whether the motion is heard by the judge who tried the case or by some other judge whose only knowledge of the facts is obtained from the record." *Jones v. Sanders*, 103 Cal. 678, 37 Pac. 649.

17. **Cal.**—*Jones v. Sanders*, 103 Cal. 678, 37 Pac. 649. **Ill.**—*People v. McConnell*, 155 Ill. 192, 40 N. E. 608. **Mass.**—*Benson v. Hall*, 197 Mass. 517, 83 N. E. 1036. **Minn.**—*Reynolds v. Reynolds*, 44 Minn. 132, 46 N. W. 236. **Mo.**—*Hendrix v. Wabash R. Co.*, 107 Mo. App. 127, 80 S. W. 970. **Neb.** *Union Pac. R. Co. v. Lotway*, 96 N. W. 527. **Va.**—*Southall v. Evans*, 114 Va. 461, 76 S. E. 929.

[a] If "death or any other imperious necessity prevent the judge, who tried the cause, from doing so, I can see no objection to its being done by his successor who is empowered by law to act in his stead? Either he must do it or there would be a failure of justice . . . there is nothing . . . incongruous to justice in the fact that one judge may hear the cause and another grant a new trial of it." *Malone v. Eastin*, 2 Port. (Ala.) 182.

18. **Cal.**—*Hausmann v. Sutter St. R. Co.*, 139 Cal. 174, 72 Pac. 905. **Minn.** *Hughley v. City of Wabasha*, 69 Minn. 245, 72 N. W. 78. **Neb.**—*Goos v. Krug Brew. Co.*, 60 Neb. 783, 84 N. W. 258. **N. Y.**—*Gordon v. Trainor*, 46 Misc. 439, 92 N. Y. Supp. 321. **W. Va.**—*Ott v. McHenry*, 2 W. Va. 73.

[a] "The circumstances, that intermediate the trial and the determination of the motion for a new trial, a change in the incumbency of the bench in the court below had occurred, and

power, however, can be exercised by the successor only upon the evidence disclosed by the record.<sup>19</sup> In some cases it is held that whenever the successor owing to the fact that he did not preside at the trial cannot fairly pass upon a motion for a new trial,<sup>20</sup> or such motion is presented upon the ground that the verdict is not sustained by sufficient evidence,<sup>21</sup> a new trial should be granted as a matter of course, unless the successor is in possession of a complete stenographic report of the proceedings.<sup>22</sup>

Where a motion for a new trial in a cause was heard and decided by the judge who presided at the trial, his successor may arbitrarily overrule all further motions made for the same purpose and based upon the same grounds.<sup>23</sup>

**VIII. ACTIONS AGAINST JUDGES.—A. CIVIL ACTIONS.** The complaint against a judicial officer must show affirmatively that the defendant was such officer at the time the act complained of was done by him,<sup>24</sup> and, if the action is based upon statute, that the act is within the purview of the statute.<sup>25</sup> Mere averments of corrupt motive do not aid the complaint if, under the law, the circumstances set forth do not show a case would otherwise make the officer liable.<sup>26</sup> The ministerial character of the act, where essential to liability, must appear from the facts set forth rather than a mere allegation of the conclusion.<sup>27</sup>

Under a statute rendering a judge liable for damages in the event of acceptance of an insufficient bond, the complaint must show that the judge did so knowingly,<sup>28</sup> or acted willfully in the matter,<sup>29</sup> and that

that the motion was determined by the new incumbent, who had not presided at the trial, can make no difference in the application of the rule" that the court on appeal will not interfere with the action of the trial court in granting or refusing a new trial, where there is a substantial conflict in the evidence. *Altschul v. Doyle*, 48 Cal. 535.

19. *Hughley v. City of Wabasha*, 69 Minn. 245, 72 N. W. 78; *Ott v. McHenry*, 2 W. Va. 73. See *Glaves v. Wood*, 78 Mo. App. 351.

[a] **Not Upon the Minutes of the Court.**—*Ohms v. State*, 49 Wis. 415, 5 N. W. 827.

20. *United States v. Meldrum*, 146 Fed. 390; *Penn Mut. Life Ins. Co. v. Ashe*, 145 Fed. 593, 76 C. C. A. 283; *Boynton v. Crockett*, 12 Okla. 57, 69 Pac. 869.

21. *Kan.*—*Bass v. Swingley*, 42 Kan. 729, 22 Pac. 714. *N. C.*—*Simonton v. Simonton*, 80 N. C. 7. *Wis.*—*Ohms v. State*, 49 Wis. 415, 5 N. W. 827.

But see *McCord v. Knowlton*, 76 Minn. 391, 79 N. W. 397, and the title "New Trial."

22. *U. S.*—*Penn Mut. Life Ins. Co. v. Ashe*, 145 Fed. 593, 76 C. C. A. 283. *Mo.*—*Fehlauer v. St. Louis*, 178 Mo. 635, 77 S. W. 843. *Okla.*—*Boynton v. Crockett*, 12 Okla. 57, 69 Pac. 869.

23. *Crippen v. Schnee*, 52 Kan. 202, 34 Pac. 793.

24. *English v. Ralston*, 112 Fed. 272.

25. *Orton v. Engledow*, 8 Tex. 206.

26. *U. S.*—*Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646; *English v. Ralston*, 112 Fed. 272. *Mass.*—*Pratt v. Gardner*, 2 Cush. 63, 48 Am. Dec. 652. *N. Y.*—*Merwin v. Rogers*, 2 N. Y. Supp. 396, 18 N. Y. St. 949. *N. D.*—*Root v. Rose*, 6 N. D. 575, 72 N. W. 1022.

27. *O'Connell v. Mason*, 132 Fed. 245, 65 C. C. A. 541.

28. *Burdine v. Pettus*, 79 Ky. 240.

29. *Spears v. Smith*, 9 Lea (Tenn.) 483.

plaintiff sustained actual damages by reason of his improper action.<sup>30</sup>

**B. CRIMINAL PROSECUTIONS.**—The general rules pertaining to indictments are applicable to criminal charges brought against judicial officers.<sup>31</sup> An indictment charging two or more offenses in the same count is bad.<sup>32</sup> The indictment must conform to the statute,<sup>33</sup> and should follow the language thereof,<sup>34</sup> and must set forth facts sufficient to enable the defendant to know in what particular he is charged to have violated the statute.<sup>35</sup>

Where the prosecution is under a law relating to misconduct in connection with his official duties the indictment must charge misconduct which is official in its character;<sup>36</sup> it must be alleged what specific duty was imposed upon defendant,<sup>37</sup> and the act must be charged to have been knowingly and corruptly done.<sup>38</sup>

30. *Spears v. Smith*, 9 Lea (Tenn.) 483.

31. See generally the title "Indictment and Information."

32. *State v. Hall*, 5 S. C. 120, crimes under different statutes stated conjunctively.

[a] **Unlawful Issuance of Several Warrants.**—Where an indictment charges a wilful and unlawful drawing and issuing of warrants against the county, the charge is bad, as "the drawing of each warrant was a separate and substantive transaction; although, when drawn, all might have been issued at the same time. There might be a thousand or more, or a less number of warrants charged in the indictment as having been issued. For the drawing and issuance of each, if wilfully and illegally done, a criminal prosecution would lie." *State v. Ferriss*, 3 Lea (Tenn.) 700.

33. *State v. Hall*, 5 S. C. 120.

34. *Casey v. State*, 53 Ark. 334, 14 S. W. 90. See generally 12 STANDARD PROC. 442, et seq.

[a] "Nothing less than a charge in the language of the statute, that is, that the neglect was wilful, can answer. It is not probable that the legislature intended to make a violation of a positive provision of the law criminal, only when the act is wilful, but to punish a casual and unintentional omission to do the act in a proper manner. . . . No case should be brought within a penal statute unless completely within its words." *Casey v. State*, 53 Ark. 334, 14 S. W. 90.

35. *Com. v. Milby*, 15 Ky. L. Rep. 568, 24 S. W. 625.

[a] **A general charge** that the defendant practiced law in his own county is insufficient. "The language of a statute cannot always be followed, in punishments for offenses of either a criminal or penal nature. Enough must be stated to enable the defendant to know in what particular he has violated the statute; what action has been brought, or he has been employed in as counsel; in what court was that action pending, and in whose name; what action was he engaged in, . . . and in what court was it pending. Such facts must be alleged and proven, to bring the case within the statute." *Com. v. Milby* (Ky.), 24 S. W. 625.

36. *Ky.*—*Com. v. Williams*, 79 Ky. 42, 42 Am. Rep. 204. *S. C.*—*State v. Hall*, 5 S. C. 120. *Tex.*—*Brackenridge v. State*, 27 Tex. App. 513, 11 S. W. 630.

[a] Where the indictment charges a judge with having unlawfully received a certain sum of money as compensation other than that authorized by law for an official duty performed by said judge, the indictment should "describe the services or duty for which the compensation was received in such manner as to enable the court to conclude from the facts stated whether or not the compensation received was 'other than that authorized or permitted by law.'" *State v. Perham*, 4 Ore. 188.

37. *State v. Hall*, 5 S. C. 120.

38. *Ark.*—*State v. Prescott*, 31 Ark.

39. *Mo.*—*State v. Grassle*, 74 Mo. App. 313. *N. C.*—*State v. Powers*, 75 N. C. 281.

**IX. DISQUALIFICATION OF JUDGES.—A. GENERALLY.** The recognition of the principle that no man can be the judge of his own cause is essential to a proper administration of justice,<sup>39</sup> and even the legislature has been said to be powerless to remove the disqualification of a judge on the ground of interest in the pending cause.<sup>40</sup>

**B. GROUNDS OF DISQUALIFICATION.—1. Generally.**—Under the common law a judge was deemed disqualified only if he was a party to or pecuniarily interested in the cause.<sup>41</sup> The right to disqualify a judge, therefore, is to a large extent statutory,<sup>42</sup> and the grounds of disqualification as specified in the statute, so far as they are in derogation of the common law, cannot be enlarged by implication,<sup>43</sup> but the statutes,

**39. Ala.**—*Medlin v. Taylor*, 101 Ala. 239, 13 So. 310; *State v. Castleberry*, 23 Ala. 85. **Cal.**—*Adams v. Minor*, 121 Cal. 372, 53 Pac. 815; *Meyer v. San Diego*, 121 Cal. 102, 53 Pac. 434, 66 Am. St. Rep. 22, 41 L. R. A. 762; *Livermore v. Brundage*, 64 Cal. 299, 30 Pac. 848; *North Bloomfield, etc. Co. v. Keyser*, 58 Cal. 315. **Conn.**—*In re Cabot Bank's Appeal*, 26 Conn. 7. **Fla.** *Swepson v. Call*, 13 Fla. 337. **Md.** *Magruder v. Swann*, 25 Md. 173. **Mass.** *Pearce v. Atwood*, 13 Mass. 324. **Mich.** *Horton v. Howard*, 79 Mich. 642, 44 N. W. 1112, 19 Am. St. Rep. 198. **N. Y.**—*In re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *McCormick v. Walker*, 158 App. Div. 54, 142 N. Y. Supp. 759. **Ohio.**—*Hunt v. State*, 27 Ohio Cir. Ct. 16. **Tex.**—*Chambers v. Hodges*, 23 Tex. 104. **Va.**—*Stuart v. Com.*, 91 Va. 152, 21 S. E. 246. **Wash.**—*Barnett v. Ashmore*, 5 Wash. 163, 31 Pac. 466. **W. Va.**—*Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370.

**40. Del.**—*Bayard v. McLane*, 3 Harr. 139. **N. J.**—*State v. Crane*, 36 N. J. L. 394; *Peck v. Freeholders*, 21 N. J. L. 656. **Ohio.**—*Conklin v. Squire*, 4 Ohio Dec. 493, 29 Wkly. L. Bul. 157.

**41. Ark.**—*Jones v. State*, 61 Ark. 88, 32 S. W. 81. **Cal.**—*People v. Compton*, 123 Cal. 403, 56 Pac. 44. **Fla.** *Bryan v. State*, 41 Fla. 643, 26 So. 1022. **Haw.**—*Ex parte Higashi*, 17 Hawaii 428. **Ind.**—*Kelly v. Hockett*, 10 Ind. 299. **Kan.**—*In re Peyton*, 12 Kan. 398. **Mass.**—*Pearce v. Atwood*, 13 Mass. 324. **Minn.**—*Cooper v. Brewster*, 1 Minn. 94. **Mont.**—*State v. Donlan*, 32 Mont. 256, 80 Pac. 244; *In re Weston*, 28 Mont. 207, 72 Pac. 512. **Nev.**—*Allen v. Reilly*, 15 Nev. 452. **N. Y.**—*Davis v. Seaward*, 85 Misc. 210, 146 N. Y. Supp. 981. **Tex.**—*Johnson v.*

*State*, 31 Tex. Crim. 456, 20 S. W. 985.

**42. U. S.**—*Duncan v. Atlantic R. Co.*, 223 Fed. 446; *Epstein v. United States*, 196 Fed. 354, 116 C. C. A. 174. **Cal.**—*People v. Compton*, 123 Cal. 403, 56 Pac. 44; *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933. **Colo.**—*People v. District Court*, 26 Colo. 226, 56 Pac. 1115. **Fla.**—*Internal Imp. Fund v. Bailey*, 10 Fla. 213. **Ga.**—*East Rome Town Co. v. Cothran*, 81 Ga. 359, 8 S. E. 737. **Ind.**—*Joyce v. Whitney*, 57 Ind. 550. **Ia.**—*Chase v. Weston*, 75 Iowa 159, 39 N. W. 246. **Kan.**—*Tootle v. Berkley*, 60 Kan. 446, 56 Pac. 755. **Ky.**—*Owings v. Gibson*, 2 A. K. Marsh. 515. **La.**—*State v. Judge*, 27 La. Ann. 225. **Me.**—*Russell v. Belcher*, 76 Me. 501. **Md.**—*Buckingham v. Davis*, 9 Md. 324. **Mich.**—*Curtis v. Wilcox*, 74 Mich. 69, 41 N. W. 863. **Mo.**—*Scott v. Taylor*, 231 Mo. 654, 132 S. W. 1149; *State v. Gray*, 100 Mo. App. 98, 72 S. W. 1081. **Mont.**—*State v. Donlan*, 32 Mont. 256, 80 Pac. 244. **N. H.** *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. **N. Y.**—*Van Rensselaer v. Douglas*, 2 Wend. 290; *Seaward v. Tasker*, 143 N. Y. Supp. 257. **N. D.**—*Stoekwell v. Crawford*, 21 N. D. 261, 130 N. W. 225. **Okla.**—*Lewis v. Russell*, 4 Okla. 129, 111 Pac. 818. **Pa.**—*Voris v. Smith*, 13 Serg. & R. 334; *Keller v. Riverton Water Co.*, 34 Pa. Super. 301. **Tex.**—*State v. Burks*, 82 Tex. 584, 18 S. W. 662; *Gaines v. Hindman* (Tex. Civ. App.), 74 S. W. 583. **Wash.**—*Fortson Shingle Co. v. Skagland*, 77 Wash. 8, 137 Pac. 304.

**43. U. S.**—*Duncan v. Atlantic C. L. R. Co.*, 223 Fed. 446; *The Richmond*, 9 Fed. 863. **Cal.**—*Patterson v. Conlan*, 123 Cal. 453, 56 Pac. 105. **Ga.** *Luke v. Batts*, 11 Ga. App. 783, 76

nevertheless, should be liberally construed with a view to effect their object,<sup>44</sup> and it has been held that the grounds of disqualification exist-

S. E. 165. **d.**—*Stevens v. Burr*, 61 Ind. 464. **Ky.**—*Owings v. Gibson*, 2 A. K. Marsh. 515. **Mo.**—*State v. Witherspoon*, 231 Mo. 706, 133 S. W. 323; *State v. Moore*, 121 Mo. 514, 26 S. W. 345. **Mont.**—*State v. Woody*, 14 Mont. 455, 36 Pac. 1043. **N. Y.**—*Davis v. Seaward*, 85 Misc. 210, 146 N. Y. Supp. 981; *Seaward v. Tasker*, 143 N. Y. Supp. 257. **Pa.**—*Keller v. Riverton Water Co.*, 34 Pa. Super. 301. **Tenn.**—*Waterhouse v. Martin*, Peck 374. **Tex.**—*Trinkle v. State*, 59 Tex. Crim. 257, 127 S. W. 1060. **Wash.**—*Fortson Shingle Co. v. Skagland*, 77 Wash. 8, 137 Pac. 304.

**44. Ala.**—*Crook v. Newberg*, 124 Ala. 479, 27 So. 432, 82 Am. St. Rep. 190; *Heydenfeldt v. Towns*, 27 Ala. 423. **Ark.**—*Johnson v. State*, 87 Ark. 45, 112 S. W. 143. **Cal.**—*Howell v. Budd*, 91 Cal. 342, 27 Pac. 747; *North Bloomfield G. M. Co. v. Keyser*, 58 Cal. 215. **Ga.**—*Roberts v. Roberts*, 115 Ga. 259, 41 S. E. 616, 90 Am. St. Rep. 108. **Ind.**—*Smith v. Amiss*, 30 Ind. App. 530, 66 N. E. 501. **La.**—*White v. McClanahan*, 133 La. 396, 63 So. 61. **Mass.**—*Com. v. Ryan*, 5 Mass. 90. **Mich.**—*Davis Col. Co. v. Charlevoix Co.*, 155 Mich. 228, 118 N. W. 929; *Stockwell v. White Lake*, 22 Mich. 341. **Miss.**—*Yazoo, etc. R. Co. v. Kirk*, 102 Miss. 41, 58 So. 710, Ann. Cas. 1914C, 968, 42 L. R. A. (N. S.) 1172. **Mont.**—*Gehlert v. Quinn*, 38 Mont. 1, 98 Pac. 369. **N. H.**—*Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. **N. Y.**—*In re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88. **Tex.**—*Hodde v. Susan*, 58 Tex. 389; *McInnes v. Wallace* (Tex. Civ. App.), 44 S. W. 537.

[a] Where a judge is disqualified according to the spirit of the law, a technical construction of the statute will not be permitted for the purpose of avoiding the disqualification. *Terrill v. Keel*, 103 Ark. 96, 146 S. W. 494.

[b] A special statutory proceeding instituted by the freeholders for an investigation of the finances of a town is a "proceeding" within the meaning of the statute providing for a hearing before another judge in case that the judge before whom the pro-

ceedings are pending is disqualified. *In re Town of Hadley*, 44 Miss. 265, 89 N. Y. Supp. 910.

[c] An application to redeem lands sold for taxes is within the terms of the statute requiring a cause to be certified to the supreme court in case of a judge's disqualification to act. *Rawson v. Boughton*, 5 Ohio 328.

[d] A proceeding to sell real estate to pay the debts of an estate is a civil action in such a sense that a change of judge should be granted in case of disqualification of the presiding judge. *Scherer v. Ingerman*, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304.

[e] A common-law assignment for the benefit of creditors is a judicial proceeding within the meaning of the statute enumerating the disqualifying grounds of judges in actions and "proceedings." *Kittridge v. Kinne*, 80 Mich. 200, 44 N. W. 1051.

[f] Contempt Proceedings.—(1) Under a statute providing for the removal of any "cause or matter" in case of a judge's disqualification a proceeding for contempt is within the intention as well as the letter of the statute. *Lamonte v. Ward*, 36 Wis. 558. (2) But see *Twp. of Noble v. Aasen*, 10 N. D. 264, 86 N. W. 742, in which it is held that a party is not entitled to another judge in contempt proceedings upon the ground of disqualification of the judge, before whom the matter is pending. It is said there: "If the proceeding is to be regarded as a means of punishing a criminal contempt of court, it must be classed as a summary proceeding of a quasi-criminal nature, and hence not a criminal action. . . . If, on the other hand, the proceeding is to be regarded as a remedy resorted to in the interest of a suitor in a civil action, it must, under the statute, be regarded as a motion made in an action. . . . The application to call in an outside judge was therefore properly denied." See also 5 STANDARD PROC. 372.

[g] An application for the probate of a will is not an action within the meaning of a statute providing for the removal of suits and actions. *Matter of Hunter's Will*, 6 Ohio 499.

ing at the common law are still available even though they are not enumerated in the statute.<sup>45</sup> An exception to the rules governing disqualification of judges is made in cases where the disqualification, if allowed to prevail, would remove the only legal tribunal for the hearing of the matter in issue.<sup>46</sup>

45. Ala.—*State v. Pitts*, 139 Ala. 152, 36 So. 20. Okla.—*Ex parte Hudson*, 3 Okla. Crim. 393, 106 Pac. 540, 107 Pac. 735. S. D.—*State v. Ham*, 24 S. D. 639, 124 N. W. 955.

[a] If "the question of disqualification were left to be determined alone by the terms of the statute, . . . under the facts in the present case, no disqualification could be said to exist. But, under the common law, there are other grounds than those mentioned in the statute, which go to the disqualification of the judge. . . . 'According to the stern morality of the common law, a judge is required to be legally indifferent between the parties.' . . . Any interest, the probable and natural tendency of which is to create a bias in the mind of the judge for or against a party to the suit, is sufficient to disqualify. The judge is human, and human nature at best is weak, and as far as it is possible a perfect equipoise should always be preserved in the administration of justice by the courts. Pecuniary interest in the result of the suit is not the only disqualifying interest. If such were true, there would exist no disqualification in the judge to try a defendant on a charge of arson in the burning of the house of the judge. And yet no one would for a moment question the existence of such an interest in the result of the trial, the probable and natural tendency of which would be to create a bias that would affect the competency of the judge." *Ex parte Cornwell*, 144 Ala. 497, 39 So. 254.

46. Ala.—*Jeffersonian Pub. Co. v. Hilliard*, 105 Ala. 576, 17 So. 112; *Heydenfeldt v. Towns*, 27 Ala. 423. Ind.—*Metsker v. Whitsell*, 181 Ind. 126, 103 N. E. 1078; *Galey v. Board of Commissioners*, 174 Ind. 181, 91 N. E. 593. Mass.—*Hill v. Wells*, 6 Pick. 104; *Pearce v. Atwood*, 13 Mass. 324. N. Y. *In re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Ten Eick v. Simpson*, 11 Paige 177; *People v. Sherman*, 66 App. Div. 231, 72 N. Y. Supp. 718. Pa.—*Phila-*

*delphia v. Fox*, 64 Pa. 169. S. D. *State v. Polley*, 138 N. W. 300. Wis. *State v. Houser*, 122 Wis. 534, 100 N. W. 964.

[a] Where (1) "a judicial officer . . . has so exclusive jurisdiction of the cause or matter by constitution or by statute, as that his refusal to act will prevent any proceeding in it, then he may act so far as that there may not be a failure of remedy, or, as it is sometimes expressed, a failure of justice." *In re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88. (2) *Compare Moses v. Julian*, 45 N. H. 52, in which it is said: "In some books the rule is laid down, that where the duties of a judge can be legally performed by no other person, he is from the necessity of the case competent to act; but we are unable to assent to this general proposition. The power resulting from necessity, can extend no further than the occasion requires. Whatever is necessary to be done to preserve the rights of parties, may be justified by the necessity; as to order a case to be continued, or transferred to another tribunal; but it can never be necessary for a judge, who is by law disqualified to decide, to assume to determine a case, which the law presumes he may probably decide wrong."

[b] "The only exception to this principle is where the constitution has conferred the jurisdiction upon a particular judge, or tribunal, and no provision is made by law for hearing and deciding the matter in controversy when the judge is related to either of the parties in the suit. There, the constitution being the paramount law, the judge, or tribunal, to whom the constitution has confided the decision of the matter, must from the necessity of the case hear and decide it, to prevent a failure of justice." *Paddock v. Wells*, 2 Barb. Ch. (N. Y.) 331.

[c] Where the objection, if sustained, would disqualify a majority of the judges of the supreme court and there is no statutory provision for the calling in of other judges in the

**2. Party to Action.**—A judge who is a party to a cause is disqualified to act therein.<sup>47</sup> The fact, however, that a judge is a merely nominal party to an action constitutes no ground of disqualification,<sup>48</sup> from the operation of the statute a judge who, though not a party of but he must be a real party in interest.<sup>49</sup> On the other hand the word "party" is not to be construed in its technical sense so as to exclude record, is directly interested in the outcome of the action.<sup>50</sup> And where

place of disqualified members of such court, the objection should be overruled. *State v. Polley* (S. D.), 138 N. W. 300.

**47. Cal.**—*Livermore v. Brundage*, 64 Cal. 299, 30 Pac. 848. **Fla.**—*Sauls v. Freeman*, 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190. **Ia.**—*Chase v. Weston*, 75 Iowa 159, 39 N. W. 246. **Mich.** *Horton v. Howard*, 79 Mich. 642, 44 N. W. 1112, 19 Am. St. Rep. 198. **Mo.**—*Field v. Mark*, 125 Mo. 502, 28 S. W. 1004. **N. Y.**—*Foot v. Stiles*, 57 N. Y. 399. **Tex.**—*Hawpe v. Smith*, 22 Tex. 410.

See also *supra*, the cases in this section.

**48. Philadelphia v. Fox**, 64 Pa. 169; *Burrell v. State* (Tex. Crim.), 65 S. W. 914; *Truesdell v. State*, 42 Tex. Crim. 544, 61 S. W. 935.

[a] Where the judge is joined as defendant but the joinder is merely formal and he has no interest in the matter no ground of disqualification exists. *Renshaw v. Cook*, 129 Ky. 347, 111 S. W. 377.

[b] That a judge is one of the trustees of municipal charities does not disqualify him from presiding in a case to which the city as a trustee of a charitable bequest is a party. *Philadelphia v. Fox*, 64 Pa. 169.

[c] Where an action is in the name of the judge for the benefit of the county he is not disqualified to try it, since he has no disqualifying interest. *McInnes v. Wallace* (Tex. Civ. App.), 44 S. W. 537.

**49. Collingsworth v. Myers** (Tex. Civ. App.), 35 S. W. 414.

[a] **Must Be Real Party in Interest.** "The provision . . . that a judge shall not sit or act in an action or proceeding to which he is a party or in which he is interested, is plain and mandatory. Yet the expression 'to which he is a party' means to which he is a real party, and made so in good faith. It evidently was not in-

tended that a plaintiff could make all the superior judges in the state save one parties, and thus select his own judge. The question as to whether or not the judge is a party, made so in good faith, or whether or not he is interested, should be determined upon notice and after a hearing, so that the record can be preserved and the matter passed upon in this court, in case it becomes necessary. And where the judge is made a party, upon proper allegation, he cannot arbitrarily determine that he is not a proper party, nor that he is not interested." *Younger v. Superior Court of Santa Cruz County*, 136 Cal. 682, 69 Pac. 485.

[b] **Party But Not Served.**—(1) The filing of a cross-bill without service of process or actual notice does not affect a judge, who was not a party to the original proceeding, so as to disqualify him as a party to the suit or a party interested in the cause of action, where it does not appear from the cross-bill that defendant has a genuine cause of complaint against the judge whom he thus makes a party to the action. *Kruegel v. Bolanz*, 100 Tex. 572, 102 S. W. 110. (2) But where a judge is a party to a suit on a note and is joined as co-defendant, though no process is served on him, a motion for a change of venue on the ground of the judge's disqualification made by a co-defendant should have been granted even though the plaintiff subsequently dismissed the suit as against the judge. *Hawpe v. Smith*, 22 Tex. 410.

[c] Where the probate judge is one of the selectmen representing the town and as such is a necessary party to a proceeding for the appointment of a conservator over a resident of the town, he is disqualified to hear an application for the appointment of such conservator. *In re Nettleton's Appeal*, 28 Conn. 268.

**50. State v. Castleberry**, 23 Ala. 85.

a judge has the right to come in and take the benefit of a decree in equity he is disqualified although he is not made a party to the suit.<sup>51</sup>

**3. Interest.**—a. *Generally.*—The interest in a cause which will disqualify a judge must be a pecuniary,<sup>52</sup> or personal interest affect-

[a] **A narrow construction** of the word "party" wholly "disregards the spirit and defeats the purpose of the constitutional prohibition, for if a judge may be influenced at all in his judgment by the fact that a person who is directly interested in the result of the suit is related to him, the potency of the influence is not lessened by the absence of the related party from the record." *Johnson v. State*, 87 Ark. 45, 112 S. W. 143, 18 L. R. A. (N. S.) 619.

[b] **"The word 'party' . . . is not to be restricted** in meaning to those who are named as parties in the pleadings, but includes all persons who are directly interested in the subject-matter and result of the suit, regardless of whether their names appear upon the record as parties to the suit. . . . Under this rule we think it clear that a judge who is related to the purchaser at a guardian's sale is disqualified to pass upon the report of sale, and an order made by such judge confirming the sale of the property is void." *Jirou v. Jirou* (Tex. Civ. App.), 136 S. W. 493.

[c] **A "judge ought not to try the title to land which he himself claims to own and is in possession of, holding adversely to one of the litigants and . . . the failure of the plaintiff [through ignorance] to make him a party defendant, as he should have done, ought not to change the rule."** *Casey v. Kinsey*, 5 Tex. Civ. App. 3, 23 S. W. 818.

**51.** *City of Grafton v. Holt*, 58 W. Va. 182, 52 S. E. 21.

**52.** *Ala.*—*Medlin v. Taylor*, 101 Ala. 239, 13 So. 310; *Ex parte State Bar Assn.*, 92 Ala. 113, 8 So. 768; *Ellis v. Smith*, 42 Ala. 349. *Ark.*—*Foreman v. Marianna*, 43 Ark. 324. *Cal.*—*City of Los Angeles v. Dehy*, 169 Cal. 234, 146 Pac. 662; *Meyer v. City of San Diego*, 121 Cal. 102, 53 Pac. 434. *Conn.*—*Clyma v. Kennedy*, 64 Conn. 310, 29 Atl. 539, 42 Am. St. Rep. 194. *Fla.*—*Ex parte Harris*, 26 Fla. 77, 7 So. 1, 23 Am. St. Rep. 548, 6 L. R. A. 713; *Ochus v. Sheldon*, 12 Fla. 138.

*Ga.*—*Angusta South. R. Co. v. McDade*, 105 Ga. 134, 31 S. E. 420. *Ia.*—*Foreman v. Hunter*, 59 Iowa 550, 13 N. W. 659. *Mass.*—*Northampton v. Smith*, 11 Metc. 390. *Minn.*—*Sjoberg v. Nordin*, 26 Minn. 501, 5 N. W. 7. *Miss.*—*Ferguson v. Brown*, 75 M. 214, 21 So. 603. *Mo.*—*Jim v. State*, 5 Mo. 147. *Neb.*—*Chicago, etc. R. Co. v. Kellogg*, 54 Neb. 138, 74 N. W. 403. *N. Y.*—*Matter of Hancock*, 91 N. Y. 284. *Ohio.*—*State v. Winget*, 37 Ohio St. 153. *Pa.*—*Philadelphia v. Fox*, 64 Pa. 169. *Tex.*—*Taylor v. Williams*, 26 Tex. 583; *McInnes v. Wallace* (Tex. Civ. App.), 44 S. W. 537. *Vt.*—*State v. Sutton*, 74 Vt. 12, 52 Atl. 116. *Wis.*—*Hungerford v. Cushing*, 2 Wis. 397.

[a] **Property Interest.**—The disqualifying interest within the meaning of the law is a property interest. "If the nature of the suit is such that no individual property interest of the judge . . . is involved in it there can be no disqualification." *Sauls v. Freeman*, 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190.

[b] **Distinguished From Bias or Prejudice.**—Likewise a "sentimental interest, or an interest in the facts which the issues make it necessary for him to determine, which may tend to induce him to give more weight to the evidence for one party than to the evidence for the other, respecting such facts, is not the interest which will disqualify him. It may tend to show his bias or prejudice, and he may be disqualified on that ground, but it will not be sufficient to disqualify him on the ground that he is interested in the action, or in the results thereof." *Lassen Irr. Co. v. Superior Court*, 151 Cal. 357, 90 Pac. 709.

[c] **Officer of Church by Which Property Is Claimed.**—(1) Where a legacy is given to a religious corporation, of which the judge is an officer, it cannot be said that he is interested within the meaning of the statute. He "has nothing to gain or lose by this provision for the church. . . . Sentiment might be granted by the bequest, but no pecuniary interest is affected."

ing the individual rights of the judge,<sup>53</sup> and not merely the general civic interest which he has as a citizen or member of the community.<sup>54</sup> The

*In re Hopkins' Will*, 3 N. Y. Supp. 661. (2) But compare *State ex rel. Colcord v. Young*, 31 Fla. 594, 12 So. 673, 34 Am. St. Rep. 41, 19 L. R. A. 636, where a judge, who was one of the vestrymen of a church, who were invested with all its property, was held disqualified to act in the probate of a will in which the church was named as the beneficiary, the court saying that the fact that "the interest may not be beneficial pecuniarily to the individual wardens or vestrymen does not make it any the less a property interest."

[d] A judge who has purchased property at a sale is disqualified to pass upon the validity of such sale. *Nona Mills Co. v. Wingate*, 51 Tex. Civ. App. 609, 113 S. W. 182.

[e] Where the judge is a surety on a recognizance given for defendant's appearance at court his interest in the matter disqualifies him from trying the cause. *State v. Castleberry*, 23 Ala. 85.

[f] Interest in Costs.—Pecuniary interest in a cause or proceeding does not refer to or include an interest in the costs, as such interest contemplates a loss or gain dependent upon the result of the issue, while costs are fixed by law and are independent of the issue. *Wellmaker v. Terrell*, 3 Ga. App. 791, 60 S. E. 464. But see *Collingsworth County v. Myers* (Tex. Civ. App.), 35 S. W. 414.

Disqualification by reason of interest in an estate, see *infra*, IX, B, 6, a.

[g] Prosecution for Crime Against Judge.—"The fact that the presiding judge was the person from whom the property was alleged to be stolen in an indictment for theft, is not a good ground of disqualification, because he is not thereby shown to be 'interested' in the 'case,' not being a party thereto or liable to any loss or profit therefrom, otherwise than as any other person in the body politic." *Davis v. State*, 44 Tex. 523. But see *Ex parte Cornwell*, 144 Ala. 497, 39 So. 354. As to bias of judge, see *infra*, this article.

53. Ala.—*Bryce v. Burke*, 172 Ala. 219, 55 So. 635; *Fulton v. Longshore*,

156 Ala. 611, 46 So. 989; *Medlin v. Taylor*, 101 Ala. 239, 13 So. 310. Colo. *Cowie v. Means*, 39 Colo. 1, 88 Pac. 485; *Phillips v. Curley*, 28 Colo. 34, 62 Pac. 837. Tex.—*Taylor v. Williams*, 26 Tex. 583.

[a] A political interest (1) in the cause does not disqualify. *Lemon v. Peyton*, 64 Miss. 161, 8 So. 235. (2) But a judge who is a candidate on a ticket is not qualified to hear a proceeding instituted for the purpose of ordering the secretary of state to complete such ticket as he is an interested party. *Cowie v. Means*, 39 Colo. 1, 88 Pac. 485.

[b] The Right to a Judicial Office Is a Property Right.—"No disqualification of a judge can be so obvious and so absolute as that which involves the question of his title to the office he occupies. When that is questioned . . . no alternative is left but to certify his disqualification." *Magruder v. Swann*, 25 Md. 173.

54. *Foreman v. Marianna*, 43 Ark. 324.

[a] In *Inhab. of Northampton v. Smith*, 11 Mete. (Mass.) 390, it is said in regard thereto: "The interest of the judge was supposed to arise from the fact, that he was one of the inhabitants of the town of Amherst; that there were, in this will, many bequests to charitable purposes, for the use and benefit of classes of persons described as dwelling in eight towns enumerated, of which towns Amherst is one; that if those bequests were beneficial to these towns, they had an interest, in their corporate capacity, in establishing the bequests and of course in proving the will; and that by means thereof, . . . the judge of probate, as an inhabitant of Amherst and a member of the corporation, had a derivative interest in the same bequests. . . . We are then to consider what is the nature of the interest, . . . which shall take the case out of the jurisdiction of the judge. . . . We think it is not to be a mere possible, contingent interest; not an interest in the question or general subject, to which the matter requiring adjudication relates; but one that is

disqualifying interest must be direct.<sup>55</sup> A contingent,<sup>56</sup> remote<sup>57</sup> and

visible, demonstrable, and capable of precise proof. . . . It is not the bias or prejudice which would be sufficient to set aside a juror. . . . It must be a pecuniary or proprietary interest, a relation by which, as a debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling, or sympathy, or bias, which would disqualify a juror. . . . It must be certain, and not merely possible or contingent. . . . It must be direct and personal, though such a personal interest may result from a relation, which the judge holds as the member of a town, parish or other corporation, where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings. It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject-matter, arising from feeling and sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a character would be too vague to serve as a test by which to decide so important a question as that of jurisdiction; it would not be capable of precise averment, demonstration and proof; not visible, tangible, or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action."

55. **U. S.**—*Middletown Nat. Bank v. Toledo, etc. R. Co.*, 105 Fed. 547. **Ala.**—*Ellis v. Smith*, 42 Ala. 349. **Ark.**—*Ferrell v. Keel*, 103 Ark. 96, 146 S. W. 494; *Osborne v. Board of Improvement*, 94 Ark. 563, 128 S. W. 357. **Cal.**—*Meyer v. City of San Diego*, 121 Cal. 102, 53 Pac. 434, 66 Am. St. Rep. 22, 41 L. R. A. 762; *Scadden Flat Gold-Min. Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440; *Oakland v. Oakland Water Front Co.*, 118 Cal. 249, 50 Pac. 268. **Fla.**—*State v. Call*, 41 Fla. 442, 26 So. 1014, 79 Am. St. Rep. 189; *Trustees Internal Imp. Fund v. Bailey*, 10 Fla. 213. **Mass.**—*Northampton v. Smith*, 11 Mete. 390. **Mont.**—*State v. Woody*, 14 Mont. 455, 36 Pac. 1043. **Nev.**—*State v. Noyes*, 25 Nev. 31, 56 Pac. 946. **N. J.**—*Peck v. Essex County*, 20 N. J.

L. 457. **N. Y.**—*Matter of Hancock*, 91 N. Y. 284; *Matter of Ryers*, 72 N. Y. 1, 28 Am. Rep. 88. **Ohio.**—*State v. Winget*, 37 Ohio St. 153. **Pa.**—*Philadelphia v. Fox*, 64 Pa. 169. **Tex.**—*New Odorless Co. v. Wisdom*, 30 Tex. Civ. App. 224, 70 S. W. 354; *Houston Cemetery Co. v. Drew*, 13 Tex. Civ. App. 536, 36 S. W. 802; *Kemp v. Wharton County Bank*, 4 Tex. Civ. App. 648, 23 S. W. 916. **W. Va.**—*Forest Coal Co. v. Doolittle*, 54 W. Va. 210, 46 S. E. 238.

[a] **Interest as Riparian Owner.** Where the action is brought to determine defendant's right to divert water of a river, a judge who is a riparian owner is disqualified from hearing the cause, as under such circumstances he has a direct and immediate interest in the matters involved and such interest is of pecuniary concern to him. *City of Los Angeles v. Dehy*, 169 Cal. 234, 146 Pac. 662.

56. **Cal.**—*Oakland v. Oakland Water Front Co.*, 118 Cal. 249, 50 Pac. 268. **Ga.**—*Augusta S. R. Co. v. McDade*, 105 Ga. 134, 31 S. E. 420. **Mass.**—*Inhab. of Northampton v. Smith*, 11 Mete. 390. **N. J.**—*Peck v. Essex County*, 20 N. J. L. 457. **N. Y.**—*People v. Whitridge*, 144 App. Div. 493, 129 N. Y. Supp. 300. **Tex.**—*Glavecke v. Tijirina*, 24 Tex. 663.

57. **Ala.**—*Ex parte State Bar Assn.*, 92 Ala. 113, 8 So. 768, 12 L. R. A. 134. **Cal.**—*Meyer v. City of San Diego*, 121 Cal. 102, 53 Pac. 434, 66 Am. St. Rep. 22, 41 L. R. A. 762. **Fla.**—*State v. Call*, 41 Fla. 442, 26 So. 1014, 79 Am. St. Rep. 189. **Me.**—*State v. Intoxicating Liquors*, 54 Me. 564. **Mass.**—*Bar Association v. Casey*, 211 Mass. 187, 97 N. E. 751. **Minn.**—*Minneapolis v. Wilkin*, 30 Minn. 140, 14 N. W. 581. **Mo.**—*In re Marshall*, 178 Mo. 16, 160 S. W. 531; *Bowman's Case*, 67 Mo. 146. **Okla.**—*Holt v. Holt*, 23 Okla. 639, 102 Pac. 187. **Tex.**—*Houston Cemetery Co. v. Drew*, 13 Tex. Civ. App. 536, 36 S. W. 802.

[a] **Street Improvement Assessment.** A chancellor's interest in a suit brought to enforce the payment of certain assessments for street improvements in the district in which the chancellor's real property is located "is at most only a remote interest and not a direct

collateral interest in the action<sup>58</sup> is not sufficient to disqualify him.

The disqualifying interest must not be merely an interest in the question involved in the action, but an interest in the subject-matter to be determined thereby,<sup>59</sup> even though the judge is a party to a similar but wholly independent suit which would in no wise be affected by the judgment in the case before him.<sup>60</sup> But the amount of the judge's interest is not material.<sup>61</sup>

b. *As Resident and Taxpayer*.—A judge who has no other or greater interest in the disposition of a pending cause than as a resident and taxpayer is not disqualified.<sup>62</sup> And in some jurisdictions the stat-

one." *Osborne v. Board of Imp. of Pav. Dist.*, 94 Ark. 563, 128 S. W. 357.

58. Conn.—*Clyma v. Kennedy*, 64 Conn. 310, 29 Atl. 539, 42 Am. St. Rep. 194. N. Y.—*In re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88. Tex.—*Meyers v. Bloon*, 20 Tex. Civ. App. 554, 50 S. W. 217; *Reed v. State*, 11 Tex. App. 587. Wis.—*State v. Nygaard*, 159 Wis. 396, 150 N. W. 513.

[a] The fact that a judge by virtue of his office manages the financial affairs of the county does not disqualify him from presiding in a case brought against a railway company of which such county is a stockholder, as he has no personal or pecuniary interest in the result of the action. *Augusta South. R. Co. v. McDade*, 105 Ga. 134, 31 S. E. 420.

[b] Nor is a judge in whom the title to a schoolhouse is vested in his official capacity disqualified to try a charge of defacing the school house building. *Clark v. State*, 23 Tex. App. 260, 5 S. W. 115.

59. Ala.—*Medlin v. Taylor*, 101 Ala. 239, 13 So. 310. Cal.—*North Bloomfield G. M. Co. v. Keyser*, 58 Cal. 315. N. Y.—*People v. Edmonds*, 15 Barb. 529. Okla.—*Holt v. Holt*, 23 Okla. 639, 102 Pac. 187. Tex.—*McFaddin v. Preston*, 54 Tex. 403. W. Va.—*Cheuveront v. Horner*, 62 W. Va. 476, 59 S. E. 964; *Forest Coal Co. v. Doolittle*, 54 W. Va. 210, 46 S. E. 238.

60. *Southern Cal. M. R. Co. v. San Bernardino Nat. Bank*, 100 Cal. 316, 34 Pac. 711.

[a] But in *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 111, it is said that "where the judge has a law suit pending or impending with another person, which rests upon a like state of facts, or upon the same points of law, as

that pending before him; this is a valid disqualification."

61. Ark.—*Ferrell v. Keel*, 103 Ark. 96, 146 S. W. 494. Cal.—*Adams v. Minor*, 121 Cal. 372, 53 Pac. 815. Ind.—*Metsker v. Whitsell*, 181 Ind. 126, 103 N. E. 1078. Kan.—*Tootle v. Berkley*, 60 Kan. 446, 56 Pac. 755. N. H.—*Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. N. Y.—*People v. Whitridge*, 144 App. Div. 493, 129 N. Y. Supp. 300. Tex.—*El Paso v. Ft. Dearborn Nat. Bank (Tex. Civ. App.)*, 71 S. W. 799.

[a] "It is the interest that disqualifies the judge; though it be ever so small and trifling, it is sufficient." *Priddy v. Mackenzie*, 205 Mo. 181, 103 S. W. 968.

[b] The "minds of men are so differently affected by the same degrees of interest that it has been found impossible to draw a satisfactory line. Any interest, therefore, however small, has been held sufficient to render a judge incompetent." *Pearce v. Atwood*, 13 Mass. 324, 340.

[c] *Liability to Costs*.—Where suit is brought by a county official against the county, the county judge and the county commissioner for a balance due on salary, the county judge "was disqualified to hear and determine this cause, or make any order therein; . . . he was interested therein to the extent of the costs of making him a party and serving him with citation; and this, we think, was sufficient interest to disqualify him from sitting as judge in the case for any purpose whatever." *Collingsworth County v. Myers (Tex. Civ. App.)*, 35 S. W. 414. But see *Wellmaker v. Terrell*, 3 Ga. App. 791, 60 S. E. 464.

62. Ala.—*Fulton v. Longshore*, 156 Ala. 611, 46 So. 989. Ark.—*Foreman v.*

ute expressly provides that judges shall not be disqualified by reason of interest common to all taxpayers.<sup>63</sup> Such statutes, however, must be strictly construed and are applicable only to cases which come clearly within their letter and spirit.<sup>64</sup> Neither the fact that the city or county in which the trial judge resides<sup>65</sup> or is a taxpayer,<sup>66</sup> is interested in the

Marianna, 43 Ark. 324. **Cal.**—Higgins v. San Diego, 126 Cal. 308, 58 Pac. 700, 59 Pac. 209; Oakland v. Oakland Water Front Co., 118 Cal. 249, 50 Pac. 268. **Ind.**—Metsker v. Whitsell, 181 Ind. 126, 103 N. E. 1078. **Ia.**—Laplant v. City of Marshalltown, 134 Iowa 261, 111 N. W. 816. **Me.**—State v. Bangor, 98 Me. 114, 56 Atl. 589; State v. Craig, 80 Me. 85, 13 Atl. 129. **Mass.**—Northampton v. Smith, 11 Mete. 390. **Minn.**—Minneapolis v. Wilkin, 30 Minn. 140, 14 N. W. 581; State v. Macdonald, 26 Minn. 445, 4 N. W. 1107. **Miss.**—Ferguson v. Brown, 75 Miss. 214, 21 So. 603. **Nev.**—State v. Noyes, 25 Nev. 31, 56 Pac. 946. **N. C.**—White v. Lane, 153 N. C. 14, 68 S. E. 895. **Ohio.**—Clermont County Comrs. v. Lytle, 3 Ohio 289. **Okla.**—Lawton R. T. Ry. Co. v. City of Lawton, 31 Okla. 458, 122 Pac. 212. **Pa.**—*In re* Huntingdon County Line, 14 Pa. Super. 571. **Tex.**—Oak Cliff v. State, 97 Tex. 391, 79 S. W. 1068; Dallas v. Peacock, 89 Tex. 58, 33 S. W. 220; Nalle v. City of Austin, 41 Tex. Civ. App. 423, 93 S. W. 141; Thornburgh v. City of Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1054.

63. **Cal.**—Meyer v. City of San Diego, 121 Cal. 102, 53 Pac. 434, 66 Am. St. Rep. 22, 41 L. R. A. 762. **Conn.**—New Hartford v. Canaan, 52 Conn. 158; Hawley v. Baldwin, 19 Conn. 584. **Fla.**—State v. Call, 41 Fla. 442, 26 So. 1014, 79 Am. St. Rep. 189. **Me.**—State v. Intoxicating Liquors, 54 Me. 564. **Mass.**—Com. v. Fletcher, 157 Mass. 14, 31 N. E. 687; Hanscomb v. Russell, 11 Gray 373; Com. v. Emery, 11 Cush. 406. **Minn.**—Minneapolis v. Wilkin, 30 Minn. 140, 14 N. W. 581. **N. J.**—State v. Crane, 36 N. J. L. 394. **W. Va.**—Wheeling v. Black, 25 W. Va. 266. **Wis.**—Jefferson v. Milwaukee, 20 Wis. 139.

[a] "It is competent for the legislature to provide that where the interest of a person is merely that of a corporator or taxpayer of a municipal corporation, it shall constitute no disqualification. . . . This does not infringe upon the constitutional right of

a party to an impartial tribunal to hear his cause. Public policy and the necessities of the case require that this should be so. The ground upon which such ruling is usually placed is that such an interest is so remote, indirect, and slight that it may be fairly supposed to be incapable of affecting the judgment or influencing the conduct." City of Minneapolis v. Wilkin, 30 Minn. 140, 14 N. W. 581.

64. See the cases *infra*, this note.

[a] Such statutes "are in derogation of the common-law rule, and . . . where in any litigation there is any certain, definable, pecuniary, or proprietary interest or relation which will be directly affected by the judgment that may be rendered, in every such case without exception . . . the disqualification of the judge is held to exist." Meyer v. City of San Diego, 121 Cal. 102, 53 Pac. 434.

[b] Under a statute providing that a judge shall not be disqualified to act in causes in which the county or municipal corporation, of which he is a resident and taxpayer, is a party, a judge who is a property owner in a school district is disqualified to try an action to levy a special school tax, as a school district is not within the purview of the statute. State v. Call, 41 Fla. 442, 26 So. 1014, 79 Am. St. Rep. 189.

65. **Ark.**—Foreman v. Marianna, 43 Ark. 324. **Mass.**—Com. v. Worcester, 3 Pick. 462. **N. J.**—Burlington County v. Fennimore, 1 N. J. L. 293. **Ohio.**—Clermont County Comrs. v. Lytle, 3 Ohio 289. **Pa.**—*In re* Huntingdon Co. Line, 14 Pa. Super. 571. **Tex.**—Thornburgh v. Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1054.

*Contra*, Jefferson v. Milwaukee, 20 Wis. 139.

66. **Ala.**—McConnell v. Goodwin, 189 Ala. 390, 66 So. 675. **Conn.**—Church v. Norwich, Kirby 140. **Ia.**—Laplant v. City of Marshalltown, 134 Iowa 261, 111 N. W. 816. **Pa.**—Com. v. Delamater, 145 Pa. 210, 22 Atl. 1098. **Tex.**—Dal-

pending cause, nor the contingency of a possible future increase or decrease of taxation dependent upon the outcome of the action,<sup>67</sup> though as to the latter proposition there are authorities to the contrary,<sup>68</sup> constitute grounds of disqualification. So too, a judge's interest arising from a possible gain through the collection of fines and penalties by the municipality or county, of which the judge is a resident and taxpayer, is not sufficient to disqualify him.<sup>69</sup> Nor, it is held, is it material that

las v. Peacock, 89 Tex. 58, 33 S. W. 220.

[a] Where "a suit is instituted against a county or municipal corporation to establish a liability, such as a suit to obtain a judgment for damages or a liability against the corporation, the judge, though a taxpayer of the county or municipality is not disqualified to sit in the trial of the cause." *State ex rel. Hart v. Call*, 41 Fla. 442, 26 So. 1014.

67. *Higgins v. San Diego*, 126 Cal. 308, 58 Pac. 700, 59 Pac. 209; *Oakland v. Oakland Water Front Co.*, 118 Cal. 249, 50 Pac. 268; *Lawton, etc. Ry. Co. v. City of Lawton*, 31 Okla. 458, 122 Pac. 212.

[a] "Every magistrate, like other citizens, is a stockholder as it respects the funds of the state and subject to proportional loss or gain by public prosecutions. Yet this trifling state interest in effect is just nothing. . . . If the justice is rich, it is beneath his consideration; if poor, his proportion of the tax, to be saved or lost, is entirely nominal and though it be possible, it may sometimes have an influence, that is not the ordinary effect, and in no case are these trials final against the respondent. If all criminal trials could be purified of the least scintilla of interest that the judge or justice has, it might be well enough for the legislature or court to do it; but as they cannot, to endeavor to lessen the interest of the justice, when it is so minute already that it will require the philosopher's principle of the divisibility of matter, to do it, yet it cannot be annihilated. It would be sacrificing convenient practice to useless theory to attempt it, besides the trouble and expense of going abroad for a justice to regulate the police of a town. These traveling justices which this doctrine would create, would not be so likely to know the character of the party and witnesses, and therefore

not so likely to do justice in these petty offenses." *State v. Batchelder*, 6 Vt. 479.

[b] The fact that the judge owns real property within the city limits does not disqualify him from trying a condemnation proceeding instituted by the city. *City of Los Angeles v. Pomeroy*, 133 Cal. 529, 65 Pac. 1049.

[c] A judge who is a taxpayer of a city is not disqualified from trying a cause to enjoin the city from entering into a contract for the construction of water works upon the ground that the city council might issue municipal bonds for that purpose and has the implied power to levy a special tax on all the property owners in order to pay the interest and ultimately redeem the bonds. *State v. Noyes*, 25 Nev. 31, 56 Pac. 946.

68. *Jefferson v. Milwaukee*, 20 Wis. 139.

[a] In *Peck v. Freeholders of Essex*, 21 N. J. L. 656, the court holding the judge disqualified by reason of a possible gain or loss as a taxpayer says: "The judge who tried the cause at the circuit was interested in the event of the suit, which was brought on a collector's bond by the board of chosen freeholders of the county of Essex, for the use of the county. The judge was an inhabitant, a freeholder and a taxpayer in the same county. If the suit should terminate against the plaintiffs, the judge would be the loser, by the amount of his proportion of the tax required to make up the loss, and if in favor of the county, he would be the gainer by the same proportion, so that at all events he must either gain or lose and so be interested in the event of the suit, and thus disqualified to sit in judgment thereon."

69. Cal.—*In re Guerrero*, 69 Cal. 88, 10 Pac. 261. Conn.—*Kilbourn v. State*, 9 Conn. 560. Del.—*State v. Lynn*, 3 Penne. 316, 51 Atl. 878. Me.—*State v. Craig*, 80 Me. 85, 13 Atl. 129; *State*

the judge's fee is contingent upon the result of the trial,<sup>70</sup> or that the fine in case of conviction goes to the salary fund out of which the judge receives his compensation.<sup>71</sup> But where the action directly involves the imposition of a tax upon the judge's property he is disqualified, although his interest arises from the fact of his being a resident and taxpayer of a county or municipality.<sup>72</sup>

Hence, a judge who is a taxpayer of a city is disqualified to act in a suit to determine the legality of a city ordinance authorizing the issuance of bonds,<sup>73</sup> and a judge who owns property in a municipality is disqualified to hear and determine an action to dissolve such municipal corporation and to enjoin its officers from collecting taxes from the property owners.<sup>74</sup> But a judge as resident of a municipality is not disqualified to hear an application for the annexation of territory to such municipality.<sup>75</sup>

**As Stockholder of Corporation.**—A judge holding shares of a private corporation ordinarily is disqualified to try a case involving property rights of such corporation,<sup>76</sup> even though it is not a party to the ac-

*v. Intoxicating Liquors*, 54 Me. 564. Mass.—*Com. v. Fletcher*, 157 Mass. 14, 31 N. E. 687; *Hanscomb v. Russell*, 11 Gray 373; *Com. v. Emery*, 11 Cush. 406; *Com. v. Worcester*, 3 Pick. 462. Ohio.—*Thomas v. Mt. Vernon*, 9 Ohio 290. Vt.—*Colgate v. Hill*, 20 Vt. 56; *State v. Batchelder*, 6 Vt. 479.

[a] A judge "is competent to sit in a liquor case, whether the city, county or state is interested in the penalty and costs, though he be a resident and taxpayer in such city. The costs are a part of the penalty or punishment." *State v. Severance* (Me.), 4 Atl. 560.

70. *Com. v. Keenan*, 97 Mass. 589.

[a] "The fees which the law gives for the performance of official duties in relation to civil or criminal proceedings, do not constitute an interest in the proceedings. They are to be regarded simply as an equivalent for the services performed. A magistrate is not disqualified to render a judicial decision because he may thereby make further official action necessary for which he will receive the appropriate compensation in fees." *Com. v. Keenan*, 97 Mass. 589.

71. *In re Guerrero*, 69 Cal. 88, 10 Pac. 261; *Bennett v. State*, 4 Tex. App. 72.

72. *Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668; *Wetzel v. State*, 5 Tex. Civ. App. 17, 23 S. W. 825. But see *contra*, *Wade v. Travis*, 72 Fed. 985, *reversed*

on other points in 174 U. S. 499, 19 Sup. Ct. 715, 43 L. ed. 1060.

[a] Where "suit is instituted to restrain the collection of a tax fixed and ascertained and resting upon the taxable property of a county or municipal corporation, then the judge who owns taxable property in the county or corporation would be disqualified as having a direct interest in the result of the litigation before him." *State v. Call*, 41 Fla. 442, 26 So. 1014, 79 Am. St. Rep. 189.

73. *Holland v. Cranfeill* (Tex.), 167 S. W. 308; *Nalle v. City of Austin* (Tex. Civ. App.), 21 S. W. 375.

[a] In *Wade v. Travis*, 72 Fed. 985 (*reversed* on other grounds in 174 U. S. 499, 19 Sup. Ct. 715, 43 L. ed. 1060), which was such a case the court says: "Authorities examined by the court leave the question in some doubt and for the purpose of having it definitely determined by an appellate tribunal we have concluded to hold that disqualification on the part of the district judge does not exist."

74. *State v. Cisco* (Tex. Civ. App.), 33 S. W. 244; *Wetzel v. State*, 5 Tex. Civ. App. 17, 23 S. W. 825.

75. *Foreman v. Marianna*, 43 Ark. 324; *Oak Cliff v. State*, 97 Tex. 391, 79 S. W. 1068.

76. Cal.—*Adams v. Minor*, 121 Cal. 372, 53 Pac. 815. Fla.—*State v. Young*, 31 Fla. 594, 12 So. 673, 34 Am. St. Rep. 41, 19 L. R. A. 636. Ga.—*Johnson v.*

tion.<sup>77</sup> But where the financial condition of the corporation of which the judge is a stockholder could not be substantially affected by the disposition of the cause, he is not disqualified.<sup>78</sup> A judge who is the holder of a benefit certificate in a mutual insurance company is disqualified to try an action brought upon another benefit certificate against the same company.<sup>79</sup> But a judge is not disqualified to try a case by reason of the fact that he is a stockholder in a corporation to which one of the parties is indebted,<sup>80</sup> or that he formerly had been connected with a corporation, the property of which is involved in the action.<sup>81</sup>

Marietta, etc. R. R., 70 Ga. 712. **Mich.** Kittridge v. Kinne, 80 Mich. 200, 44 N. W. 1051. **Mo.**—Bowman's Case, 67 Mo. 146. **Nev.**—State v. Mack, 26 Nev. 430, 69 Pac. 862. **N. Y.**—*In re Dodge & Stevenson Mfg. Co.*, 77 N. Y. 101; *In re Reddish*, 49 Hun 612, 2 N. Y. Supp. 259. **Ohio.**—Gregory v. Cleveland, C. & C. R. Co., 4 Ohio St. 675. **Tex.**—Williams v. City Nat. Bank (Tex. Civ. App.), 27 S. W. 147. **Vt.**—Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315.

[a] He is disqualified to act upon a claim of such corporation against an estate. *State v. Mack*, 26 Nev. 430, 69 Pac. 862.

[b] **Dedication.**—Every stockholder of a corporation "has a present pecuniary interest in property of the corporation that is dedicated to public use. When the legal effect of a dedication by a corporation is litigated, any person who was a stockholder when the dedication was made is disqualified to determine judicially the legal effect of the dedication." *State ex rel. Adams v. Call*, 59 Fla. 610, 51 So. 537.

[c] He is not competent to issue a writ of attachment in an action in which the bank of which he is director and stockholder is interested. "The solvency of the securities and the sufficiency of the bond had to be passed upon by him. . . . This was illegal." *King v. Thompson*, 59 Ga. 380.

[d] But the fact that his name appears on the articles of incorporation as a subscriber is immaterial where in fact he did not take the stock. *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. ed. 996.

77. *Adams v. Minor*, 121 Cal. 372, 53 Pac. 815, involving validity of bonds some of which were held by bank

of which judge was a stockholder, though such bank was not a party.

78. *Hyde Park Lumber Co. v. Shepardson*, 72 Vt. 188, 47 Atl. 826.

[a] A judge is not disqualified from issuing a citation on a petition for the appointment as guardian of a corporation of which he is a stockholder. Matter of Estate of Leonard, 95 Mich. 295, 54 N. W. 1082.

79. It is "quite evident that the Woodmen of the World is a mutual insurance company, that its assets are the property of the holders of benefit certificates issued by the order, and any judgment, which requires the order to pay a sum, or releases the order from payment, must affect the assets of the order, and consequently directly affects each benefit certificate in the hands of the owner." *Sovereign Camp v. Hall* (Tex.), 120 S. W. 539.

[a] A judge who is the holder of a policy of a mutual life insurance company, by which the company agreed to pay to his widow a certain sum as well as to pay to him at the end of twenty years, if living, the share of the accumulated profits of the company apportionable to the policy, has such an interest in the result of a suit on a policy issued by the company as to disqualify him from trying it. *New York Life Ins. Co. v. Sides*, 46 Tex. Civ. App. 246, 101 S. W. 1163.

80. *Webb v. Town of Eutaw*, 9 Ala. App. 474, 63 So. 687. Compare *Anderson v. Com. (Ky.)*, 117 S. W. 364, holding the judge disqualified for bias, because he was a stockholder in a corporation which was a large creditor of the bank which the defendant was charged with having wrecked. As to bias, see *infra*, IX, B, 7.

81. **Cal.**—*Scadden F. G. Min. Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440.

**As Member of Bar Association.**—A judge as member of a bar association has no such interest in a proceeding instituted by such association against an attorney for the purpose of disbarment as will disqualify him,<sup>82</sup> although the dues paid by the judge may have to be appropriated to the payment of costs in such a proceeding.<sup>83</sup>

**4. Relationship.**—*a. To Party.*—The relationship of a judge within the degrees specified in the statute to one of the parties renders him disqualified to try a cause,<sup>84</sup> and whenever the statute defines the disqualifying degrees of relationship, it impliedly excludes more distant degrees from operating as ground of disqualification.<sup>85</sup>

In a number of jurisdictions the word "party" is held to embrace every person who, though not a party of record, is directly affected by the outcome of the action and a relationship of the judge to such person disqualifies him to act in the cause.<sup>86</sup> Pursuant to such construe-

Ga.—*Johnson v. Marietta & N. G. R. R.*, 70 Ga. 712. N. Y.—*Palmer v. Lawrence*, 5 N. Y. 389.

[a] **A judge, who formerly owned stock** of a corporation and was an officer thereof is not disqualified to try a case in which such corporation is interested, although he may be held liable for ultra vires acts of the corporation; "it will be time enough for the judge to hold himself disqualified when a suit is brought against him to recover a personal judgment." *Nicholson v. Showalter*, 83 Tex. 99, 18 S. W. 326.

82. **Ala.**—*Ex parte State Bar Assn.*, 92 Ala. 113, 8 So. 768, 12 L. R. A. 134. **Mass.**—*Bar Association v. Casey*, 211 Mass. 187, 97 N. E. 751. **Mo.** *In re Marshall*, 178 Mo. 16, 160 S. W. 531; *Bowman's Case*, 67 Mo. 146.

83. **Ex parte State Bar Assn.**, 92 Ala. 113, 8 So. 768, 12 L. R. A. 134.

84. **Ala.**—*State v. Pitts*, 139 Ala. 152, 36 So. 20; *Hooks v. Barnett's Exr.*, 38 Ala. 607. **Ark.**—*Kelly v. Neely*, 12 Ark. 657, 56 Am. Dec. 288. **Cal.**—*Robinson v. Southern Pac. Co.*, 105 Cal. 526, 38 Pac. 94, 28 L. R. A. 773; *Howell v. Budd*, 91 Cal. 342, 27 Pac. 747; *People v. De La Guerra*, 24 Cal. 73. **Conn.**—*Nettleton v. Nettleton*, 17 Conn. 542; *Church v. Norwich*, Kirby 140. **Del.**—*Bayard v. McLane*, 3 Harr. 139. **Fla.**—*State v. Wall*, 41 Fla. 463, 28 So. 1020, 79 Am. St. Rep. 195, 49 L. R. A. 548. **Ga.**—*Bivins v. Richland Bank*, 109 Ga. 342, 34 S. E. 602; *Short v. Mathis*, 101 Ga. 287, 28 S. E. 918; *Olliff v. State*, 1 Ga. App. 553. **Haw.**—*Smith v. Lindsay*, 20 Hawaii 262. **Ia.**—*Chase v. Weston*, 75 Iowa 159, 39 N. W. 246. **La.**—*State*

*v. Foster*, 112 La. 533, 36 So. 554; *State v. Judge*, 41 La. Ann. 319, 6 So. 22. **Mass.**—*Taylor v. Worcester*, 105 Mass. 225. **Mich.**—*Davis Colliery Co. v. Charlevoix Sugar Co.*, 155 Mich. 228, 118 N. W. 929; *Horton v. Howard*, 79 Mich. 642, 44 N. W. 1112, 19 Am. St. Rep. 198. **Miss.**—*Dodd v. Kelly*, 107 Miss. 471, 65 So. 561. **N. H.**—*Sanborn v. Fellows*, 22 N. H. 473. **N. Y.** *People v. Connor*, 142 N. Y. 130, 36 N. E. 807. **S. C.**—*Ex parte Kreps*, 61 S. C. 29, 39 S. E. 181. **Tex.**—*Schultze v. McLeary*, 73 Tex. 92, 11 S. W. 924; *Gains v. Barr*, 60 Tex. 676; *Seabrook v. First Nat. Bank (Tex. Civ. App.)*, 171 S. W. 247. **Vt.**—*Davidson v. Whitehill*, 87 Vt. 499, 89 Atl. 1081.

In probate proceedings, see *infra*, IX, B, 6, b.

85. See *Stearnes Mfg. Co. v. Curll Co.*, 4 Pa. Co. Ct. 265.

[a] **Near Relative.**—A statute providing for disqualification of a judge whenever any near relative of the judge is interested in the case "certainly was not intended to embrace any relative within the degrees of affinity. It may be fairly assumed that if it were so intended it would have been mentioned in apt and expressive words." *Stearnes Mfg. Co. v. Curll & Co.*, 4 Pa. Co. Ct. 265.

86. **Ala.**—*Crook v. Newberg*, 124 Ala. 479, 27 So. 432, 82 Am. St. Rep. 190. **Ark.**—*Johnson v. State*, 87 Ark. 45, 112 S. W. 143, 18 L. R. A. (N. S.) 619. **Cal.**—*Howell v. Budd*, 91 Cal. 342, 27 Pac. 747. **Ga.**—*Roberts v. Roberts*, 115 Ga. 259, 41 S. E. 616, 90 Am. St. Rep. 108. **Ind.**—*Smith v. Amiss*, 30 Ind. App. 530, 66 N. E. 501. **Mich.**—*Davis*

tion of the word "party," a spouse whose rights are involved in an action,<sup>87</sup> a party interested as heir in an estate,<sup>88</sup> the beneficiary of a

*Colliery Co. v. Charlevoix Sugar Co.*, 155 Mich. 228, 118 N. W. 929. *Minn.* *Bryant v. Livermore*, 20 Minn. 313. *Miss.*—*Dodd v. Kelly*, 107 Miss. 471, 65 So. 561. *Mont.*—*State ex rel. Carroll v. District Court*, 50 Mont. 506, 148 Pac. 312. *N. H.*—*Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. *Okla.* *Hengst v. Burnett*, 40 Okla. 42, 135 Pac. 1062. *Tex.*—*Schultze v. McLeary*, 73 Tex. 92, 11 S. W. 924; *Jordon v. Moore*, 65 Tex. 363; *Gulf R. Co. v. Looney*, 42 Tex. Civ. App. 234, 95 S. W. 691.

[a] "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation, whether that interest is revealed by an inspection of the record or developed by evidence aliunde the record. The real parties in interest furnish the reason for the judge to recuse himself when it becomes known that they are related to the judge, although they may not be parties *eo nomine*." *Yazoo & M. V. R. Co. v. Kirk*, 102 Miss. 41, 58 So. 710, 834, Ann. Cas. 1914C, 968, 42 L. R. A. (N. S.) 1172.

[b] "A narrow or contracted construction of the term 'party,' which confines it to the very persons named on the docket as such, and excludes such as stand precisely in the same relation, would often defeat the end had in view, of having justice impartially administered free from the bias and influence produced by the interest held in the cause by the judge or his relations." *Hodde v. Susan*, 58 Tex. 389.

[c] "The party in interest, though not a party to the record is even more surely within the meaning of the law than the party to the record who is without interest." *White v. McClanahan*, 133 La. 396, 63 So. 61, 47 L. R. A. (N. S.) 448.

[d] All persons for whose immediate benefit the action is prosecuted or defended, are "parties." *Bank of Lansingburgh v. McKie*, 7 How. Pr. (N. Y.) 360. To the same effect, *Foot v. Morgan*, 1 Hill (N. Y.) 654.

[e] But the relationship of the judge to a garnishee is no ground for disqualification, as a garnishee is not in any sense a party to the action; "he is not concluded by the judgment in respect to any issue he may properly raise, nor could such judgment so bind him if it professed to do so, nor would he be a proper party to an appeal from such judgment." *Patterson v. Seeton*, 19 Tex. Civ. App. 430, 47 S. W. 732.

[f] And a relationship of the judge by affinity (1) to the son of the plaintiff constitutes no ground for disqualification, the plaintiff's son not being a party in interest. *Lucas v. Lucas*, 20 Hawaii 434. (2) But where a judge is related by affinity within the prohibited degree to the wife of a person who is sought to be made a party to the action, he is disqualified to try the cause. *Seabrook v. First Nat. Bank* (Tex. Civ. App.), 171 S. W. 247.

87. *Schultze v. McLeary*, 73 Tex. 92, 11 S. W. 924; *Jordon v. Moore*, 65 Tex. 363.

[a] Where the wife of a judge is a shareholder of the corporation plaintiff, "it would seem to be an anomaly for her husband to sit as judge in a case where she was so directly interested." *First Nat. Bank v. McGuire*, 12 S. D. 226, 80 N. W. 1074, 76 Am. St. Rep. 598, 47 L. R. A. 413.

[b] And where an action is brought by the husband for damages which, if recovered, would constitute community property of husband and wife, the latter though not mentioned in the pleadings is a party to the suit within the purview of the statute defining disqualification of a judge by reason of relationship to one of the parties. *Gulf, C. & S. F. Ry. Co. v. Looney*, 42 Tex. Civ. App. 234, 95 S. W. 691.

[c] *Wife a Creditor.*—Where the wife of the chancellor was a creditor of a bank which made an assignment for the benefit of its creditors, the chancellor is disqualified to appoint a receiver of the bank. *Dodd v. Kelly*, 107 Miss. 471, 65 So. 561.

88. *Gains v. Barr*, 60 Tex. 676.

life insurance policy<sup>89</sup> sureties on a bond,<sup>90</sup> a guardian,<sup>91</sup> a purchaser at a guardian's sale,<sup>92</sup> have been held to be parties within the contemplation of a statute providing for a judge's disqualification by reason of relationship to one of the parties to the action. In other jurisdictions, however, the term "party" as used in the statute is held to be confined to the parties of record.<sup>93</sup>

89. *State Mut. Life Ins. Co. v. Walton*, 142 Ga. 765, 83 S. E. 656.

90. *Crook v. Newberg*, 124 Ala. 479, 27 So. 432, 82 Am. St. Rep. 190; *Hodde v. Susan*, 58 Tex. 389.

91. *State ex rel. Carroll v. District Court*, 50 Mont. 506, 148 Pac. 312.

[a] A guardian is a party to a proceeding for an order to purchase property for the ward, and a judge who is a brother-in-law of such guardian is disqualified to sit in the proceeding. *Hengst v. Burnett*, 40 Okla. 42, 135 Pac. 1062.

[b] But a guardian ad litem (1) of an infant defendant is not a party within the meaning of the statute, and a relationship of the judge to such guardian is no ground for disqualification. *Bryant v. Livermore*, 20 Minn. 313. (2) "Whatever may be said of the ethics of a judicial officer's appointment of a near kinsman to a position within the gift of such officer, we do not think that this appointment by the surrogate of his brother as special guardian of an infant litigant, in his court, comes within any of the statutory prohibitions, . . . The guardian being only an officer of the court and not a party in the statutory sense of that term, . . . the surrogate had jurisdiction to hear and determine the case." *Matter of Van Wagoner*, 69 Hun 365, 23 N. Y. Supp. 636.

92. *Jirou v. Jirou* (Tex. Civ. App.), 136 S. W. 493, to confirmation proceedings.

93. Conn.—*Casmento v. Barlow Bros. Co.*, 83 Conn. 180, 76 Atl. 361; *Clyma v. Kennedy*, 64 Conn. 310, 29 Atl. 539, 42 Am. St. Rep. 194. Fla.—*Williams v. Robles*, 22 Fla. 95. N. Y.—*Matter of Dodge & Stevenson Mfg. Co.*, 77 N. Y. 101, 33 Am. Rep. 579. Vt. *Searsburgh Tpk. Co. v. Cutler*, 6 Vt. 315.

[a] The word "parties" cannot be construed, "to mean 'or other persons in interest.' The legislature have not deemed it expedient to go to that

length: nor do we so deem it. It would be impossible to foresee what remote and contingent interests might be involved in the progress of a suit, and to make the jurisdiction of the court to depend upon a disclosure of such an interest, would lead to the discussion of matters foreign to the issue, and would often interrupt the administration of justice." *Searsburgh Tpk. Co. v. Cutler*, 6 Vt. 315.

[b] "Interest on the part of the judge disqualifies him from sitting but interest on the part of a relative of the judge does not. The statute very clearly expresses that such relative must be one of the parties to the cause, to render the judge incompetent. . . . It would be almost impossible to carry on the administration of justice under any different rule. The judge may be presumed to know whether he is himself interested in a cause brought before him, and he can ascertain from the papers, who are the parties to it, and presumably may know whether any of them are related to him by blood or marriage . . . ; but how can he possibly know what persons, not named, may be interested in the subject, or whether any such persons are related to him?" *Matter of Dodge & Stevenson Mfg. Co.*, 77 N. Y. 101, 33 Am. Rep. 579.

[c] In Texas (1) the rule is somewhat uncertain. In *Winston v. Master-ton*, 87 Tex. 200, 27 S. W. 768, the court uses language apparently confining the term parties to parties of record only. But *Duncan v. Herder*, 57 Tex. Civ. App. 542, 122 S. W. 904, refuses to follow the case on this point on the ground that it is contrary to the previous decisions of the supreme court and that the court could not have intended to overrule itself. See *Schultze v. McLeary*, 73 Tex. 92, 11 S. W. 924; *Hodde v. Susan*, 58 Tex. 389, 392. (2) A relationship of the judge to an inchoate party who may be affected by the judgment is not within the letter or spirit of the law. Inter-

It is not material whether the party is suing or is being sued as individual or in his representative capacity.<sup>94</sup> But the relationship of a judge to a merely nominal party does not disqualify him.<sup>95</sup> Where the judge is related to the person upon whom the crime is charged to have been committed by the defendant, he is disqualified,<sup>96</sup> though there are cases to the contrary, on the ground that such person is not a party to the action.<sup>97</sup> The judge's relationship to the prosecuting attorney does not disqualify him.<sup>98</sup>

b. *To Stockholder.*—In some jurisdictions the relationship of a judge to a stockholder of a corporation, which is a party to the action, does not disqualify him,<sup>99</sup> though in others a contrary rule prevails.<sup>1</sup>

national & G. N. Ry. Co. v. Anderson Co. (Tex. Civ. App.), 174 S. W. 305.

94. *Smith v. Lindsay*, 20 Hawaii 262; *State v. Foster*, 112 La. 533, 36 So. 554.

[a] Where a relative of the judge is a party to the action as administrator of an estate, the judge is disqualified. The administrator "was a litigant in the full sense of the term. That he acted in a fiduciary capacity made him no less a party to the case. . . . The administrator was certainly interested in the size and value of the estate which he was to administer. He had the right to hold and administer all property subject to administration, and the pecuniary value of the right, the compensation which he would be entitled to receive, depended upon the amount of the property." *Dennard v. Jordan*, 14 Tex. Civ. App. 398, 37 S. W. 876.

95. *Fowler v. Byers*, 16 Ark. 196, trustee.

96. *Gill v. State*, 61 Ala. 169.

[a] "It is manifest that the present case does not fall within the letter of the statute. But, if we confine the rule to the strict letter . . ., we thereby declare a judge may sit in judgment on a criminal, who took the life of his nearest relative. Nay, more; for offenses less than homicide, we declare that a judge may try an offender for a public offense against his own person or property." *Gill v. State*, 61 Ala. 169.

[b] Under a statute providing for disqualification of a judge where the accused or the party "injured" may be related to him within the prohibited degree, a judge is disqualified from trying a case of malicious mischief consisting in wilfully killing a hog owned by a brother of the judge.

*January v. State*, 36 Tex. Crim. 488, 38 S. W. 179.

[c] A judge is not disqualified to try a criminal case by reason of the fact that his relative has been jointly indicted with the defendant, where such relative has not been arrested or formally charged. *Reed v. State*, 11 Tex. App. 587.

97. *Newman v. State*, 49 Ala. 9; *Ingraham v. State*, 82 Neb. 553, 118 N. W. 320.

98. *People v. Patrick*, 183 N. Y. 52, 75 N. E. 963, nor does it make it improper for him to sit.

99. *Cal.*—*Robinson v. Southern Pac. Co.*, 105 Cal. 526, 38 Pac. 94, 28 L. R. A. 773. *N. Y.*—*Matter of Dodge & Stevenson Mfg. Co.*, 77 N. Y. 101, 33 Am. Rep. 579; *Bank of Lansingburgh v. McKie*, 7 How. Pr. 360. *Tex.*—*Winston v. Masterson*, 87 Tex. 200, 27 S. W. 768; *Kingman, etc. Co. v. Herring Nat. Bank* (Tex. Civ. App.), 153 S. W. 394; *Houston Cemetery Co. v. Drew*, 13 Tex. Civ. App. 536, 36 S. W. 802; *Lewis v. Hillsboro Co.* (Tex. Civ. App.), 23 S. W. 338.

[a] Though a stockholder necessarily is affected by the result of a suit by or against the corporation, the judge's relationship to such stockholder affords no ground of disqualification. "The corporation in its corporate capacity is plaintiff, and not the individual stockholders in their individual capacity. A stockholder, as such, can neither control nor discharge the suit, nor indeed exercise any power over it more than a stranger." *Searsburgh Tpk. Co. v. Cutler*, 6 Vt. 315.

1. *Ga.*—*State Mut. Life Ins. Co. v. Walton*, 142 Ga. 765, 83 S. E. 656, relationship to beneficiary of mutual life insurance policy. *Ind.*—*Smith v. Amiss*, 30 Ind. App. 530, 66 N. E. 501. *S. D.*

c. *To Attorney*.—In some jurisdictions relationship of a judge to one of the attorneys in the cause disqualifies him;<sup>2</sup> but elsewhere it is not a ground of disqualification, unless the attorney has a property interest in the cause.<sup>3</sup> The general rule seems to be that whenever an attorney, who is related to the judge within the prohibited degree, is retained under a contract for a contingent fee, the judge is disqualified to hear the cause,<sup>4</sup> though it has been held to the contrary.<sup>5</sup>

5. **Former Counsel**.—In the absence of an express statutory provision a judge is not disqualified by reason of having been counsel in a cause,<sup>6</sup> though there are cases holding that such fact constitutes a

First Nat. Bank *v.* McCarthy, 13 S. D. 356, 83 N. W. 423; Same *v.* McGuire, 12 S. D. 226, 80 N. W. 1074, 76 Am. St. Rep. 598, 47 L. R. A. 413.

2. *People v. Ebey*, 6 Cal. App. 769, 93 Pac. 379.

[a] It is immaterial whether or not such attorney appeared of record in the case or was to receive compensation for his services. *Johnston v. Brown*, 115 Cal. 694, 47 Pac. 686.

3. *Patton v. Collier*, 90 Tex. 115, 37 S. W. 413; *Winston v. Masterson*, 87 Tex. 200, 27 S. W. 768.

[a] Under a statute prohibiting a judge from sitting in any cause in which he would be excluded from sitting as a juror a judge is not disqualified by reason of relationship to one of the attorneys in the case. *State v. Ledbetter*, 111 Minn. 110, 126 N. W. 477. See also *Sjoberg v. Nordin*, 26 Minn. 501, 5 N. W. 677.

[b] In an application for alimony and counsel fees, the attorney for applicant is pecuniarily interested in the result of the suit and a judge who is related within the prohibited degree to such attorney is disqualified to hear the application. *Roberts v. Roberts*, 115 Ga. 259, 41 S. E. 616, 90 Am. St. Rep. 108.

4. **Ark.**—*Johnson v. State*, 87 Ark. 45, 112 S. W. 143, 18 L. R. A. (N. S.) 619. **Ga.**—*Shuford v. Shuford*, 141 Ga. 407, 81 S. E. 115. **Ia.**—*Cavanagh v. District Court*, 163 Iowa 76, 144 N. W. 25. **La.**—*White v. McClanahan*, 133 La. 396, 63 So. 61, 47 L. R. A. (N. S.) 448. **Miss.**—*Yazoo & M. V. R. Co. v. Kirk*, 102 Miss. 41, 58 So. 710, Ann. Cas. 1914C, 968, 42 L. R. A. (N. S.) 1172. **Okla.**—*State ex rel. Mayo v. Pitchford*, 43 Okla. 105, 141 Pac. 433. **S. D.**—*Vine v. Jones*, 13 S. D. 54, 82 N. W. 82.

[a] **Order for Attorney's Fees**.—A judge whose son is one of the attorneys for foreign heirs and has an interest in the matter by reason of a contingent fee is disqualified to make an order for the payment of fees to the attorneys of the foreign heirs. *Cavanagh v. District Court*, 163 Iowa 76, 144 N. W. 25.

[b] But where the agreement for a contingent fee was abrogated prior to the trial, a judge who was a brother-in-law of plaintiff's counsel, is not disqualified to preside at the trial of the cause. *Knickerbocker v. Worthing*, 138 Mich. 224, 101 N. W. 540.

5. **Fla.**—*Hundley v. State*, 47 Fla. 172, 36 So. 362. **N. C.**—*Allison v. Southern Ry. Co.*, 129 N. C. 336, 40 S. E. 91. **Tex.**—*Knapp & Co. v. Campbell*, 14 Tex. Civ. App. 199, 36 S. W. 765.

[a] An attorney, whose fee is contingent is not a party within the meaning of the statute, and a judge is not disqualified because his son-in-law is of counsel for one of the parties under a contract for a contingent fee. *Missouri, K. & T. R. Co. v. Mitcham*, 57 Tex. Civ. App. 134, 121 S. W. 871.

6. **U. S.**—*Duncan v. Atlantic C. L. R. Co.*, 223 Fed. 446. **Cal.**—*Barnhart v. Fulkerth*, 59 Cal. 130. **Haw.**—*Love v. Love*, 17 Hawaii 194. **Ky.**—*Owings v. Gibson*, 2 A. K. Marsh. 515. **Miss.**—*Thomas v. State*, 5 How. 20. **Mo.**—*State ex rel. Gallivan v. Bradley*, 194 Mo. 166, 92 S. W. 464. **N. J.**—*Denn v. Tatem*, 1 N. J. L. 164. **N. Y.**—*Davis v. Seaward*, 85 Misc. 210, 146 N. Y. Supp. 981. **Ohio.**—*State v. Winget*, 37 Ohio St. 153. **Pa.**—*Bank of North America v. Fitzsimons*, 2 Binn. 454. **Tex.**—*Chambers v. Hodges*, 23 Tex. 104. **W. Va.**—*Cheuvront v. Horner*, 62 W. Va. 476, 59 S. E. 964. **Wis.**—*Schaeffner's Appeal*, 41 Wis. 260;

ground of disqualification even in the absence of statute.<sup>7</sup>

In some states statutes have been enacted which provide that a judge who had been counsel in the case is disqualified to act therein.<sup>8</sup> Such statutes must be strictly construed and no ground of disqualification exists thereunder unless the judge had been counsel in the pending action or proceeding,<sup>9</sup> although it is held in some cases that a judge who has been counsel in another suit between the same parties based on the same cause of action is disqualified to act.<sup>10</sup> But a judge is not

*Morgan v. Hammett*, 23 Wis. 30. *Wyo.* *Ross v. State*, 8 Wyo. 351, 57 Pac. 924.

7. *Fla.*—*State v. Hocker*, 34 Fla. 25, 15 So. 581, 25 L. R. A. 114; *Tampa St. Ry. & P. Co. v. Tampa Sub. R. R. Co.*, 30 Fla. 595, 11 So. 562, 17 L. R. A. 681. *N. Y.*—*Ten Eick v. Simpson*, 11 Paige 177. *W. Va.*—*State v. Cottrell*, 45 W. Va. 837, 32 S. E. 162.

See also *infra*, IX, B, 6, c.

8. *U. S.*—*Epstein v. United States*, 196 Fed. 354, 116 C. C. A. 174. *Cal.* *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933. *Colo.*—*People v. District Ct.*, 26 Colo. 226, 56 Pac. 1115; *Sterling No. 2 Ditch Co. v. Iliff & Platte Val. Ditch Co.*, 24 Colo. 491, 52 Pac. 669. *Ga.* *East Rome Town Co. v. Cothran*, 81 Ga. 359, 8 S. E. 737. *Ind.*—*Fechheimer v. Washington*, 77 Ind. 366; *Joyce v. Whitney*, 57 Ind. 550; *Witter v. Taylor*, 7 Ind. 110. *Kan.*—*Tootle v. Berkley*, 60 Kan. 446, 56 Pac. 755. *La.*—*State v. Judge*, 27 La. Ann. 225; *Amacker v. Varnado*, 19 La. Ann. 381. *Mich.* *Curtis v. Wilcox*, 74 Mich. 69, 41 N. W. 863; *Fraser v. Lapeer Circ. Judge*, 48 Mich. 176, 12 N. W. 40; *People v. Judge*, 26 Mich. 342. *Mo.*—*State v. Gray*, 100 Mo. App. 98, 72 S. W. 1081. *N. H.*—*Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. *N. Y.*—*Wigand v. Dejonge*, 8 Abb. N. C. 260; *Van Rensselaer v. Douglas*, 2 Wend. 290. *Pa.* *Voris v. Smith*, 13 Serg. & R. 334. *Tex.*—*State v. Burks*, 82 Tex. 584, 18 S. W. 662; *Taylor v. Williams*, 26 Tex. 583; *Kalklosh v. Bunting*, 40 Tex. Civ. App. 233, 88 S. W. 389; *Gaines v. Hindman* (Tex. Civ. App.), 74 S. W. 583.

[a] **Judge on Appeal.**—Under a statute prohibiting judges to sit or participate in the decision of a cause in which they have been attorney or counsel, a determination of an appeal participated in by a justice who had been attorney with regard to matters involved in the action is void even

though the majority of the court rendered a judgment contrary to the opinion of the disqualified judge. *Seaward v. Tasker*, 143 N. Y. Supp. 257.

[b] **Incompetent To Settle Bill of Exceptions.**—*State ex rel. Gallivan v. Bradley*, 194 Mo. 166, 92 S. W. 464. To the same effect, *Waterman v. Morgan*, 114 Ind. 237, 16 N. E. 590.

9. *U. S.*—*Duncan v. Atlantic C. L. R. Co.*, 223 Fed. 446. *Ky.*—*Owings v. Gibson*, 2 A. K. Marsh. 515. *N. Y.* *Davis v. Seaward*, 146 N. Y. Supp. 981; *Seaward v. Tasker*, 143 N. Y. Supp. 257. *Pa.*—*Keller v. Riverton Water Co.*, 34 Pa. Super. 301. *Tex.*—*Glasscock v. Hughes*, 55 Tex. 461; *Frinkle v. State*, 59 Tex. Crim. 257, 127 S. W. 1060. *Wash.*—*Fortson Shingle Co. v. Skagland*, 77 Wash. 8, 137 Pac. 304.

[a] Where the judge's name was inadvertently used as counsel and he was not in fact an attorney in the case, he is not disqualified. *Fort Worth & D. C. Ry. Co. v. Mackney*, 83 Tex. 410, 18 S. W. 949.

[b] Negotiations not resulting in his employment do not disqualify him. *Baines v. State*, 43 Tex. Crim. 490, 66 S. W. 847.

10. *Kahanek v. Galveston, etc. Ry. Co.*, 72 Tex. 476, 10 S. W. 570; *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604; *Barnes v. State*, 47 Tex. Crim. 461, 83 S. W. 1124; *Woody v. State* (Tex. Crim.), 69 S. W. 155; *State v. Dick*, 125 Wis. 51, 103 N. W. 229. But see *Taylor v. Williams*, 26 Tex. 583.

[a] Where defendant had been formerly convicted of a simple assault arising out of the same transaction and based upon the same state of facts and the trial judge in that case acted as private prosecuting attorney and thereafter the grand jury indicted defendant upon the same facts for the offense of aggravated assault, the judge is disqualified to try the case. *John-*

disqualified as having been of counsel in a cause where the parties in the pending suit are different,<sup>11</sup> or the issues are separate and distinct.<sup>12</sup> Nor is it material that some of the issues of the case at bar were involved in the action in which the trial judge acted as attorney for one of the parties,<sup>13</sup> or that the same or similar questions were involved,<sup>14</sup> or that the judge prior to his election had been attorney for one of the parties in matters not connected with the pending cause,<sup>15</sup>

son v. State, 29 Tex. App. 526, 16 S. W. 418.

11. *Lassen Irr. Co. v. Superior Court*, 151 Cal. 357, 90 Pac. 709; *City of Austin v. Cahill*, 99 Tex. 172, 88 S. W. 542, 89 S. W. 552.

[a] **Prejudice Against Party.**—The fact that the judge theretofore had been of counsel in other cases against the defendant by reason whereof defendant believes that the judge is so prejudiced against him as to deny him a fair trial, does not present a ground for disqualification. *Trinkle v. State*, 59 Tex. Crim. 257, 127 S. W. 1060.

12. *The Richmond*, 9 Fed. 863; *Butts v. Davis* (Tex. Civ. App.), 149 S. W. 741.

[a] **Where the questions in the two cases are quite different**, though in some measure growing out of the same transactions, the material issue in one case being whether a certain trust deed had been made and in the other whether the trusts under such deed were fulfilled, the fact that the judge was of counsel in one case does not disqualify him from trying the other. *Hungerford v. Cushing*, 2 Wis. 397.

[b] **A judge who was attorney for an administrator** (1) appointed on his petition, is not disqualified from hearing a petition of the administrator to sell land of the estate, filed many years afterwards. *Ryan v. Geigel*, 25 Colo. App. 122, 136 Pac. 804. (2) Nor is such former connection as counsel for the administrator a ground of the judge's disqualification in a proceeding to foreclose a mortgage brought against the estate. *Morrissey v. Gray*, 160 Cal. 390, 117 Pac. 438.

[c] **Action by Receiver for Whom He Secured Appointment.**—A judge is not disqualified to hear and determine a case, brought by a receiver against a third party, by reason of the fact that he as attorney at law had been employed to file the petition for the appointment of the receiver, where

after such appointment he had retired from the case and had no further connection therewith and was not interested in any way in the litigation. *Conyers v. Ford*, 111 Ga. 754, 36 S. E. 947.

13. *Cal.*—*Cleghorn v. Cleghorn*, 66 Cal. 309, 5 Pac. 516. *Md.*—*Blackburn v. Craufurd*, 22 Md. 447. *Tex.*—*Glasscock v. Hughes*, 55 Tex. 461.

[a] **Criminal Case.**—A county judge is not disqualified to act in a case wherein defendant is charged with a criminal offense, although he appears as attorney for plaintiff in a civil action to which the accused is defendant. *McIndoo v. State*, 66 Tex. Crim. 307, 147 S. W. 235.

14. *U. S.*—*In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622. *N. Y.*—*Keefe v. Third Nat. Bank*, 177 N. Y. 305, 69 N. E. 593. *Tex.*—*King v. Sapp*, 66 Tex. 519, 2 S. W. 573; *Taylor v. Williams*, 26 Tex. 583.

15. *U. S.*—*Carr v. Fife*, 156 U. S. 494, 15 Sup. Ct. 427, 39 L. ed. 508. *Colo.*—*Ryan v. Geigel*, 25 Colo. App. 122, 136 Pac. 804. *Ga.*—*Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814. *Haw.*—*Territory v. Kapiolani*, 20 Hawaii 548. *Ky.*—*Owings v. Gibson*, 2 A. K. Marsh. 515. *Mo.*—*Fields v. Bollinger*, 234 Mo. 190, 136 S. W. 293. *Mont.*—*State ex rel. McCormick v. Woody*, 14 Mont. 455, 36 Pac. 1043. *N. Y.*—*Davis v. Seaward*, 85 Misc. 210, 146 N. Y. Supp. 981. *Tex.*—*McIndoo v. State*, 66 Tex. Crim. 307, 147 S. W. 235; *Trinkle v. State*, 59 Tex. Crim. 257, 127 S. W. 1060. *Wash.*—*Fortson Shingle Co. v. Skagland*, 77 Wash. 8, 137 Pac. 304.

[a] "The mere fact that an attorney, in his professional capacity, formerly prosecuted an individual in a civil or criminal action, creates no presumption that such attorney is prejudiced against such individual in any other matter." *Karcher v. Pearce*, 14 Colo. 557, 24 Pac. 568.

[b] **The mere fact that the judge**

unless he had received a general retainer from such party.<sup>16</sup> But where the right to recovery in one action is dependent upon the result of another, a judge who was the attorney of one of the parties in one action is disqualified from presiding at the trial of the other action.<sup>17</sup>

It has been held in some cases that a judge is disqualified not only in the identical case in which he has been the attorney but also in any supplemental or other proceedings closely connected therewith as for the enforcement of the judgment obtained.<sup>18</sup> On the other hand it has been held that a judge who had been counsel in a case in which a judgment was obtained by him is not disqualified to hear and determine a proceeding for the revival of such judgment.<sup>19</sup>

It is immaterial so far as the judge's disqualification is concerned, whether compensation was charged or not by the judge for his services as counsel of one of the parties,<sup>20</sup> and the disqualification upon the

has once been attorney for a party does not disqualify him under such a statute unless he was counsel in the pending case. *State v. Woody*, 14 Mont. 455, 36 Pac. 1043.

[c] A probate judge is not disqualified to hear a proceeding for the probate of a will on the ground that he was an attorney for the testator in certain actions which the deceased had pending before and at the time of his death. *People ex rel. Kirk v. Weiant*, 30 Hun (N. Y.) 475. See also *Schaeffer's Appeal*, 41 Wis. 260.

[d] "If either the cause or controversy is not identical the disqualification does not exist. . . . the controversy in which the judge was of counsel was as to the liability for a collision. The controversy now pending and being litigated is with reference to the liability of sureties under a mandate remitted from the supreme court. It could not be error for the judge to sit in this matter, nor would the statute exempt him." *The Richmond*, 9 Fed. 863.

16. *Kern Valley Water Co. v. McCord*, 70 Cal. 646, 11 Pac. 798.

17. *Seaward v. Tasker*, 143 N. Y. Supp. 257.

[a] **Civil and Criminal Action on Same Transaction.**—Where a judge is employed by a wife as attorney to bring suit for divorce against her husband on the ground of cruelty, he is disqualified to preside at the husband's trial for assault on his wife, as this offense constituted the gravamen of the action for divorce. *Barnes v. State*, 47 Tex. Crim. 461, 83 S. W. 1124.

[b] **Issues Substantially Identical.** Where the judge prior to his election was attorney for the comptroller of the state in a proceeding to determine the amount of taxes due upon the estate and it was claimed that considerable property was concealed by the executor, the judge is disqualified to hear a petition for the removal of the executor, as "the two proceedings may reasonably be regarded as one." *People ex rel. Kennedy v. Gill*, 147 App. Div. 924, 131 N. Y. Supp. 902.

[c] **Successive Actions for Divorce.** Where the first action was by the wife, in which the judge was defendant's attorney, and the second was by the husband, the judge is disqualified to sit in the second. *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604.

18. *State v. Hocker*, 34 Fla. 25, 15 So. 581, 25 L. R. A. 114, a claim case.

[a] A probate judge is disqualified to hear a petition for the sale of land to satisfy a judgment recovered in an action in which the judge acted as counsel for the plaintiff. *Darling v. Pierce*, 15 Hun (N. Y.) 542.

19. *Stevens v. Hall*, 8 Idaho 549, 69 Pac. 282.

[a] But where the judge was not only of counsel in obtaining the judgment revived but has a direct and pecuniary interest in the judgment, the attorney's fee not having been paid, he is disqualified to hear the cause. *Tootle v. Berkley*, 60 Kan. 446, 56 Pac. 755.

20. **Ga.**—*East Rome Town Co. v. Cothran*, 81 Ga. 359, 8 S. E. 737. **N. Y.** *People v. Haas*, 105 App. Div. 119, 93

ground of having been counsel, extends to all cases handled by a law firm of which the judge was formerly a partner, although he did not personally participate therein.<sup>21</sup>

It is not necessary that the formal relation of attorney and client should have existed between the judge and a party to the cause, but any service rendered in that cause by the judge in a professional capacity as a lawyer, disqualifies him.<sup>22</sup> Where the judge as counsel had given advice as to the matter in dispute, he is disqualified to sit in the case.<sup>23</sup> But the fact that he had, prior to his election, given advice in a matter connected with the pending suit does not necessarily disqualify him.<sup>24</sup> The fact that he tried to persuade the parties to compromise the litigation does not disqualify him.<sup>25</sup>

**Criminal Cases.**—The rules pertaining to disqualification of judges upon the ground of having been counsel in the case are applicable to criminal cases.<sup>26</sup> A judge who as prosecuting attorney participated in

N. Y. Supp. 790. **Tex.**—*Woody v. State* (Tex. Crim.), 69 S. W. 155.

[a] If a judge as an attorney should advise as to a matter in dispute, the judge would thereafter be disqualified from sitting in the case, when it had ripened into a suit, even though he had charged no fee for his advice, provided he was consulted professionally. *Slaven v. Wheeler*, 58 Tex. 23.

21. *East Rome Town Co. v. Cothran*, 81 Ga. 359, 8 S. E. 737.

[a] **Member of Law Firm.**—It is contended that as the judge was "absent when the business was transacted by his copartner in the firm name, and knew nothing of it, and never received any compensation for the services which his copartner in the name of the firm rendered, and did not become judge till long afterwards, he was free from disqualification; but we think otherwise. What his partner did in the firm name was done by the firm, and upon the firm responsibility, and this was so whether compensation was charged or not." *East Rome Town Co. v. Cothran*, 81 Ga. 359, 8 S. E. 737.

22. *People v. Haas*, 105 App. Div. 119, 93 N. Y. Supp. 790.

23. *Slaven v. Wheeler*, 58 Tex. 23.

[a] Where a judge advised a party as to the legal effect of a document he is disqualified to determine an action in which the controversy turns upon a right under such document. *Tampa St. Ry. & P. Co. v. Tampa Suburban R. Co.*, 30 Fla. 595, 11 So. 562, 17 L. R. A. 681; *Slaven v. Wheeler*, 58 Tex. 23.

24. *Mo.*—*Fields v. Bollinger*, 234 Mo. 190, 136 S. W. 293. *Pa.*—*Bank of North America v. Fitzsimons*, 2 Binn. 454. **Tex.**—*Cullen v. Drane*, 82 Tex. 484, 18 S. W. 590.

[a] **Action Against Tenant Under Lease Drawn by Judge.**—A judge is not disqualified to preside at the trial of an action for ejectment brought against the tenant under a lease which was drawn by the judge. *Cook v. Berth*, 102 Mass. 372.

[b] **Counsel in the Case.**—Where the statute expressly provides that a judge is disqualified only where the judge had been of counsel "in the case," the fact that the judge as counsel gave an opinion in regard to the validity of the title to the land in controversy does not disqualify him from trying a case for the recovery of such land, as the opinion may have been given in some other case in regard to the title. *Houston & T. C. Ry. Co. v. Ryan*, 44 Tex. 426.

25. *In re Nevitt*, 117 Fed. 448, 54 C. C. A. 622.

[a] But where the whole case was laid before him before his election, on a proposition of compromise, and the judge give his advice in regard to the compromise, he is disqualified to sit on the trial of the cause. *Curtis v. Wilcox*, 74 Mich. 69, 41 N. W. 863.

26. *State v. Woods*, 124 La. 738, 50 So. 671.

[a] "We are unable to discover any reason for prohibiting a judge from presiding in a civil cause in which he

the preliminary proceedings is disqualified to sit at the trial of a criminal case,<sup>27</sup> though it has been held, in a state where the statute did not expressly cover this case, that merely drawing the statutory indictment without participation in presenting the case to the grand jury, does not disqualify a former prosecuting attorney to try the case.<sup>28</sup>

**6. In Probate Proceedings.—a. Interest in the Estate.**—The general rules governing disqualification of judges are applicable to probate proceedings,<sup>29</sup> and the interest in an estate must be direct<sup>30</sup>

may have been of counsel, which does not apply on the trial of a criminal cause. The constitution makes no distinction, and we are not authorized to make any." *Mathis v. State*, 3 Heisk. (Tenn.) 127.

[b] A judge who has given advice to defendant's alleged accomplice cannot preside on the trial of a criminal case. *People v. Haas*, 105 App. Div. 119, 93 N. Y. Supp. 790.

[c] **Pronouncing Sentence.**—Where the judge previously and while engaged in the practice of the law had been consulted and retained as counsel for the state by the prosecutor and the trial and conviction were had before the judge came upon the bench, it is not reversible error for such judge to pronounce sentence. *Thomas v. State*, 5 How. (Miss.) 20.

27. **Tenn.**—*Mathis v. State*, 3 Heisk. 127. **Tex.**—*Johnson v. State*, 29 Tex. App. 526, 16 S. W. 418. **W. Va.**—*State v. Cottrell*, 45 W. Va. 837, 32 S. E. 162.

[a] The Texas statute expressly disqualifies one who has acted in the same case as counsel for the state. This includes receiving the complaint, reducing it to writing, having it signed and sworn to and attesting it. *Terry v. State* (Tex. Crim.), 24 S. W. 510.

[b] But a judge who assisted the district attorney in presenting to the grand jury the case against defendant's accomplice is not disqualified to preside at the trial, where the participation of the defendant in the crime was not known or referred to at that time. *Locklin v. State* (Tex. Crim.), 75 S. W. 305.

28. *Kirby v. State*, 78 Miss. 175, 28 So. 846, 84 Am. St. Rep. 622.

[a] "If it had been shown that the judge, as district attorney, had heard the facts and advised and drawn

the bill, a very different case would be before us." *Kirby v. State*, 78 Miss. 175, 28 So. 846, 84 Am. St. Rep. 622.

[b] But in *State v. Cottrell*, 45 W. Va. 837, 32 S. E. 162, where the court holding that a judge, who as prosecuting attorney drew the indictment, is disqualified it is said: "No prosecutor likes to quash his own papers, and his knowledge of the facts obtained while prosecutor may tend to prejudice the prisoner's right to a fair and impartial trial. Evil appearances should be avoided."

29. **Cal.**—*Estate of White*, 37 Cal. 190. **Mo.**—*State v. Gray*, 100 Mo. App. 98, 72 S. W. 1081. **Nev.**—*State v. Mack*, 26 Nev. 430, 69 Pac. 862.

[a] Although "probate proceedings are special and statutory in their character, they must be classed among proceedings of a civil nature . . . Besides, the act, itself, in terms, applies to all proceedings of a civil nature, as well as to actions in the stricter sense." *State ex rel. Nissler v. Donlan*, 32 Mont. 256, 80 Pac. 244.

30. *Glavecke v. Tijirina*, 24 Tex. 663. See *supra*, IX, B, 3, a.

[a] That the surrogate in his official capacity has funds in his possession belonging to the estate and for which he must account, does not disqualify him. *Matter of Hancock*, 91 N. Y. 284.

[b] Where the judge is one of the vestrymen of a church, who by the terms of the incorporating act are invested with all its property, he is disqualified to act in the probate of a will in which the church is named as the beneficiary. *State v. Young*, 31 Fla. 594, 12 So. 673, 34 Am. St. Rep. 41, 19 L. R. A. 636.

[c] The judge's joint interest with the estate in a tract of land does not

and subsisting<sup>31</sup> before it will disqualify a probate judge. A judge who holds a claim against an estate is disqualified to act therein.<sup>32</sup> So too, an indebtedness of the probate judge to an estate creates a disqualifying interest.<sup>33</sup> The fact that the judge is also the representative of an estate disqualifies him as to that estate,<sup>34</sup> as does the fact that he was formerly its representative and has never made a final settlement,<sup>35</sup> or is the representative of a deceased heir or beneficiary of the estate.<sup>36</sup>

disqualify him to appoint an administrator of the estate. "When it shall become necessary to make an order relating to the land in which he has an interest, then if he still have an interest in it, his competency may be called in question. Before such order may be necessary, he may not be in office . . . , or he may have transferred his interest in such a way, that he will not then be disqualified from acting. It is unnecessary to anticipate the contingencies which might or might not disqualify him from acting." *Glavecke v. Tijirina*, 24 Tex. 663.

[d] But a probate judge holding a power of attorney from persons claiming to be the heirs at law of the deceased by virtue of which he is to receive for them all the money and property which they might be entitled to from the estate of the deceased is absolutely disqualified to act in the matters of the estate except to arrange the calendar or to change the venue. *Estate of White*, 37 Cal. 190.

[e] A probate judge who is one of the sureties on the administrator's bond, is disqualified to act in the settlement of the administration. *Wilson v. Wilson*, 36 Ala. 655. Compare *Halbert v. Martin* (Tex. Civ. App.), 30 S. W. 388, holding that a judge who was surety on the bond of a temporary administrator is not disqualified.

31. *City of El Paso v. Ft. Dearborn Nat. Bank* (Tex. Civ. App.), 71 S. W. 799; *Richter v. Estate of Leiby*, 107 Wis. 404, 83 N. W. 694.

32. Ala.—*Thornton v. Moore*, 61 Ala. 347. La.—*Succession of Payne*, 32 La. Ann. 355. Mass.—*Coffin v. Cottle*, 9 Pick. 287; *In re Cottle*, 5 Pick. 483.

[a] "The creditor, . . . is pecuniarily interested in every proceeding in the administration, from the appointment of an administrator until his claim is paid. This is such a direct pecuniary interest as would incapacitate a judge who is a creditor of the estate from making any orders what-

ever in the administration thereof." *Burks v. Bennett*, 62 Tex. 277.

[b] Notwithstanding His Intention Not To Enforce the Claim.—*Sigourney v. Sibley*, 21 Pick. (Mass.) 101, 32 Am. Dec. 248, discussing effect of release and waiver of disqualifying interest.

[c] Even Though His Claim Is Inventoried as Paid.—*Succession of Rhea*, 31 La. Ann. 323. But compare *City of El Paso v. Ft. Dearborn Nat. Bank* (Tex. Civ. App.), 71 S. W. 799, holding that if the claim of the judge is paid or otherwise discharged or barred by the statute of limitations it does not operate to create the judge's disqualification.

[d] Where a judge before his election was a member of a law firm to which decedent was indebted for legal services rendered, the judge is disqualified to pass upon a contested account in the matter of the estate, although prior to his election he transferred all his interest in the fees of the firm to his former law partner. *Succession of Jan*, 43 La. Ann. 924, 10 So. 6.

[e] But where a judge certifies in substance that he is not a creditor of the estate and claims no interest therein he is not disqualified by reason of the fact that his name was put on the list of creditors of the estate. *Perkins v. Shadbolt*, 44 Wis. 574.

[f] Where the statute specifically provides how a judge's claim against the estate shall be disposed of, he is disqualified to act only in those matters which directly affect his claim. *Regents of Univ. of California v. Turner*, 159 Cal. 541, 114 Pac. 842, Ann. Cas. 1912C, 1162.

33. *Gay v. Minot*, 3 Cush. (Mass.) 252; *Matter of Hancock*, 27 Hun (N. Y.) 78.

34. *Bedell v. Bailey*, 58 N. H. 62.

35. *Burks v. Bennett*, 55 Tex. 237, temporary administrator.

36. *In re Bacon*, 7 Gray (Mass.) 391.

A judge who was a witness to a will is not thereby disqualified to pass upon its probate,<sup>37</sup> but a judge is not qualified to sit on the probate of a will which had been drawn by him.<sup>38</sup>

b. *Relationship to Party in Interest.*—The relationship of a probate judge within the prohibited degree to a party interested in an estate ordinarily disqualifies him,<sup>39</sup> but in some jurisdictions a judge is not disqualified by reason of the fact that his wife is an heir or legatee of the decedent.<sup>40</sup>

c. *Former Counsel.*<sup>41</sup>—A judge who has been counsel for the heirs of the decedent,<sup>42</sup> or for the executor of the estate,<sup>43</sup> is disqualified to act in matters of the estate.

*Relationship to Personal Representative.*—A judge who is related to the personal representative is disqualified to act in the estate, and<sup>44</sup> it is therefore improper for him to appoint a relative as administrator.<sup>45</sup>

7 **Bias.**—a. *Generally.*—In the absence of statutory provisions prejudice not based on property interest is no ground<sup>46</sup> of disqualifica-

37. *Patten v. Tallman*, 27 Me. 17.

38. *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

39. *Ala.*—*Crook v. Newberg*, 124 Ala. 479, 27 So. 432, 82 Am. St. Rep. 190. *Cal.*—*Howell v. Budd*, 91 Cal. 242, 27 Pac. 747. *La.*—*Lacroix's Succession*, 30 La. Ann. 924.

See *supra*, IX, B, 4.

[a] **Where a legacy to the judge's wife fails** because she is a witness to the will, he is not disqualified. *In re Hopkins' Will*, 3 N. Y. Supp. 661, 6 Dem. Sur. 12, 19 N. Y. St. 528.

40. *Perkins v. George*, 45 N. H. 453.

41. **Disqualification To Probate Will Drawn by Him.**—See *supra* IX, B, 4, a.

42. *Graham v. People*, 111 Ill. 253; *In re Cottle*, 5 Pick. (Mass.) 483.

[a] **A probate judge holding a power of attorney from certain persons claiming to be the heirs at law of the deceased is disqualified, as a party interested in the proceeding, to act in any matter pertaining to such estate.** *Estate of White*, 37 Cal. 190.

[b] **Interest in Single Question.** Where a judge as attorney for heirs of an intestate is interested only in a single question connected with the settlement of an estate, he is disqualified to act in relation to that particular question, but in all other respects the settlement of the estate may proceed before him. "An estate is not a single litigation. Its settlement may in-

volve many distinct legal controversies, in some of which one attorney may be interested, and in others different attorneys." *Graham v. People*, 111 Ill. 253.

43. *Wigand v. Dejonge*, 8 Abb. N. C. (N. Y.) 260. But see *State v. Woody*, 14 Mont. 455, 36 Pac. 1043, holding that a judge who has been the attorney for an administratrix is not disqualified from trying a proceeding instituted for her.

44. *Plowman v. Henderson*, 59 Ala. 559; *Hall v. Thayer*, 105 Mass. 219, 7 Am. Rep. 513. See *supra* IX, B, 4.

45. *Plowman v. Henderson*, 59 Ala. 559 (appointment improper but not void); *Hall v. Thayer*, 105 Mass. 219, 7 Am. Rep. 513.

46. *Ark.*—*Jones v. State*, 61 Ark. 88, 32 S. W. 81. *Cal.*—*Bulwer Consolidated Min. Co. v. Standard Con. Min. Co.*, 83 Cal. 613, 23 Pac. 1109; *People v. Shuler*, 28 Cal. 490; *People v. Williams*, 24 Cal. 31. *Fla.*—*Bryan v. State*, 41 Fla. 643, 26 So. 1022. *Ga.*—*Elliott v. Hipp*, 134 Ga. 844, 68 S. E. 736, 137 Am. St. Rep. 272. *Haw.*—*Ex parte Higashi*, 17 Hawaii 428. *Kan.*—See *In re Peyton*, 12 Kan. 398. *Minn.*—*Cooper v. Brewster*, 1 Minn. 94. *Miss.*—*Evans v. State*, 92 Miss. 34, 45 So. 706. *Mo.*—*Scott v. Taylor*, 231 Mo. 654, 132 S. W. 1149. *Mont.*—*State v. Donlan*, 32 Mont. 256, 80 Pac. 244; *In re Weston*, 28 Mont. 207, 72 Pac. 512; *In re Davis' Estate*, 11 Mont. 1, 27 Pac. 342. *Nev.*—*Allen v. Reilly*, 15 Nev. 452.

tion, though it has been held to the contrary.<sup>47</sup> In many jurisdictions it is provided by statute that bias or prejudice on the part of the judge disqualifies him to try a cause,<sup>48</sup> and such general expressions as "otherwise unable" or "otherwise disqualified" or "other disability" following an enumeration of particular disqualifications, have been held to include bias and prejudice.<sup>49</sup>

In order to constitute a ground of disqualification the alleged prejudice must be directed against the person of a litigant and not merely against the cause,<sup>50</sup> and must be of such character as may prevent a

**Tex.**—Johnson *v. State*, 31 Tex. Crim. 456, 20 S. W. 985.

[a] "Our statute enumerates the grounds for a change of venue, and the prejudice of the judge trying the cause is not one of the enumerated grounds. . . . However improper and indelicate such expressions as are here attributed to the judge may be, they do not of themselves afford a ground for a reversal of the cause. . . . The most that can be said . . . is that such conduct will cause a closer and more rigid scrutiny of the errors complained of." Gaines *v. State*, 38 Tex. Crim. 202, 42 S. W. 385.

47. Day *v. Day*, 12 Idaho 556, 86 Pac. 531, where it is said: "Regardless of the statutory provision, where . . . a change of place of trial is demanded because of the prejudice of a judge, a change of venue, or at least a change of judges, should be granted to preserve from discredit the judiciary of the state. No technical refinement of argument can convince the people that a prejudiced judge can fairly try a case between his friend and his foe. Such a thing might occur, but the general public would not look upon such a trial as an administration of justice without prejudice."

48. **Cal.**—People *v. Compton*, 123 Cal. 403, 56 Pac. 44, under statute of 1897. **Ill.**—McGoon *v. Little*, 7 Ill. 42. **Ind.**—Bernhamer *v. State*, 123 Ind. 577, 24 N. E. 509. **Ia.**—Berner *v. Frazier*, 8 Iowa 77. **Kan.**—*In re Peyton*, 12 Kan. 398. **Ky.**—Powers *v. Reynolds*, 89 Ky. 259, 12 S. W. 298. **Minn.**—*Ex parte Curtis*, 3 Minn. 274. **Mo.**—Scott *v. Taylor*, 231 Mo. 654, 132 S. W. 1149. **N. D.**—Stockwell *v. Crawford*, 21 N. D. 261, 130 N. W. 225. **Okla.**—Lewis *v. Russell*, 4 Okla. Crim. 129, 111 Pac. 818. **S. D.**—State *v. Chapman*, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432. **Wis.**—Haley *v. Jump River Lumb. Co.*,

81 Wis. 412, 51 N. W. 321. **Wyo.**—Dolan *v. Church*, 1 Wyo. 187.

[a] **Statute Strictly Construed.**—"The disqualification of imputed bias and prejudice . . . is purely statutory. It does not rest upon the ascertainment of any fact, but only upon an imputation. Such being the case, and the statute being open to so much abuse, we are inclined to construe it strictly according to its express terms, and not broaden it by implication to include conditions not clearly within them." State *ex rel. Nissler v. Donlan*, 32 Mont. 256, 80 Pac. 244.

49. *In re Peyton*, 12 Kan. 398.

[a] "The words 'otherwise unable' and 'other disability' when applied to the subject-matter of the statutes, are broad enough to include the case of a justice who, for any reason, does not stand indifferent in the cause. Conscious bias or prejudice in favor of one of the parties, or against the other, caused by hearing an *ex parte* statement of the facts of the case, is an inability or disability to try the case, within the just meaning of the statutes." Williams *v. Robinson*, 6 Cush. (Mass.) 333.

50. **Cal.**—McCauley *v. Weller*, 12 Cal. 500. **Fla.**—Purvis *v. Frink*, 55 Fla. 715, 46 So. 171; Conn *v. Chadwick & Co.*, 17 Fla. 428. **Ky.**—Powers *v. Com.*, 114 Ky. 237, 70 S. W. 644; Smith *v. Com.*, 108 Ky. 53, 55 S. W. 718. **Mo.**—Charlotte *v. Chouteau*, 33 Mo. 194; Bent *v. Lewis*, 15 Mo. App. 40. **Tex.**—Johnson *v. State*, 31 Tex. Crim. 456, 20 S. W. 985.

[a] **Prejudice Against Damage Suits.**—In McDonald's Admr. *v. Wall-send Co.*, 135 Ky. 624, 117 S. W. 349 it was held that a judge who formerly was an officer in a coal mining company and was commonly known to be hostile to damage suits was not by rea-

party from obtaining a fair and impartial trial of the cause.<sup>51</sup> There must be actual prejudice on the part of the judge and a mere fear of a party that such prejudice exists does not constitute a ground of disqualification.<sup>52</sup> Mere political antagonism does not constitute a ground of disqualification,<sup>53</sup> unless it amounts to a personal hostility<sup>54</sup> toward

son thereof disqualified to preside at the trial of an action for personal injuries against a coal mining company. The court said there: "The judge is not charged . . . with being personally hostile to the litigant, nor as entertaining . . . antipathy toward the plaintiff or his suit. It is said he does not look with favor upon litigation growing out of personal injuries. It is likely some judges have just the opposite feeling concerning such suits. But we do not see that that fact necessarily disqualifies the judge from presiding at the trial of such cases in his court. Judges, like other men, have their notions of right and wrong, which may not agree with the law of the matter. Their alleged bias may, so far as they are concerned, be a matter of conscience. Unless it causes them to act corruptly or with such oppression as to be equivalent to corruption, we do not see how it can legally disqualify the judge as an official."

[b] **Prejudice Against Crime.**—(1) "There is a great and manifest difference between prejudice against a crime and being prejudiced against a person who may be charged with the commission of such crime. Every good citizen is prejudiced against the commission of such crime . . . If being prejudiced against the commission of crime is a disqualification, then the members of this court are disqualified to decide any case pending before 'them.'" *Crawford v. Ferguson*, 5 Olka. Crim. 377, 115 Pac. 278. See also *Hargis v. Com.*, 135 Ky. 578, 123 S. W. 239. (2) Participation in a meeting of judges called for the purpose of devising ways and means for suppressing gaming and disorderly houses does not disqualify a judge to preside at the trial of a person indicted for keeping a disorderly house. *Daily v. State* (Tex. Crim.), 55 S. W. 821.

[c] The federal statute contains the word "personal," which must appear in an affidavit. *Henry v. Speer*, 201 Fed. 869, 120 C. C. A. 207.

51. *Cal.*—*People v. Findley*, 132 Cal.

301, 64 Pac. 472; *Higgins v. San Diego*, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209. *Kan.*—*State v. Morrison*, 67 Kan. 144, 72 Pac. 554; *State v. Bohan*, 19 Kan. 28. *Ky.*—*Vance v. Field*, 89 Ky. 178, 12 S. W. 190. *Mo.*—*Scott v. Taylor*, 231 Mo. 654, 132 S. W. 1149.

[a] The fact that a judge feels or expresses himself as prejudiced against the personality of a litigant does not absolutely disqualify a judge. *Scott v. Taylor*, 231 Mo. 654, 132 S. W. 1149.

52. *Hungerford v. Cushing*, 2 Wis. 397.

53. *Ala.*—*Fulton v. Longshore*, 156 Ala. 611, 46 So. 989, 19 L. R. A. (N. S.) 602. *Ga.*—*Elliott v. Hipp*, 134 Ga. 844, 68 S. E. 736, 137 Am. St. Rep. 272. *Ky.*—*Powers v. Com.*, 114 Ky. 237, 70 S. W. 644.

[a] A judge who was a candidate for re-election is not disqualified to hear a proceeding involving the validity of a ticket upon which he had declined to run. *O'Connor v. Smithers*, 45 Colo. 23, 99 Pac. 46.

54. *Givens v. Crawshaw*, 21 Ky. L. Rep. 1618, 55 S. W. 905.

[a] **Political Bias.**—"We do not mean to be understood as saying that a judge of one political faith may not properly try the case of a litigant of a different political faith, though the question involved was one purely political. Nor is the mere fact of a difference in political belief or affiliation a legal ground for objecting to a trial judge. We do not believe . . . that the judges' political views control their decisions upon matters of law before them for adjudication. It will be a most calamitous day for the Commonwealth when such comes to be the case. But cases may arise . . . where a judge may become disqualified in fact and in law, by an undue bias, from properly presiding in a case that has grown out of a political controversy, as well as any other controversy. . . . If the fact be that the judge is biased or prejudiced against a litigant because of politics, it would seem to disqualify him as certainly and com-

a party, or is coupled with a personal interest of the judge in the proceeding.<sup>55</sup>

The fact that a judge is opposed to the sale of liquor in any form is not of itself sufficient reason why he should not preside in the trial of cases involving infractions of the liquor laws of the state.<sup>56</sup> Nor will the signing of a petition for a local option election disqualify a judge from passing upon a suit instituted for the purpose of preventing such election.<sup>57</sup>

Neither intimate terms of friendship of the judge with one of the parties,<sup>58</sup> nor intimacy of the judge with counsel,<sup>59</sup> or ill-feeling toward

pletely as if he were prejudiced or biased against him for any other reason." *Powers v. Com.*, 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494.

55. *Cowie v. Means*, 39 Colo. 1, 88 Pac. 485; *MacMillan v. Spenceer*, 28 Colo. 80, 62 Pac. 849; *Phillips v. Curley*, 28 Colo. 34, 62 Pac. 837.

[a] **Personal Interest in Election Contest.**—Where a contest was instituted of the election of a tax collector of the county, while in another court a contest of the judge's election based upon the same grounds was pending, the judge properly declined to hear the contest, as the judge had "in the nature of things, such a bias in favor of one of the parties to the case, as disqualified him to hear and determine the same." *Medlin v. Taylor*, 101 Ala. 239, 13 So. 310.

56. *Rush v. Denhardt*, 138 Ky. 238, 127 S. W. 785, Ann. Cas. 1912A, 1199; *Erwin v. Benton*, 120 Ky. 536, 87 S. W. 291; *Benson v. State*, 39 Tex. Crim. 56, 44 S. W. 167. But compare *Wathen, Mueller & Co. v. Com.*, 133 Ky. 94, 116 S. W. 336.

[a] **Public Advocacy of Local Option.**—The fact that a judge "while a candidate for the position he held, was in favor of local option, and advocated it before the people, and stated to the people that he would see that the law was enforced, or that he advised with the friends of local option how to enforce the law, does not disqualify him from trying" a case of violation of the local option law. *Bateman v. State* (Tex. Crim.), 44 S. W. 290.

57. *Galey v. Board of Comrs.*, 174 Ind. 181, 91 N. E. 593, Ann. Cas. 1912C, 1090; *Lemon v. Peyton*, 64 Miss. 161, 8 So. 235.

[a] **Party to Contest of Validity of**

**Law.**—In *Burrell v. State* (Tex. Crim.), 65 S. W. 914, it is said: "In *Truesdell v. State* (Tex. Cr. App.), 61 S. W. 935, we held the mere fact that the judge who presided at defendant's trial for violating local option law was a formal party to an application to contest the validity of the election on the question of local option, under which the prosecution was maintained, did not disqualify the judge from sitting in the case. Nor do we think the fact that he was a formal party, and, as a codefendant to the contest, made an argument on the validity of the law, would render him disqualified from sitting in the trial of this case. The mere fact of an argument would not add anything to his disqualification other than already existed by being a formal party and having signed a formal answer to the contest. We hold that the county judge who tried this case was not disqualified."

58. *Sparks v. Colson*, 109 Ky. 711, 60 S. W. 540.

59. *Boreing v. Wilson*, 128 Ky. 570, 108 S. W. 914.

[a] "A judge of a court is human, and like every other man, must have his likes and dislikes, must find in the members of the bar characteristics and qualities which he likes or dislikes. . . . In so far as he is not swayed by these natural emotions to do any man an injustice, the fact that he has them in common with his brother man does not disqualify him from trying a case." *May v. May*, 150 Ky. 522, 150 S. W. 685.

[b] **Must Amount to Judicial Favoritism.**—The fact that a judge has shown favoritism, both personally and socially, towards one of the parties and his attorney is no ground for disqualification, but only judicial favor-

him<sup>60</sup> are, of themselves, grounds of disqualification. The mere ruling of a judge upon a legal question against a party is not sufficient to charge him with bias or prejudice.<sup>61</sup>

b. *Personal Knowledge or Opinion.*—That the judge personally knows the facts which may be under inquiry in the case does not disqualify him:<sup>62</sup> nor does the fact that he has formed an opinion either upon the legal questions involved,<sup>63</sup> or upon the facts, if the case is one for the jury.<sup>64</sup>

c. *Expression of Opinion.*—The expression of an opinion upon matters involved in the cause ordinarily does not disqualify,<sup>65</sup> but

itism constitutes such ground. *Boring v. Wilson*, 128 Ky. 570, 108 S. W. 914.

60. *May v. May*, 150 Ky. 522, 150 S. W. 685.

[a] "If we must presume bias and prejudice toward the client because of ill feeling toward the attorney, it would establish a dangerous rule by which the attorney through his own fault, could have his case transferred to another judge by quarreling with the court. We prefer to believe that a judge may, with or without cause, cordially dislike and even distrust an attorney, and yet be capable of doing exact justice toward his client." *Higgins v. City of San Diego*, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209.

61. **U. S.**—*Ex parte American Steel Co.*, 230 U. S. 35, 33 Sup. Ct. 1007, 57 L. ed. 1379. **Ariz.**—*State ex rel. Young v. Superior Court*, 14 Ariz. 126, 125 Pac. 707. **Ind.**—*Hays v. Morgan*, 87 Ind. 231. **Wash.**—*State ex rel. Lefebvre v. Clifford*, 65 Wash. 313, 118 Pac. 40.

62. *Atlantic & B. Ry. Co. v. Mayor of Cordele*, 128 Ga. 293, 57 S. E. 493; *Heflin v. State*, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147.

63. *Western Bank v. Tallman*, 15 Wis. 92.

64. *Jones v. State*, 61 Ark. 88, 32 S. W. 81. See *Heflin v. State*, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147; and *infra*, IX, B, 7, c; IX, B, 11.

[a] The "belief or disbelief of a trial judge in the guilt of a defendant put upon trial before him is not a test of his qualification to preside at such trial. A trial judge may be convinced from his personal knowledge of the case, or what he has heard from others, of the guilt of one put upon trial be-

fore him, and yet with the utmost fairness and impartiality conduct the trial and give the defendant a fair and impartial hearing. It is the existence of prejudice or bias in the mind of the trial court against defendant which must be clearly shown in support of an application for a change of venue from the court presided over by such judge, not the belief of the judge in the guilt of defendant." *State v. Morrison*, 67 Kan. 144, 72 Pac. 554.

[b] **The constitutional provision** which guarantees to every person charged with crime a trial without prejudice, in so far as it relates to the judge who presides at the trial, does not include the opinion of the judge as to the guilt or innocence of the defendant, but in order to disqualify a judge it must be shown that he bears ill-will toward the defendant of such a character as might prevent him from giving the defendant a fair trial. *Cochran v. State*, 113 Ga. 736, 39 S. E. 337; *Heflin v. State*, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147; *State ex rel. Nowakowski v. Lockridge*, 6 Okla. Crim. 216, 118 Pac. 152, Ann. Cas. 1913C, 251, 45 L. R. A. (N. S.) 525; *Ingles v. McMillan*, 5 Okla. Crim. 130, 113 Pac. 998, 45 L. R. A. (N. S.) 511.

65. *May v. May*, 150 Ky. 522, 150 S. W. 685; *Inhab. of Readington v. Dilley*, 24 N. J. L. 209. See *Jones v. State*, 61 Ark. 88, 32 S. W. 81.

[a] **Previous Approval of Legislative Act in Question.**—A judge is not disqualified from hearing a case in which the construction of a legislative act is involved, "because he expressed to a member of the judiciary committee of the legislature his approval of the bill." *Ex parte Higashi*, 17 Hawaii 428.

where a judge announces his decision of the case in advance he obviously is disqualified to hear the cause.<sup>66</sup>

**8. In Contempt Proceedings.** — A judge is not disqualified from hearing proceedings in contempt although the contempt itself consists in imputation upon the judge's motives.<sup>67</sup>

**9. Judge a Witness in the Case.** — In the absence of a statute authorizing a trial judge to testify in a case tried before him a judge who is a material witness in the cause is disqualified to preside as trial judge therein.<sup>68</sup> It must, however, clearly appear that the judge is a necessary witness, otherwise no ground of disqualification exists.<sup>69</sup>

**10. Physical Disability.** — A judge may be disqualified also by reason of physical disability.<sup>70</sup>

**11. Participation in Previous Proceedings.** — The fact that a judge had previously tried the cause,<sup>71</sup> or the issues involved therein,<sup>72</sup> con-

66. *Massie v. Com.*, 93 Ky. 588, 20 S. W. 704; *In re Cameron*, 126 Tenn. 614, 151 S. W. 64.

[a] "To compel a litigant to submit to a judge who has already confessedly prejudged him, and who is candid enough to announce his decision in advance, and insist that he will adhere to it, no matter what the evidence may be, would be so farcical and manifestly wrong that it seems to us that the idea must necessarily be excluded by the very expression 'administration of justice.'" *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A. 317.

[b] On a prosecution for contempt the judge is disqualified if he has previously announced his intention to imprison the defendant. *State ex rel. Russell v. Superior Court*, 77 Wash. 631, 138 Pac. 291.

67. *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638. See also *In re Ulmer*, 208 Fed. 461; *Lamberson v. Superior Court*, 151 Cal. 458, 91 Pac. 100, 11 L. R. A. (N. S.) 619; and 5 STANDARD PROC. 372.

68. Kan.—*Gray v. Crockett*, 35 Kan. 66, 10 Pac. 452. La.—*Ross v. Buhler*, 2 Mart. (N. S.) 312. Ohio.—*McMillen v. Andrews*, 10 Ohio St. 112. Wash. *Maitland v. Zanga*, 14 Wash. 92, 44 Pac. 117.

[a] It is proper "to remove trial judges from all temptation, and relieve them from all suspicion or criticism, by adopting and enforcing an unyielding rule in the state, that he who has been,

or is to be, a material witness in a cause, cannot preside at the trial thereof. The refusal of the court to change the place of trial for the reason shown on the application, is one of that class of errors for which the case must be reversed." *Burlington Ins. Co. v. McLeod*, 40 Kan. 54, 19 Pac. 354.

[b] It is error for a judge to refuse to disqualify himself at the request of a party and give material testimony in the case over the objection of such party. *Powers v. Cook* (Okla.), 149 Pac. 1121. But see *State ex rel. Nowakowski v. Lockridge*, 6 Okla. Cr. 216, 118 Pac. 152, Ann. Cas. 1913C, 251, 45 L. R. A. (N. S.) 525.

[c] A judge "may be called as a witness and is not from that fact alone disqualified from sitting in judgment on a case." *Hopkins v. Scott*, 38 Neb. 661, 57 N. W. 391.

69. *Marry v. James*, 2 Daly (N. Y.) 437; *Johnson v. Wells*, 5 Okla. Crim. 599, 115 Pac. 375.

70. *State v. Blair*, 53 Vt. 24.

71. *May v. May*, 150 Ky. 522, 150 S. W. 685.

[a] "Even a justice of the peace may try an action between the same parties, involving a cause of action which was the subject of a former action between them, where the judgment rendered by the justice, in such former action has been reversed." *Fry v. Bennett*, 28 N. Y. 324.

72. *Heflin v. State*, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147; *Martyn v. Curtis*, 68 Vt. 397, 35 Atl. 333,

stitutes no ground of disqualification unless the statute expressly prohibits a judge from trying a case under such circumstances.<sup>73</sup> In some jurisdictions it is provided by statute that an appellate judge shall not participate in the decision of a cause which was determined by him below,<sup>74</sup> but in the absence of such statute he is not disqualified.<sup>75</sup>

[a] **Conducting Preliminary Examination.**—There is no merit in a "contention that conducting the preliminary committal trial disqualifies, or ought to disqualify, the judge from presiding at the regular trial of the accused." *Cochran v. State*, 113 Ga. 736, 39 S. E. 337.

73. *State v. Hartley*, 75 Conn. 104, 52 Atl. 615.

[a] **Upon reversal of a judgment** either party is entitled to a change of judges by filing an affidavit of prejudice. *Woodsmall v. State*, 181 Ind. 613, 105 N. E. 155.

[b] **A new trial means** that the case shall have had a previous trial on an issue of fact and not merely a determination on demurrer. "The statute must be taken to refer to the new trial known to the common law." *Matsumura v. County*, 19 Hawaii 197.

74. *Van Arsdale v. King*, 152 N. Y. 69, 46 N. E. 179; *Duryea v. Traphagen*, 84 N. Y. 652; *Case v. Hoffman*, 100 Wis. 314, 74 N. W. 220.

[a] "The enactment (of Congress), alike by its language and by its purpose, is not restricted to the case of a judge's sitting on a direct appeal from his own decree upon a whole cause, or upon a single question. A judge who has sat at the hearing below of a whole cause at any stage thereof is undoubtedly disqualified to sit in the Circuit Court of Appeals at the hearing of the whole cause at the same or at any later stage. And as 'a cause' in its usual and natural meaning, includes all questions that have arisen or may arise in it, there is strong reason for holding that a judge who has once heard the cause, either upon the law or upon the facts, in the court of first instance, is thenceforth disqualified to take part in the Circuit Court of Appeals, at the hearing and decision of the cause or of any question arising therein." *Moran v. Dillingham*, 174 U. S. 153, 19 Sup. Ct. 620, 43 L. ed. 930. To the same effect *Rexford v. Brunswick-Balke-Collender Co.*, 228 U.

S. 339, 33 Sup. Ct. 515, 57 L. ed. 864.

[b] **Motion To Dismiss Appeal.** Under a statute prohibiting a judge to sit in review of his own decision a judge who tried a case is disqualified to participate in the determination of a motion to dismiss the appeal. *Pistor v. Hatfield*, 46 N. Y. 249.

[c] **Where the case was tried by a referee** who did not report the form of the judgment but the same was settled by the judge, the latter is disqualified to take any part in the appeal from such judgment. *Murdock v. International, etc. Co.*, 14 Misc. 225, 35 N. Y. Supp. 668.

[d] **But where a judge granted an ex parte order which thereafter was set aside** by an order of another judge, the judge who granted the first order is not disqualified from participating in the determination of an appeal brought from the last order. *Philips v. Germania Bank*, 107 N. Y. 630, 13 N. E. 923.

[e] **Merely Formal Participation.** Where the order appealed from was made by another judge and the judge sitting on the appeal merely signed the order as a matter of form, the statute does not apply and the judge has the right to participate in the determination of the appeal. *Mori v. Pearsall*, 14 Misc. 251, 35 N. Y. Supp. 829.

[f] **Statute Applicable Only to Appeal From Final Determination.**—*Smith v. Wingard*, 3 Wash. Ter. 260, 14 Pac. 596.

[g] **Statute Held Unconstitutional.** *Powers v. Seaton*, 2 Ohio Dec. (Reprint) 365.

75. **La.**—*Edwards v. His Wife*, 9 La. Ann. 321. **S. D.**—*Graham v. Selbie*, 8 S. D. 604, 67 N. W. 831. **Tex.**—*Beckham v. Rice*, 1 Tex. Civ. App. 281, 21 S. W. 389.

[a] "It has been the uniform practice in this court for a judge who tried the case in the court below and subsequently became a member of this court to decline to sit in the case upon ap-

C. REMOVAL OF DISQUALIFICATION. — The disqualification of a judge by reason of his pecuniary interest is removed by the loss of such interest,<sup>76</sup> or by relinquishing the demand,<sup>77</sup> but the judge's mere intention not to enforce a claim does not remove his disqualification on the ground of interest.<sup>78</sup> The disqualification by reason of relationship is likewise removed by the loss of interest of such relative in the cause,<sup>79</sup> or by the termination of the relationship by death of the relative.<sup>80</sup> But the fact that a defendant to whom the judge is related within the prohibited degree, fails to appear in the action does not remove the disqualification.<sup>81</sup>

peal. This has, however, proceeded from motives of delicacy and not because it has ever been thought that the judge is disqualified to sit. The grounds of disqualification of the judges of the courts in this state are specified in the constitution and they are exclusive of all others; and the fact that a judge may have tried the case in a lower court or participated in the decision in such court is not made one of them." *Galveston & H. I. Co. v. Grymes*, 94 Tex. 609, 63 S. W. 860, 64 S. W. 778.

[b] **Not a Disqualifying Interest.** Trial of the case below does not make him "interested" and thereby disqualified from sitting on the appeal, under a statute disqualifying a judge from acting as such in any case wherein he is "interested." *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 138, 74 N. W. 403.

[c] **As to preliminary motions he is not disqualified** but he cannot sit on the hearing of cause for reversal or affirmance. *Engle v. Cromlin*, 21 N. J. L. 561; *Smith v. Wingard*, 3 Wash. Ter. 260, 14 Pac. 596.

76. Cal.—*Scadden Flat Gold Min. Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440; *Gregg v. Pemberton*, 53 Cal. 251. Ga.—*Johnson v. Marietta*, etc. R. R., 70 Ga. 712. Mich.—*Knickerbocker v. Worthing*, 138 Mich. 224, 101 N. W. 540. N. Y.—*Palmer v. Lawrence*, 5 N. Y. 389.

[a] **Removal of Interest After Submission.**—But the judge's disqualification remains where the cause of such disqualification is removed only after submission of the case, for the rules of a judge's disqualification are not intended to "mean that he may hear the evidence in a case in which he is interested and may decide it, after sit-

ting and acting in it, provided he remove the cause of disqualification before he enters judgment. As we all know, the decision of questions arising during the course of the trial often determines the final judgment itself." *Adams v. Minor*, 121 Cal. 372, 53 Pac. 815.

[b] **A transfer of the judge's claim without recourse** removes his disability notwithstanding the fact that the transfer was made for that purpose. *Nicholson v. Showalter*, 83 Tex. 99, 18 S. W. 326.

77. *Gregg v. Pemberton*, 53 Cal. 251; *In re Cottle*, 5 Pick. (Mass.) 483.

78. See *supra*, IX, B, 3, a.

[a] **A determination of the judge not to prosecute a claim** is "in its own nature revocable. Even had he expressed such determination, it would make no difference, because a parol release, without payment or satisfaction, is no extinguishment of a debt." *Sigourney v. Sibley*, 21 Pick. (Mass.) 101, 32 Am. Dec. 248.

79. *Knickerbocker v. Worthing*, 138 Mich. 224, 101 N. W. 540.

[a] **Dissolution of Contract Creating Interest.**—Where the judge is related to one of the attorneys holding a contract for a contingent fee, the disqualification is removed by the cancellation of such contract. *Knickerbocker v. Worthing*, 138 Mich. 224, 101 N. W. 540.

80. *Yerby v. Martin* (Tex. Civ. App.), 38 S. W. 541, death of relative without issue.

[a] **In case of relationship by marriage** the dissolution of the marriage by death removes the disqualification even though children of such marriage remain surviving. *Winchester v. Hinsdale*, 12 Conn. 88.

81. *Bivins v. Richland Bank*, 109

A judge has no power to remove his own disqualification by an order of discontinuance as to the party whose interest creates the disqualification.<sup>82</sup>

D. WAIVER OF DISQUALIFICATION.—In the absence of an express statute disqualifying a judge of the case, the common law disqualification may be waived by the parties to the action.<sup>83</sup> But where a judge is prohibited by statute from sitting in a cause, the consent of the parties cannot affect his disqualification, as the statute is not designed merely for the protection of the parties to a suit but for the general interests of justice.<sup>84</sup> In some jurisdictions, however, the statute ex-

Ga. 342, 34 S. E. 602; *Matthews v. Noble*, 25 Misc. 674, 55 N. Y. Supp. 190.

82. *Gains v. Barr*, 60 Tex. 676.

83. U. S.—*Utz v. Regulator Co.*, 213 Fed. 315, 130 C. C. A. 17; *Coltrane v. Templeton*, 106 Fed. 370, 45 C. C. A. 328. Ala.—*Hall v. Heirs of Wilson*, 14 Ala. 295. Ga.—*Berry v. State*, 117 Ga. 15, 43 S. E. 438. Ind.—*Carr v. Duhme*, 167 Ind. 76, 78 N. E. 322, 10 Ann. Cas. 967. Ia.—*Stone v. Marion*, 78 Iowa 14, 42 N. W. 570. Ky.—*Pace v. Reed*, 138 Ky. 605, 128 S. W. 891. La.—*Ricks v. Gantt*, 35 La. Ann. 920. Mass.—*Crosby v. Blanchard*, 7 Allen 385. Mont.—*Washoe C. Co. v. Hickey*, 46 Mont. 363, 128 Pac. 584. N. H.—*Hutchinson v. Manchester St. Ry.*, 73 N. H. 271, 60 Atl. 1011; *Stearns v. Wright*, 51 N. H. 600; *Warren v. Glynn*, 37 N. H. 340. S. C.—*Jeffers v. Jeffers*, 89 S. C. 244, 71 S. E. 810; *Ex parte Hilton*, 64 S. C. 201, 41 S. E. 978, 92 Am. St. Rep. 800. S. D.—*State v. Ham*, 24 S. D. 639, 124 N. W. 955. Tenn.—*Posey v. Eaton*, 9 Lea 500.

[a] Except in cases where the statute expressly forbids it "the parties, by a joint application to the judge, suggesting the ground of recusation, expressly waiving all objection on that account, and requesting him to proceed with the trial or hearing, signed by them, or their attorneys, may give full power to the judge to proceed, as if no objection existed." *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

84. U. S.—*McClaghry v. Deming*, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. ed. 1049; *In re Eatonton Elec. Co.*, 120 Fed. 1010. Conn.—*State v. Hartley*, 75 Conn. 104, 52 Atl. 615. Mass.—*Richardson v. Welcome*, 6 Cush. 331; *Sigourney v. Sibley*, 21 Pick. 101, 32 Am. Dec. 248. N. H.—*Stearns v. Wright*,

51 N. H. 600. N. Y.—*People v. Connor*, 142 N. Y. 130, 36 N. E. 807; *Matter of Bingham*, 127 N. Y. 296, 27 N. E. 1055; *Murdock v. International Tile Co.*, 14 Misc. 225, 35 N. Y. Supp. 668. S. D.—*State v. Ham*, 24 S. D. 639, 124 N. W. 955. Tex.—*Dallas v. Peacock*, 89 Tex. 58, 33 S. W. 220; *Gains v. Barr*, 60 Tex. 676; *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604; *Chambers v. Hodges*, 23 Tex. 104; *Gresham v. State*, 43 Tex. Crim. 466, 66 S. W. 845; *Gulf R. Co. v. Looney*, 42 Tex. Civ. App. 234, 95 S. W. 691. Wis.—*Case v. Hoffman*, 100 Wis. 314, 72 N. W. 390.

[a] It "has always been held that, where a judge is disqualified, he cannot be permitted to sit in the case, even with the consent of the parties; that such consent could not remove the disqualification or incapacity and authorize the judge to sit against the prohibitions of the law. These provisions of the law are designed, not merely for the protection of the parties . . . , but for the general interest of society." *Summerlin v. State*, 69 Tex. Crim. 275, 153 S. W. 890.

[b] "It is the design of the law to maintain the purity and impartiality of the courts, and to ensure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important, in that respect that their decisions should be free from all bias. . . . The party may be interested only that his particular suit should be justly determined; but the state, the community is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind. The party who desired it might be permitted to take the hazard of a biased decision, if he

pressly authorizes the parties to waive all objections to the disqualification of the judge.<sup>85</sup> Such a statute has no application to cases in which minors are parties,<sup>86</sup> nor, it has been held to a case where the judge is a party;<sup>87</sup> and in any case its requirements must be strictly observed, and where it provides that the waiver of disqualification must be in writing and entered of record, a waiver in any other form is not sufficient to affect the judge's competency to act.<sup>88</sup> But in the absence of statutory provision to the contrary the waiver may be express or implied,<sup>89</sup> as by proceeding in the cause notwithstanding the knowledge of the facts which disqualify the judge,<sup>90</sup> or by failure to make

alone were to suffer for his folly, but the state can not endure the scandal and reproach which would be visited upon its judiciary in consequence. Although the party consent, he will invariably murmur if he do not gain his cause, and the very man who induced the judge to act, when he should have forborne, will be the first to arraign his decision as biased and unjust." *Oakley v. Aspinwall*, 3 N. Y. 547.

[c] **The disqualification affects the jurisdiction and power of the court to act and cannot be waived.** *Chambers v. Hodges*, 23 Tex. 104; *Lee v. British-American Mtg. Co.*, 51 Tex. Civ. App. 272, 115 S. W. 320. To the same effect, *People v. Whitridge*, 144 App. Div. 493, 129 N. Y. Supp. 300.

[d] **Merely imputed bias may be waived, though actual disqualification can be questioned at any time.** *State ex rel. Jacobs v. District Court*, 48 Mont. 410, 138 Pac. 1091.

85. *Ala.*—*Hine v. Hussey*, 45 Ala. 496. *Ga.*—*Shope v. State*, 106 Ga. 226, 32 S. E. 140; *Rogers v. Felker*, 77 Ga. 46. *Ia.*—*Dows v. De Long*, 149 Iowa 251, 128 N. W. 341; *Stone v. Marion County*, 78 Iowa 14, 42 N. W. 570. *Mo.*—*Priddy v. Mackenzie*, 205 Mo. 181, 103 S. W. 968; *State ex rel. Gallivan v. Bradley*, 194 Mo. 166, 92 S. W. 464. *Neb.*—*Ingraham v. State*, 82 Neb. 553, 118 N. W. 320. *Tenn.*—*Holmes v. Eason*, 8 Lea 754.

[a] **Knowledge of Facts.**—Where at the time of the giving of the consent to the hearing a party knew that the judge was related to one of the parties to the action, he is estopped to raise the question of disqualification, although he did not know at that time the precise degree of relationship. *Buena Vista L. & S. Bank v. Grier*, 114 Ga. 398, 40 S. E. 284.

86. *McIntosh v. Bowers*, 143 Wis. 74, 126 N. W. 548.

87. *City of Kansas v. Knotts*, 78 Mo. 356.

88. *State v. Hartley*, 75 Conn. 104, 52 Atl. 615; *Holmes v. Eason*, 8 Lea (Tenn.) 754.

[a] "Jurisdiction in the case is made to depend upon the consent of the parties evidenced by a writing to that effect filed in the case and made a part of the record. In no other way can jurisdiction be acquired." *Walters v. Wiley* (Neb.), 95 N. W. 486.

89. *Ind.*—*Carr v. Duhme*, 167 Ind. 76, 78 N. E. 322, 10 Ann. Cas. 967. *Ia.*—*Dows v. De Long*, 149 Iowa 251, 128 N. W. 341. See also *Stone v. Marion*, 78 Iowa 14, 42 N. W. 570. But see *Chase v. Weston*, 75 Iowa 159, 39 N. W. 246. *Miss.*—*Nimocks v. McGehee*, 97 Miss. 321, 52 So. 626. *Neb.*—*Ingraham v. State*, 82 Neb. 553, 118 N. W. 320.

90. *Ark.*—*Pettigrew v. Washington County*, 43 Ark. 33. *Colo.*—*Eberville v. Leadville Co.*, 28 Colo. 241, 64 Pac. 200. *Ga.*—*Berry v. State*, 117 Ga. 15, 43 S. E. 438. *Ind.*—*Smith v. Amiss*, 30 Ind. App. 530, 66 N. E. 501. *La.*—*Ricks v. Gantt*, 35 La. Ann. 920. *Miss.*—*Nimocks v. McGehee*, 97 Miss. 321, 52 So. 626. *Neb.*—*Wustrack v. Hall*, 95 Neb. 384, 145 N. W. 835. *N. H.*—*Hutchinson v. Manchester St. Ry.*, 73 N. H. 271, 60 Atl. 1011; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. *N. Y.*—*In re Hopkins' Will*, 3 N. Y. Supp. 661, 6 Dem. Sur. 12, 19 N. Y. St. 528. *S. C.*—*Ex parte Hilton*, 64 S. C. 201, 41 S. E. 978, 92 Am. St. Rep. 800. *Tenn.*—*Posey v. Eaton*, 9 Lea 500. *Wash.*—*Nance v. Woods*, 79 Wash. 188, 140 Pac. 323.

[a] "It is a general rule . . . that where general jurisdiction, or the power to act exists, and the only objection to its exercise is one intended

objection within the time prescribed by law.<sup>91</sup> Even under a statute authorizing a waiver, however, the court may refuse to sit in a case where he is disqualified, although the parties have consented to his presiding.<sup>92</sup>

**E. MODE AND DETERMINATION OF DISQUALIFICATION.—1. By Judge of His Own Motion.**—A judge has the power to declare himself disqualified to act and on his own motion to decline to hear a cause pending before him,<sup>93</sup> even though, pursuant to statute, the parties have consented that he may sit in the case.<sup>94</sup> In some jurisdictions the judge may exercise this right under any circumstances,<sup>95</sup> in others he

for the benefit and designed for the protection of the party complaining, such objection must be taken at the earliest practicable opportunity, after the party or his counsel become aware of the facts on which its validity depends, or it will be held to have been waived by the omission or neglect to urge it seasonably. The reason of the rule would seem to be, that it is justly to be regarded as the folly or misfortune of a party, if, knowing of a valid objection to a proceeding, he neglects to avail himself of it, but stands by and participates therein, unless he intends, as is the natural presumption, from his silence, to waive altogether any objection on that account." *Warren v. Glynn*, 37 N. H. 340. See generally the title "Waiver."

[b] Where a party asks for and obtains a change of venue from a judge and thereafter goes to trial before the same judge without objecting that the judge is disqualified, he waives the point and cannot urge it as a ground of reversal on appeal or writ of error. *Du Quoin Water-Works Co. v. Parks*, 207 Ill. 46, 69 N. E. 587.

[c] A defendant in a criminal case, who knowing of the disqualification of the judge before verdict, makes no objection to his presiding, will be held to have waived such disqualification and, therefore, cannot after conviction obtain a new trial upon this ground. *Berry v. State*, 117 Ga. 15, 43 S. E. 438.

As to effect of lack of knowledge of the disqualifying facts, see *infra*, IX, E, 2, c.

91. As to waiver by failure to object within prescribed time, see *infra* IX, D.

92. *In re Eatonton Electric Co.*, 120 Fed. 1010.

93. *Oakley v. Aspinwall*, 3 N. Y. 547; *Connellee v. Blanton* (Tex. Civ. App.), 163 S. W. 404.

[a] Whenever "a judge of a court is notified in any manner that a cause, in which he has been engaged as counsel for any of the parties, is pending before him, his self-respect, and his duty as a servitor in the administration of justice, alike demand that he should promptly refuse to sit as a judge in the hearing of such cause, even with the consent of all the parties." *Joyce v. Whitney*, 57 Ind. 550.

94. *In re Eatonton Elec. Co.*, 120 Fed. 1010.

95. Ala.—*Medlin v. Taylor*, 101 Ala. 239, 13 So. 310; *Marston v. Carr*, 16 Ala. 325. Cal.—*Lux v. Haggin*, 72 Cal. xxi, 13 Pac. 654; *Kern Valley Water Co. v. McCord*, 70 Cal. 646, 11 Pac. 798. Fla.—*Fairechild v. Knight*, 18 Fla. 770. Ind.—*In re Appelman*, 94 N. E. 566; *Joyce v. Whitney*, 57 Ind. 550; *Smith v. Amiss*, 30 Ind. App. 530, 66 N. E. 501. La.—*Nugent v. Stark*, 34 La. Ann. 628. Mo.—*State v. Gilham*, 97 Mo. App. 296, 70 S. W. 943. N. Y. *Oakley v. Aspinwall*, 3 N. Y. 547. Tex. *Connellee v. Blanton* (Tex. Civ. App.), 163 S. W. 404; *Childress v. Grim*, 57 Tex. 56.

[a] A judge may decline to sit in any case in which he deems it improper to preside for reasons best known to himself and it must be presumed that he acted properly in the matter. *Louisville & N. R. Co. v. Shuck*, 23 Ky. L. Rep. 25, 62 S. W. 259.

[b] Under a statute providing that a judge may decline to act "when he can not properly preside" the judge's action in that regard "must be within the exercise of a sound judicial discretion, as it is left with the judge alone to determine, by reason of his

has the right to decline to act only where the parties under the statute have the right to object to his presiding at the trial of the cause.<sup>96</sup> But where he is disqualified under the statute it is deemed his duty so to decline to sit in the case although no objection to his competency is raised by the parties.<sup>97</sup> Where the judge considering himself disqualified to act transfers the cause and the parties proceed to trial before another judge the objection to the transfer on the ground that the judge was not disqualified is deemed waived.<sup>98</sup>

**2. Upon Objection by Party.**—*a. Generally.*—Where a judge who is disqualified has not voluntarily refused to sit in the case,<sup>99</sup> his disqualification may be taken advantage of only in the manner prescribed by law for a change of judges upon that ground.<sup>1</sup> Generally

relation to the parties, his interest in the cause, his bias the one way or the other, his ability to preside, so as to give the party a fair and an impartial hearing. He ought not and can not decline to preside merely for the reason of a disinclination on his part to hear the case; but the reasons influencing his action must be such as to cause him to believe that he can not properly preside." *Byram's Exrs. v. Holliday*, 84 Ky. 18.

[c] A judge who has voluntarily disqualified himself cannot subsequently vacate his order granting a change of venue, on the ground that the party had no legal ground to disqualify him, as the "mere absence, . . . of a right in a defendant . . . to obtain upon his own application, a change of venue from a judge, . . . can not in any way operate as a limitation upon the general power and authority given to the judge . . . to disqualify himself." *State ex rel. Lentz v. Fort*, 178 Mo. 518, 77 S. W. 741.

96. *State v. Judge*, 41 La. Ann. 319, 6 So. 22. See *infra* IX, F.

[a] "It is the duty of a judge to perform his official functions regardless of his personal feelings or sentiments, and no judge shall refuse to act unless he is in fact disqualified," but where the judge has declared himself disqualified it will be assumed that such was the case. *Hill v. Nelson Coal Co.*, 40 Mont. 1, 104 Pac. 876.

[b] The order of a judge declaring himself disqualified to act, (1) is not conclusive and a party may apply for a writ of mandate commanding the judge to hear the cause. *Medlin v. Tay-*

*lor*, 101 Ala. 239, 13 So. 310. (2) But such order will not be set aside unless there was a manifest abuse of judicial discretion. *Childress v. Grim*, 57 Tex. 56. See *infra*, IX, E, 2, e.

97. Cal.—*People v. De la Guerra*, 24 Cal. 73. La.—*Nugent v. Stark*, 34 La. Ann. 628. N. Y.—*Oakley v. Aspinwall*, 3 N. Y. 547.

Parties cannot waive the objection to his qualifications, see *supra*, IX, D.

98. *Marston v. Carr*, 16 Ala. 325.

[a] Where the parties were dissatisfied with the refusal of the judge to hear a case, they were bound to pursue the proper remedy and to object to the transfer. "They should have excepted to or protested against it; and, if overruled, they should have resorted to the remedy of mandamus in this court, to compel him to exercise the jurisdiction vested in him by law, and to perform the duties attached to his office, which he was illegally refusing to exercise and perform. . . . Had objection been made, and particularly had the judge's attention been called to the plain, textual provisions of the law . . ., it is evident the recusation could not have been persisted in. Having submitted in silence, and without objection, the judge, as well as their adversaries, had the right to assume that they acquiesced, and to proceed with the case in regular course on that presumption. Hence the case was regularly re-allotted." *State ex rel. Mexican Imp. Co. v. Voorhies*, 41 La. Ann. 567, 6 So. 826.

99. See *supra*, IX, E, 1.

1. *Hutchinson v. Manchester St. Ry.*, 73 N. H. 271, 60 Atl. 1011.

the objection may be made by petition<sup>2</sup> or motion prior to the trial,<sup>3</sup> but cannot be raised by demurrer,<sup>4</sup> or by way of challenge.<sup>5</sup> It does not afford a ground for a continuance,<sup>6</sup> and cannot be made the basis for a motion in arrest of judgment.<sup>7</sup> The application, as a rule, must be supported by an affidavit.<sup>8</sup> It is held that a party cannot disqualify more than one judge in the same action by an affidavit of prejudice,<sup>9</sup> and it is sometimes so provided by statute.<sup>10</sup>

b. *Who May Object.*—The objection to a judge on the ground of his disqualification may be made by either party,<sup>11</sup> and only by them.<sup>12</sup> Where the statute requires the affidavit to be made by a party it can-

2. *Kelly v. Hockett*, 10 Ind. 299; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

3. *Richardson v. Welcome*, 6 Cush. (Mass.) 331.

[a] Where a motion assigns no legal ground for disqualification it may properly be treated as frivolous and be overruled without reference to another judge. *State v. Blount*, 124 La. 202, 50 So. 12.

4. *Frevert v. Swift*, 19 Nev. 400, 13 Pac. 6.

5. *Lyon v. State Bank*, 1 Stew. (Ala.) 442; *Wright v. State*, 3 Ala. App. 24, 58 So. 68.

6. *Hutchinson v. Manchester St. Ry.*, 73 N. H. 271, 60 Atl. 1011.

7. *Miller v. Wild Cat G. Road Co.*, 52 Ind. 51.

8. See the statutes, and *Moore v. Superior Court*, 22 Cal. App. 156, 133 Pac. 990; *Curry v. McCaffery*, 47 Mont. 191, 131 Pac. 673.

As to requisites of affidavit, see *infra*, IX, E, 2, d.

9. *State v. Gardiner*, 88 Minn. 130, 92 N. W. 529.

[a] In "analogy to a change of venue in a criminal case, the defendant's right to have his case transferred to another judge for trial is limited to one transfer. Any other conclusion would, . . . , lead to gross abuses and a miscarriage of justice; for, if it be once conceded that the party has the right to disqualify more than one judge, there is no limit to the right." *State v. Gardner*, 88 Minn. 130, 92 N. W. 529.

10. *Buchanan v. State*, 2 Okla. Crim. 126, 101 Pac. 295.

11. *Stevens v. Burr*, 61 Ind. 464; *Kelly v. Hockett*, 10 Ind. 299.

[a] By Favored Party.—The party with whom a judge "is connected has as much to apprehend as the other; for such is the nature of man, that frequently to avoid one imputation, he will go as far to the other side as it was feared he would on the side of his relation. The dread of censure is as much to be deprecated on the one side as a leaning towards his relation is on the other. Therefore, the Constitution has used the word 'parties' in the plural number." *Waterhouse v. Martin, Peck (Tenn.)* 374. But see *Bonnefoy v. Landry*, 4 Rob. (La.) 23, holding that the party who might be favored cannot object.

[b] While a party in default has no standing in court except to move for relief from the default or to take an appeal, he is still a "party" within the meaning of the statute permitting the filing of an affidavit of prejudice, upon presenting a motion to vacate the default. *State ex rel. Working v. District Court*, 50 Mont. 435, 147 Pac. 614.

12. *Stevens v. Burr*, 61 Ind. 464.

[a] Under a statute providing for a change of judge on the ground of bias, prejudice or interest of the judge on application of "either party" the "affidavit must be both made and filed by the party. The language of the statute is explicit, and admits of no other construction. The right to a change depends upon the statute, and the party asking it must take it on the terms prescribed by the statute, or not at all." *Stevens v. Burr*, 61 Ind. 464. To the same effect, *Heshion v. Pressley*, 80 Ind. 490.

not be made by his attorney,<sup>13</sup> though a corporation may act through those of its officers or agents who are authorized to verify its pleadings or statements.<sup>14</sup> The application, of course, may be made and the affidavit filed by a party through his attorney.<sup>15</sup> One of several plaintiffs or defendants may raise the objection alone without joining the others.<sup>16</sup>

c. *Time of Objection.*—The time for questioning the qualifications of the judge, may be regulated by statute.<sup>17</sup> It is variously provided or held that objection must be made at the first appearance in the cause,<sup>18</sup> or at the earliest practicable opportunity after the party becomes aware of the facts<sup>19</sup> on which the validity of the objection de-

13. *Western Bank v. Tallman*, 15 Wis. 92.

14. *Western Bank v. Tallman*, 15 Wis. 92, not by attorney of foreign corporation.

[a] An affidavit made by an agent of a corporation is sufficient, it being the object "of the statute that the affidavit should be made by an officer or agent sufficiently acquainted with the facts to make it conscientiously. In this case the affidavit shows that the agent making it was the only person, officer or agent, conversant with the facts; that it was his business to attend to and investigate all claims made against the company in this state, look up evidence on the trial, etc. He then, of all others, was most competent to make the affidavit, since he alone was sufficiently well acquainted with the facts to do it." *Jones v. Chicago & N. W. R. R. Co.*, 36 Iowa 68.

15. *Firestone v. Hershberger*, 121 Ind. 201, 22 N. E. 985.

16. *State v. Dick*, 125 Wis. 51, 103 N. W. 229; *Wolcott v. Wolcott*, 32 Wis. 63.

17. See the statutes.

18. *Tolliver v. Com.*, 165 Ky. 312, 176 S. W. 1190; *White v. Jouett*, 147 Ky. 197, 144 S. W. 55; *Massie v. Com.*, 93 Ky. 588, 20 S. W. 704; *German Ins. Co. v. Landram*, 88 Ky. 433, 11 S. W. 367; *French v. Com.*, 30 Ky. L. Rep. 98, 97 S. W. 427.

[a] A party who permits the court to pass upon a demurrer and motion to strike out certain parts of the complaint, and thereafter files an answer, waives his right to object to the judge for bias. *Pace v. Reed*, 138 Ky. 605, 128 S. W. 891.

[b] After the judge has made sev-

eral orders in the case it is too late to file an affidavit of prejudice. *Dupoyster v. Ft. Jefferson Imp. Co.*, 121 Ky. 518, 89 S. W. 509.

[c] Where a judge has appointed a receiver upon motion of a party, and after certain motions of an administrative nature have been submitted for his decision, the objection comes too late. *Coltrane v. Templeton*, 106 Fed. 370, 45 C. C. A. 328.

19. *Eberville v. Leadville Co.*, 28 Colo. 241, 64 Pac. 200; *Yazoo & M. V. R. Co. v. Kirk*, 102 Miss. 41, 58 So. 710, Ann. Cas. 1914C, 968, 42 L. R. A. (N. S.) 1172. See *State ex rel. Hannebohl v. Superior Court*, 85 Wash. 663, 149 Pac. 16; *Bedolfe v. Bedolfe*, 71 Wash. 60, 127 Pac. 594; *State ex rel. Lefebvre v. Clifford*, 65 Wash. 313, 118 Pac. 40.

[a] The reason for this rule is that "it is justly to be regarded as the folly or misfortune of a party, if, knowing of a valid objection to a proceeding, he neglects to avail himself of it, but stands by and participates therein, unless he intends, as is the natural presumption, from his silence, to waive altogether any objection on that account." *Warren v. Glynn*, 37 N. H. 340.

[b] An application for a change of judges is timely when made after the interposition of a motion to make the complaint more definite and certain and prior to the determination thereof. *State ex rel. Deavers v. French*, 78 Wash. 260, 138 Pac. 869.

[c] Where at the time of the arraignment and plea the defendant had not been represented by counsel and the attorney filed the application for a change of judge upon first appearance

pend, or before the cause is set for trial,<sup>20</sup> or prior to the beginning of the term at which the cause is to be tried,<sup>21</sup> or within a certain number of days before the trial,<sup>22</sup> or at any time before the commencement of the trial,<sup>23</sup> or, in some jurisdictions, on the trial of the cause.<sup>24</sup>

An objection to a judge on the ground of his disqualification, as a rule, is not available after judgment,<sup>25</sup> though in some jurisdictions such objection may be raised for the first time on a motion for a new trial,<sup>26</sup> or to modify the judgment.<sup>27</sup> Where the court consists of several judges, objection is obviously in time if made as soon as the cause

in the case, such application is timely. *State ex rel. Jones v. Gay*, 65 Wash. 629, 118 Pac. 830.

[d] Where a party is charged with a civil contempt for refusing to comply with a judgment, it is too late to apply for a change of judges on the ground of prejudice as the contempt proceeding is merely ancillary to the original action in which the party had appeared. *State ex rel. Gourley v. Smith*, 78 Wash. 292, 139 Pac. 60.

20. *Scherer v. Ingberman*, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304 (under rule of court); *Ex parte Hilton*, 64 S. C. 201, 41 S. E. 978, 92 Am. St. Rep. 800.

[a] "Unless the party so applying has just learned that facts exist from which he believes that a judge may be prejudiced against him, which facts should be alleged in the affidavit." *Dolan v. Church*, 1 Wyo. 187.

21. *Ex parte Fairbank Co.*, 194 Fed. 978; *Stockwell v. Crawford*, 21 N. D. 261, 130 N. W. 225.

22. U. S.—*Ex parte Glasgow*, 195 Fed. 780. Minn.—*State v. Hoist*, 111 Minn. 325, 126 N. W. 1090. Ohio.—*Leiblang v. State*, 21 Ohio Cir. Ct. (N. S.) 539.

23. N. Y.—*In re Hopkins' Will*, 3 N. Y. Supp. 661, 6 Dem. Sur. 12, 19 N. Y. St. 528; *Lampier's Case*, 5 City Hall Rec. 179. Okla.—*White v. State*, 150 Pac. 716; *Rea v. State*, 3 Okla. Crim. 276, 105 Pac. 384, 139 Am. St. Rep. 954. Wis.—*Swineford v. Pomeroy*, 16 Wis. 553.

[a] The calling of the case for trial and the drawing of a juror is the beginning of the trial and the right to file an affidavit of prejudice against the trial judge cannot be exercised thereafter. *State v. Johnson*, 24 S. D. 590, 124 N. W. 847.

[b] Before or After Reference.

(1) A motion to change the place of

trial on account of the prejudice of the judge made after the cause had been referred and the referee had made his report comes too late. *Duffy v. Hickey*, 68 Wis. 380, 32 N. W. 54. See also *Bell v. Vernoo*, 18 Hun (N. Y.) 125. (2) But an application made prior to such reference although the cause was upon the calendar for trial is seasonably made. *Eldred v. Becker*, 60 Wis. 48, 18 N. W. 720.

24. *Crosby v. Blanchard*, 7 Allen (Mass.) 385.

25. Ark.—*Pettigrew v. Washington County*, 43 Ark. 33. Ga.—*Berry v. State*, 117 Ga. 15, 43 S. E. 438. Idaho.—*Stevens v. Hall*, 8 Idaho 549, 69 Pac. 282.

[a] On Motion To Quash Execution. An objection to the judge on account of his interest cannot be raised for the first time on a motion to quash an execution issued in the cause. *Collins v. Hammock*, 59 Ala. 448.

[b] Not on Motion for New Trial. *Wustrack v. Hall*, 95 Neb. 384, 145 N. W. 835.

26. *Keating v. Keating*, 169 Cal. 754, 147 Pac. 974; *Seabrook v. First Nat. Bank* (Tex. Civ. App.), 171 S. W. 247; *Gulf, C. & S. F. Ry. Co. v. Looney*, 42 Tex. Civ. App. 234, 95 S. W. 691.

[a] "While the disqualification of imputed bias and prejudice may not be invoked during a hearing, . . . , yet the disqualification may be worked, . . . , at any time before the day of hearing upon any of the separate steps to be taken in the progress of the case. This would include, of course, a motion for a new trial." *State ex rel. Carleton v. District Court*, 33 Mont. 138, 82 Pac. 789.

27. *Cooper v. Cooper*, 83 Wash. 85, 145 Pac. 66, an application to modify the judgment is a "proceeding" within the meaning of the statute.

is assigned to a particular judge,<sup>28</sup> and it has been held that party cannot be deprived of his right to raise the objection by the expiration of the statutory period therefor, where the grounds of disqualification were not previously discovered,<sup>29</sup> though other authorities are to the contrary.<sup>30</sup> So, also, a distinction has been drawn between merely "imputed bias" and other grounds of disqualification, to the effect that the former cannot be urged after the time prescribed in the statute while the latter is available whenever it appears.<sup>31</sup>

**Where Disqualification Cannot Be Waived.**—But in those states where the disability cannot be waived, being regarded, on grounds of public policy, as a jurisdictional matter,<sup>32</sup> it would seem that objection might be made whenever the disqualification appears, in accordance with the general rules regulating jurisdictional objections.<sup>33</sup>

**d. Essentials of Application or Affidavit.**—The application for a change of judge on the ground of disqualification, as a rule, must show facts which under the statute constitute one of the grounds of disqualification.<sup>34</sup> It is not enough to merely "suggest" the existence of a dis-

28. *Cooper v. Cooper*, 83 Wash. 85, 145 Pac. 66, as soon as cause is assigned for trial in a particular department.

[a] **A rule of court** requiring all applications for a change of judges to be made prior to the setting of the cause for trial is unreasonable and in contravention of the statute, where it appears from the record that the case was assigned to a certain judge and set for trial at the same time, for a party is not required to file an affidavit of prejudice until he knows to whom a case has been assigned. *State ex rel. Beeler v. Smith*, 76 Wash. 460, 136 Pac. 678.

29. *Bernhamer v. State*, 123 Ind. 577, 24 N. E. 509; *Shoemaker v. Smith*, 74 Ind. 71; *Sandusky Grain Co. v. Sanilac Circuit Judge*, 184 Mich. 126, 150 N. W. 329; *Bliss v. Caille Bros. Co.*, 149 Mich. 601, 113 N. W. 317.

[a] "The law does not require impossibilities, and as the appellant had no knowledge of the bias and prejudice on account of which he sought a change of judge in time to make his application within the time prescribed by the rule of court, it must be held that the want of such knowledge was sufficient cause for not making it sooner." *Bernhamer v. State*, 123 Ind. 577, 24 N. E. 509.

[b] **Discovery of Prejudice After Trial.**—A motion for a new trial is an independent proceeding and there is

no reason why a litigant, who after trial and before the hearing of a motion for a new trial discovers that the judge who had tried the cause is prejudiced against him, should not be entitled to a change of judges on the ground of bias. *Keating v. Keating*, 169 Cal. 754, 147 Pac. 974.

[c] **Knowledge of counsel** is the knowledge of the client. *Crosby v. Blanchard*, 7 Allen (Mass.) 385.

30. *Nimocks v. McGehee*, 97 Miss. 321, 52 So. 626, a party, at his peril, is bound to exercise the necessary diligence to discover the facts.

31. *State ex rel. Jacobs v. District Court*, 48 Mont. 410, 138 Pac. 1091.

32. See *supra*, IX, D.

33. **Mo.**—*City of Kansas v. Knotts*, 78 Mo. 356, where judge is a party. **Mont.**—*State ex rel. Jacobs v. District Court*, 48 Mont. 410, 138 Pac. 1091. **N. Y.**—*People v. Whitridge*, 144 App. Div. 493, 129 N. Y. Supp. 300. **Tex.**—*City of Dallas v. Peacock*, 89 Tex. 58, 33 S. W. 220; *Chambers v. Hodges*, 23 Tex. 104; *Lee v. British-Am. Mtg. Co.*, 51 Tex. Civ. App. 272, 115 S. W. 320.

See also *supra*, IX, D; and generally the title "Jurisdiction."

34. **U. S.**—*McGuire v. Blount*, 199 U. S. 142, 26 Sup. Ct. 1, 50 L. ed. 125. **Ark.**—*Jones v. State*, 61 Ark. 88, 32 S. W. 81. **Cal.**—*Dakan v. Superior Court*, 2 Cal. App. 52, 82 Pac. 1129. **Colo.**—*In re Smith*, 54 Colo. 486, 131

qualifying fact, but it must be positively alleged.<sup>35</sup> It is not sufficient to state that the judge is personally interested in the case without stating the character of the alleged interest.<sup>36</sup>

An affidavit merely stating affiant's belief that he cannot have a fair trial before the judge without expressly naming any of the grounds enumerated in the statute will be disregarded,<sup>37</sup> and where the ground urged in support of a motion for a change of judge is not sustained by facts alleged in the affidavit, the latter is insufficient to support the motion.<sup>38</sup> Although it is not necessary to strictly pursue the language of the statute,<sup>39</sup> it is sufficient in some jurisdictions, to do so with respect to bias;<sup>40</sup> though in other jurisdictions it is not sufficient to as-

Pac. 277. **Fla.**—*Conn v. Chadwick & Co.*, 17 Fla. 428. **Ind.**—*Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; *Millison v. Holmes*, 1 Ind. 45. **Kan.**—*Emporia v. Volmer*, 12 Kan. 622. **La.**—*State v. Chantlain*, 42 La. Ann. 718, 7 So. 669. **Minn.**—*Burke v. Mayall*, 10 Minn. 287. **Mo.**—*State v. Montgomery*, 160 Mo. App. 724, 142 S. W. 474. **Ohio.**—*Wolfe v. Marmet*, 72 Ohio St. 578, 74 N. E. 1076. **Okla.**—*White v. State*, 150 Pac. 716. **Tex.**—*Houston & T. C. Ry. Co. v. Ryan*, 44 Tex. 426.

[a] There being no presumption that a judge is disqualified, it is the duty of the party claiming disqualification to show affirmatively the facts upon which the claim is based. *Gasson v. Atkins*, 59 Misc. 145, 112 N. Y. Supp. 224.

35. *Dunbar v. Wallace*, 84 Ark. 231, 105 S. W. 257.

36. *Schwing v. Dunlap*, 130 La. 498, 58 So. 162.

[a] "The averment that the chancellor was disqualified because 'a party to said suit and interested therein,' is insufficient, because it is not explained how he was a party or how interested." *Metcalf v. Merchants & P. Bank*, 89 Miss. 649, 41 So. 377.

37. *Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; *Kentucky J. Pub. Co. v. Gaines*, 33 Ky. L. Rep. 402, 110 S. W. 268. See also *State v. Chantlain*, 42 La. Ann. 718, 7 So. 669.

38. *Smith v. Com.*, 108 Ky. 53, 55 S. W. 718, facts held insufficient to show personal hostility.

39. *Witter v. Taylor*, 7 Ind. 110.

[a] Counsel Prior to Election.—Under a statute providing that a judge is disqualified if he had been engaged

as counsel in the case prior to his election, the omission of the words "prior to his election" is not fatal to the application, as the main fact to be alleged is the employment as counsel, and whether he was so employed before or after his election is not material. *Witter v. Taylor*, 7 Ind. 110.

[b] Personal Bias.—But where the statute qualifies the bias or prejudice by the word "personal," an affidavit in which such qualifying term is not used, is insufficient. *Henry v. Speer*, 201 Fed. 869, 120 C. C. A. 207.

40. **Ariz.**—*Stephens v. Stephens*, 17 Ariz. 306, 152 Pac. 164. **Mont.**—*State ex rel. Grogan v. District Court*, 44 Mont. 72, 119 Pac. 174. **S. D.**—*State v. Palmer*, 4 S. D. 543, 57 N. W. 490.

[a] "If a judge were related to any of the parties, that is a fact; or, if he has an interest in the result of the litigation, . . . that is a fact. . . . But, whether a man is biased or not is a fact of itself, and you have not to state something else to show that he has such bias. We think the facts required by the statute do not refer to anything but relationship or interest that the party may have in the litigation. It is a sort of metaphysical question as to whether he is biased or not. The judge says he was not and he probably was not; but does that satisfy the party, or is that what the legislature intended when it provided that a litigant should have the right to have his case tried by a judge whom he did not think had any bias or prejudice against him? We think that is not an issuable fact to be tried." *State ex rel. Zurhorst v. Wolfe*, 11 Ohio Cir. Ct. 591.

sert the judge's bias, but facts must be alleged showing the state of feeling complained of,<sup>41</sup> hence a mere assertion of affiant's belief in the judge's prejudice without giving reasons in its support is not sufficient to disqualify a judge,<sup>42</sup> and an allegation of prejudice on information

[b] A rule of court requiring a statement of facts in such instance is to that extent invalid. *Hunt v. State*, 27 Ohio Cir. Ct. 16.

41. U. S.—*Pacific Coal & Transp. Co. v. Pioneer Min. Co.*, 205 Fed. 577, 123 C. C. A. 593. Ky.—*Tolliver v. Com.*, 165 Ky. 312, 176 S. W. 1190; *White v. Jouett*, 147 Ky. 197, 144 S. W. 55; *Sparks v. Colson*, 109 Ky. 711, 60 S. W. 540; *Hargis v. Marcum*, 31 Ky. L. Rep. 795, 103 S. W. 346. La.—*State v. Hayes*, 127 La. 762, 53 So. 983. Okla. *White v. State*, 150 Pac. 716. Utah. *State ex rel. Brooks v. First Judicial Dist. Court*, 43 Utah 499, 136 Pac. 785.

[a] "The facts upon which the claim of prejudice is made must be set out in the application so that the judge and the other side may know what is claimed and upon what the claim is based." *Lewis v. Russell*, 4 Okla. Crim. 129, 111 Pac. 818.

[b] Bias or prejudice as a basis of disqualification may be claimed only "in those rare instances in which the affiant is able to state facts . . . and reasons which tend to show personal bias or prejudice." *Ex parte American Steel Co.*, 230 U. S. 35, 33 Sup. Ct. 1007, 57 L. ed. 1379.

[c] And the "affidavit should allege such facts, which, if true, show that the trial judge will not, or may not, afford the litigant a fair and impartial trial of his case." *Kentucky Journal Pub. Co. v. Gaines*, 33 Ky. L. Rep. 402, 110 S. W. 268.

[d] An affidavit which shows that the judge in open court and in advance of any hearing made an announcement of his intention to imprison the person charged with contempt is sufficient to entitle the moving party to a change of judges as a matter of right. *State ex rel. Russell v. Superior Court*, 77 Wash. 631, 138 Pac. 291.

42. U. S.—*Pacific Coal & T. Co. v. Pioneer Min. Co.*, 205 Fed. 577, 123 C. C. A. 593; *Ex parte Fairbank Co.*, 194 Fed. 978. Ark.—*Davis v. Atkinson*, 75 Ark. 300, 87 S. W. 432. Cal. *Hoyt v. Zumwalt*, 149 Cal. 381, 86 Pac.

600. Colo.—*People v. District Court*, 60 Colo. 1, 152 Pac. 149; *In re Smith*, 54 Colo. 486, 131 Pac. 277. Ky.—*Sparks v. Colson*, 109 Ky. 711, 60 S. W. 540; *Vance v. Field*, 89 Ky. 178, 12 S. W. 190; *French v. Com.*, 30 Ky. L. Rep. 98, 97 S. W. 427; *Musgrave v. Parrish*, 11 Ky. L. Rep. 573, 12 S. W. 709. N. H.—*Hutchinson v. Manchester St. Ry.*, 73 N. H. 271, 60 Atl. 1011. N. D. *Waterloo G. E. Co. v. O'Neill*, 19 N. D. 784, 124 N. W. 951. Okla.—*Kelly v. Ferguson*, 5 Okla. Crim. 316, 114 Pac. 631. But see *Lincoln v. Territory*, 8 Okla. 546, 58 Pac. 730; *Buchanan v. State*, 2 Okla. Crim. 126, 101 Pac. 295. S. D.—*State v. Chapman*, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

[a] **Prejudice Against Liquor Traffic.**—In *Erwin v. Benton*, 120 Ky. 536, 87 S. W. 291, it was alleged in the affidavit, that the bias of the judge against the licensed traffic in spirituous, vinous and malt liquors is so pronounced that he cannot and will not afford affiants a fair and impartial trial. The court says there: "The law is administered not by the personal predilections of the judge, but by the application of known and accepted rules or principles to the facts of the controversy. Very rarely it must happen that the judge's personal views can properly enter, or do they enter, into the adjudication of the matter before him. . . . It is inconceivable that a man qualified to act as judge . . . can have formed no opinion regarding many, if not most, of the moral and economic questions which have engaged public attention for many years. It would be an astounding proposition if it were true that judges with personal opinions on such questions were disqualified to act in cases where the law as written is to be applied where those matters became involved. . . . There is no . . . case . . . that holds, nor has it ever been held under any statute, that a mere charge of bias . . . against the judge will disqualify him from sitting on the trial of a case. Facts which, if true, would probably operate to prevent his giving a fair trial, must be alleged.

and belief is wholly insufficient to support a motion for a change of judge.<sup>43</sup> So too, the affidavit must show that the alleged prejudice is a prejudice against the party.<sup>44</sup>

e. *Proceedings On and Determination of Application or Objection.* The proceeding to disqualify a judge being statutory,<sup>45</sup> a defendant seeking to disqualify a trial judge upon any ground must follow the statute.<sup>46</sup> In some jurisdictions upon the filing of an affidavit of prejudice in accordance with the statute, the judge has no discretion in the matter but must allow a change of judge,<sup>47</sup> and it is reversible error to

The affidavit in this case is wholly lacking in this particular." *Erwin v. Benton*, 120 Ky. 536, 87 S. W. 291.

[b] "The affidavit or affidavits must not only state facts, but the facts stated must establish to the satisfaction of a reasonable mind that the judge has a bias or prejudice that will in all probability prevent him from dealing fairly with the defendant. We are unwilling to think that a trial judge would be prejudiced, within the meaning of the statute cited, against one on trial before him, on account of his successful candidacy for office against a relative of such judge." *People v. Findley*, 132 Cal. 301, 64 Pac. 472.

43. **U. S.**—*Ex parte Fairbank Co.*, 194 Fed. 978. **Ala.**—*Schileer v. Brock*, 124 Ala. 626, 27 So. 473; *Pollard v. Southern Fertilizer Co.*, 122 Ala. 410, 25 So. 169. **Ky.**—*Schmidt v. Mitchell*, 101 Ky. 570, 41 S. W. 929, 72 Am. St. Rep. 427. **S. D.**—*Crouch v. Dakota W. & M. R. R. Co.*, 18 S. D. 540, 101 N. W. 722.

[a] An affidavit which consists of mere hearsay as to the facts stated is not sufficient to justify a judge in vacating the bench. *Schmidt v. Mitchell*, 101 Ky. 570, 41 S. W. 929, 72 Am. St. Rep. 427.

[b] **Belief Accompanied by Facts.** But where the allegation of prejudice, though based on affiant's belief, is accompanied by a statement of facts justifying such belief, the affidavit is sufficient. *Morehouse v. Morehouse*, 136 Cal. 332, 68 Pac. 976.

44. *Purvis v. Frink*, 55 Fla. 715, 46 So. 171; *Conn v. Chadwick & Co.*, 17 Fla. 428.

[a] **Personal Bias.**—*Henry v. Speer*, 201 Fed. 869, 120 C. C. A. 207; *Henry v. Harris*, 191 Fed. 868.

45. *Joaquin v. Barretto*, 25 Phil. Isl. 281.

46. **La.**—*State v. Blount*, 124 La. 202, 50 So. 12. **Mo.**—*State v. Moore*, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542. **Okla.**—*Fox v. Ziehme*, 30 Okla. 673, 120 Pac. 285; *Myers v. Bailey*, 26 Okla. 133, 109 Pac. 820.

47. **U. S.**—*Henry v. Speer*, 201 Fed. 869, 120 C. C. A. 207; *Cox v. United States*, 100 Fed. 293, 40 C. C. A. 380. **Ariz.**—*Stephens v. Stephens*, 17 Ariz. 306, 152 Pac. 164, the truth of the affidavit is immaterial. **Colo.**—*People v. District Court*, 60 Colo. 1, 152 Pac. 149. **Ind.**—*Woodsmall v. State*, 181 Ind. 613, 105 N. E. 155; *Thorn v. Silver*, 174 Ind. 504, 89 N. E. 943; *Burkett v. Holeman*, 104 Ind. 6, 3 N. E. 406; *Fisk v. Patriot & B. Tpk. Co.*, 54 Ind. 479. **Kan.**—*Jones v. American Cent. Ins. Co.*, 83 Kan. 44, 109 Pac. 1077. **Ky.**—*Vance v. Field*, 89 Ky. 178, 12 S. W. 190; *Powers v. Comm.*, 114 Ky. 237, 24 Ky. L. Rep. 1007, 70 S. W. 644; *Givens v. Crawshaw*, 21 Ky. L. Rep. 1618, 55 S. W. 905. **La.**—*State v. Banta*, 122 La. 235, 47 So. 538; *State v. Judge*, 37 La. Ann. 253. **Minn.**—*State v. Hoist*, 111 Minn. 325, 126 N. W. 1090. **Mo.**—*State v. Montgomery*, 160 Mo. App. 724, 142 S. W. 74; *State v. Gray*, 100 Mo. App. 98, 72 S. W. 1081. **Mont.**—*State ex rel. Lohman v. District Court*, 49 Mont. 247, 141 Pac. 659; *Washoe C. Co. v. Hickey*, 46 Mont. 363, 128 Pac. 584. **N. D.**—*State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686. **Ohio.**—*State v. Wolfe*, 11 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 118. **S. D.**—*State v. Palmer*, 4 S. D. 543, 57 N. W. 490, 499. **Wash.**—*State ex rel. Russell v. Superior Court*, 77 Wash. 631, 138 Pac. 291. **Wis.**—*Rines v. Boyd*, 7 Wis. 155. **Wyo.**—*Murdie v. State*, 22 Wyo. 196, 137 Pac. 574; *Huhn v. Quinn*, 21 Wyo. 51, 128 Pac. 514.

[a] "The law does not contemplate

refuse to do so.<sup>48</sup> In other jurisdictions, in case of doubt as to the disqualification of the judge, the matter is to be referred for determination to the court, if it consists of several members,<sup>49</sup> or to a judge ad hoc, but the question cannot be decided by the judge claimed to be disqualified.<sup>50</sup> But in some states it devolves upon the trial judge to determine the question of his own incompetency,<sup>51</sup> and this determination should be upon affidavits and not upon his own knowledge in the matter.<sup>52</sup>

an issue of fact upon an application for a change of venue on account of the disqualification of the judge, to be heard and determined by the judge alleged to be disqualified. . . . When the application is properly made and supported by affidavit as required by the statute the judge has no discretion; he cannot sit in judgment upon the question of his own qualification, but must grant the change as applied for." *State v. Witherspoon*, 231 Mo. 706, 133 S. W. 233.

48. *Woodsmall v. State*, 181 Ind. 613, 105 N. E. 155; *Stockton v. Ham*, 180 Ind. 628, 102 N. E. 378; *Wathen, Mueller & Co. v. Com.*, 133 Ky. 94, 116 S. W. 336.

49. *Internal Improvement Fund v. Bailey*, 10 Fla. 213.

50. *State v. Foster*, 112 La. 533, 36 So. 554; *State ex rel. Nolan v. Judge*, 39 La. Ann. 994, 3 So. 91; *State v. Judge*, 33 La. Ann. 1293.

51. *Ala.*—*State v. Pitts*, 139 Ala. 152, 36 So. 20; *Ex parte Dew*, 7 Ala. App. 437, 62 So. 261. *Cal.*—*Estudillo v. Security L. & T. Co.*, 158 Cal. 66, 109 Pac. 884; *Moore v. Superior Court*, 22 Cal. App. 156, 133 Pac. 990; *Johnston v. Dakan*, 9 Cal. App. 522, 99 Pac. 729. *Colo.*—*Nordloh v. Packard*, 45 Colo. 515, 101 Pac. 787. *Me.*—*Bellows v. Murray*, 66 Me. 199. *P. I.*—*Joaquin v. Barretto*, 25 Phil. Isl. 281.

[a] While it is the duty of a judge "to grant the motion should bias or other disqualification be shown, yet, upon the other hand, it is equally his duty to deny the motion and to sit in the case himself if, in his judgment, the disqualifying cause alleged is not sufficiently established by the evidence. An added embarrassment under such circumstances arises from the fact that the judge himself is made the trier of the question touching his own bias or other disqualification. But the law

has seen fit to impose this painful duty upon him, and he may not shirk its performance." *Swan v. Talbot*, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066.

[b] "Not only is a judge not required to withdraw from the hearing of a case upon a mere suggestion that he is disqualified to sit, but it is improper for him to do so, unless the alleged cause of recusal is known by him to exist, or is shown by proof to be true in fact." *State v. De Maio*, 70 N. J. L. 220, 58 Atl. 173.

[c] **Must Give Opportunity for Proof.**—But the trial judge cannot decide the question of his disqualification without affording an opportunity to submit proof in support of the application for a change of judges. *Benson v. State*, 39 Tex. Crim. 56, 44 S. W. 167.

[d] **In Oklahoma** the court cannot hear evidence or try the issue, but if he deems himself disqualified on the grounds alleged, he so certifies, otherwise he refuses to act and the matter is then tried by the appellate court on application for a writ of mandamus. *Kelly v. Ferguson*, 5 Okla. Crim. 316, 114 Pac. 631.

52. *People v. Compton*, 123 Cal. 403, 56 Pac. 44. But see *Chase v. Weston*, 75 Iowa 159, 39 N. W. 246, where the court says: "In our opinion it was the duty of the judge, having knowledge of the prohibited relationship, to refuse to act as judge on the trial of the cause until the required consent was given."

[a] "An issue as to the disqualification of the judge may be made, and when made is to be determined by the judge upon the evidence adduced before him by the parties; and when his decision in that respect is brought up for review, the evidence upon which the decision was made should be in-

f. *Review of Ruling.*—The judge's decision is subject to review on an application for a writ of mandamus<sup>53</sup> or prohibition<sup>54</sup> as well as on appeal.<sup>55</sup> The decision of a judge as to his qualifications will not be reversed unless there is manifest error.<sup>56</sup>

incorporated into the statement of facts for the inspection of the revising court. The mere statement of the judge as to his previous professional connection with the matter in dispute, not made under the sanctions of an oath, as a witness, ought not to be considered as evidence unless that requisite had been waived by the parties." *Slaven v. Wheeler*, 58 Tex. 23.

53. *McConnell v. Goodwin*, 189 Ala. 290, 66 So. 675, Ann. Cas. 1917A, 839; *Medlin v. Taylor*, 101 Ala. 239, 13 So. 310; *Ex parte State Bar Assn.*, 92 Ala. 113, 8 So. 768, 12 L. R. A. 134; *State v. Castleberry*, 23 Ala. 85; *State v. Young*, 31 Fla. 594, 12 So. 673, 34 Am. St. Rep. 41, 19 L. R. A. 636.

[a] "It is the duty of an attorney, when he desires to secure a writ of mandamus to disqualify a judge, to present his petition therefor to this court as soon after the judge has declined to disqualify himself as can be conveniently done. Counsel cannot file an application for a change of judge, and, after the judge has acted upon such application, allow the matter to rest until the case is about to be tried, and then use such application as a ground for a continuance. Counsel must be vigilant, if they desire the assistance of this court. We therefore hold that the petition for a writ of mandamus . . . was not filed in this court in proper time." *Johnson v. Wells*, 5 Okla. Crim. 599, 115 Pac. 375.

[b] "If the application is in compliance with the statute, and the judge concedes that he is prejudiced, he certifies his disqualification as requested. On the other hand, if the application be in proper form, but the judge does not admit his disqualification and therefore refuses to make the certificate, a petition may be filed for a writ of mandamus to require him to do so; and the question of his disqualification will then be tried out and determined in the appellate court upon the petition, the response, and such proof as may be there offered. But the filing of an application with the clerk below in full compliance with the section above

quoted is a prerequisite to the procuring of the writ. The facts upon which the claim of prejudice is made must be set out in the application, so that the judge and the other side may know what is claimed and upon what the claim is based; and it is not sufficient to set these facts out for the first time in the petition for the writ. . . . It is evident that the statute never intended that a judge should hear evidence and judicially pass upon the question of his own prejudice. . . . It is illegal and absurd to place a judge upon trial before himself. Such a trial would manifestly be a miserable farce. No man is competent to sit in judgment upon his own conduct or when his individual integrity or feelings are involved. The fact that he assumes that he is competent to do this is conclusive evidence of the fact that he is incompetent to properly discharge this judicial duty." *Kelly v. Ferguson*, 5 Okla. Crim. 700, 114 Pac. 631.

54. Cal.—*North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315; *Moore v. Superior Court*, 22 Cal. App. 156, 133 Pac. 900. Mo.—*State v. Wear*, 129 Mo. 619, 31 S. W. 608. Wash.—*State v. Board of Education*, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A. 317.

55. Ala.—*Medlin v. Taylor*, 101 Ala. 239, 13 So. 310. Ohio.—*State v. Wolfe*, 6 Ohio Cir. Dec. 118, 11 Ohio Cir. Ct. 591. Tex.—*City of Austin v. Nalle*, 85 Tex. 520, 22 S. W. 960.

56. *Estudillo v. Security L. & T. Co.*, 158 Cal. 66, 109 Pac. 884, findings on conflicting evidence is conclusive.

[a] Abuse of discretion must appear. *Childress v. Grim*, 57 Tex. 56.

[b] Under the statute "a party has not the absolute right to have his cause tried by a judge other than the regularly elected and presiding judge of the court, on the alleged ground of the latter's prejudice. The matter lies in the sound discretion of the judge to whom the application is made and his decision is not reviewable unless an abuse of discretion is

**F. CALLING IN ANOTHER JUDGE OR TRANSFERRING CAUSE.**<sup>57</sup> — The power to request another judge to try a case is not an inherent power vested in the judge, but it must depend for its support upon the statute,<sup>58</sup> and the requirements of such statute must be strictly followed.<sup>59</sup> Where under the statute the judge must file a certificate of his disqualification, such filing is essential to confer jurisdiction upon the judge who is called to try the cause.<sup>60</sup>

The order for a trial before another judge should recite the fact that the trial judge is disqualified.<sup>61</sup> In some jurisdictions the statute requires a disqualified judge to transfer the cause to another court,<sup>62</sup> unless another qualified judge of the same court is available,<sup>63</sup> and such statute is not satisfied by calling in another judge to try the cause.<sup>64</sup> The disqualified judge must make an order<sup>65</sup> for the transfer

shown." *Nordloh v. Packard*, 45 Colo. 515, 101 Pac. 787.

[c] In support of the court's decision it will be presumed that counter-affidavits were filed unless the record shows the contrary. *Talbot v. Pirkey*, 139 Cal. 326, 73 Pac. 858.

57. As to transfer of causes generally see the title "Transfer of Causes."

As to change of venue see the title "Change of Venue."

58. Ala.—*Thornton v. Moore*, 61 Ala. 347. Fla.—*Swepson v. Call*, 13 Fla. 337. Ga.—*Ivey v. State*, 112 Ga. 175, 37 S. E. 398. Ind.—*Hutts v. Hutts*, 51 Ind. 581. La.—*State ex rel. Hunter v. Judges*, 29 La. Ann. 785. Me.—*State v. Thomas*, 56 Me. 490. Mo.—*State v. McCarver*, 194 Mo. 717, 92 S. W. 684. Mont.—*Farleigh v. Kelly*, 24 Mont. 369, 62 Pac. 495. Nev.—*State v. Mack*, 26 Nev. 430, 69 Pac. 862. N. C.—*Bear v. Cohen*, 65 N. C. 511. S. D.—*State v. Palmer*, 4 S. D. 543, 57 N. W. 490. Wis.—*Rines v. Boyd*, 7 Wis. 155.

Compare *supra*, IX, E, 1.

[a] The judge alone is "endowed by law with the duties and responsibilities which pertain and belong to the court; and if these are assumed by another, or attempted to be conferred by the court or parties, all proceedings emanating from such assumed or enforced authority will be absolute nullities, and should be declared void whenever attempted to be enforced." *Wright v. Boon*, 2 Greene (Iowa) 458.

[b] But where the statute gives a judge the authority to request a judge of another circuit to try a case, in which he is disqualified to act, he can make such request in chambers and

even in vacation of his court. *State v. Gillham*, 174 Mo. 671, 74 S. W. 859.

59. Fla.—*Swepson v. Call*, 13 Fla. 337. La.—*Succession of Cabrol*, 28 La. Ann. 637. Mich.—*Shannon v. Smith*, 31 Mich. 451. N. Y.—*In re Rhinebeck*, 19 Hun 346. Pa.—*Com. v. White*, 161 Pa. 576, 29 Atl. 283. Wis.—*Rines v. Boyd*, 7 Wis. 155.

[a] "When the statute says that the place of trial shall not be changed for disqualification of the judge, when another judge will appear, etc., it must be construed to mean something, if meaning can be extracted from language; and, in our opinion, it does mean that such judge shall appear by the only method by which it is possible for him to appear, viz., by the invitation of the resident judge." *Granite Mt. Min. Co. v. Durfee*, 11 Mont. 222, 27 Pac. 919.

60. *In re Rhinebeck*, 19 Hun (N. Y.) 346; *Queens Ins. Co. v. Graham*, 142 N. Y. Supp. 589.

61. *Thornton v. Moore*, 61 Ala. 347; *Wilson v. Wilson*, 36 Ala. 655.

62. Cal.—*Remy v. Olds*, 5 Cal. Unrep. Cas. 182, 42 Pac. 239. Ill.—*Graham v. People*, 111 Ill. 253. Tex.—*Poole v. Mueller Bros. F. & C. Co.*, 80 Tex. 189, 15 S. W. 1055.

63. *Paige v. Carroll*, 61 Cal. 215; *Remy v. Olds*, 5 Cal. Unrep. Cas. 182, 42 Pac. 239. See also *Upton v. Upton*, 94 Cal. 26, 29 Pac. 411.

64. *Remy v. Olds*, 5 Cal. Unrep. Cas. 182, 42 Pac. 239.

65. *Swepson v. Call*, 13 Fla. 337; *Poole v. Mueller Bros. F. & C. Co.*, 80 Tex. 189, 15 S. W. 1055; *Smith v. Hardin*, 68 Tex. 120, 3 S. W. 453.

of the cause to another court and forward the record to the court to which the cause is transferred.<sup>66</sup>

**G. AUTHORITY OF DISQUALIFIED JUDGE. — 1. Generally.** — While the power of a judge when disqualified generally ceases except to certify his incapacity to act<sup>67</sup> he is authorized to make orders of a purely formal character,<sup>68</sup> to revoke such orders<sup>69</sup> and to perform duties which are merely ministerial in their nature.<sup>70</sup> But a disqualified judge has no power to make any order in the cause which requires the exercise of judicial discretion.<sup>71</sup>

[a] **An order for the transmission of papers to a register is not an order of transfer of a cause to a court.** *Shannon v. Smith*, 31 Mich. 451.

[b] **The grounds of the judge's disqualification, however, need not be stated in the order unless it is excepted to by one of the parties.** *Bates v. Casey*, 61 Tex. 592.

[c] **When Parties Have Not Selected Special Judge.**—Where the statute makes the power of a judge to order a change of venue contingent upon the failure of the parties to agree upon or elect a special judge, an order for a change of venue cannot be made unless an opportunity had been previously given to the parties to hold an election. *State v. Bacon*, 107 Mo. 627, 18 S. W. 19.

66. *Swepson v. Call*, 13 Fla. 337.

[a] **A cause is not pending in the court to which it is ordered to be transferred until the receipt of the papers by the clerk of such court, together with a copy of the order of transfer.** *Swepson v. Call*, 13 Fla. 337.

67. **Colo.**—*People v. District Court*, 60 Colo. 1, 152 Pac. 149. **Ind.**—*Fechheimer v. Washington*, 77 Ind. 366. **La.** *State v. Judge*, 37 La. Ann. 253. **Md.** *Magruder v. Swann*, 25 Md. 173. **Mo.** *Lacy v. Barrett*, 75 Mo. 469. **Mont.** *State ex rel. Goodman v. District Court*, 46 Mont. 492, 128 Pac. 913. **N. D.** *State v. White*, 21 N. D. 444, 131 N. W. 261. **Tex.**—*Poole v. Mueller Bros. F. & C. Co.*, 80 Tex. 189, 15 S. W. 1055.

68. **Ala.**—*Plowman v. Henderson*, 59 Ala. 559; *Hayes v. Collier*, 47 Ala. 726; *Heydenfeldt v. Towns*, 27 Ala. 423. **Cal.**—*People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933. **Colo.**—*People v. District Court*, 60 Colo. 1, 152 Pac. 149. **Ia.**—*Howe Co. v. Jones*, 71 Iowa 92, 32 N. W. 187; *Ellsworth v. Moore*,

5 Iowa 486. **Md.**—*Buckingham v. Davis*, 9 Md. 324. **Mich.**—*McFarlane v. Clark*, 39 Mich. 44, 33 Am. Rep. 346. **Mont.** *State ex rel. Goodman v. District Court*, 46 Mont. 492, 128 Pac. 913.

[a] **An objection to a judge upon the ground of his disqualification "does no more than arrest the power of the judge to pass upon an issue or the merits of the case."** *State ex rel. Nelson v. Yakey*, 64 Wash. 511, 117 Pac. 265.

[b] **Mere "formal orders necessary to bring the cause before a proper tribunal, and where nothing is decided—mere orders to advance the cause towards a final hearing—an interested judge may enter, but that is the extent of his power."** *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370.

69. *Poole v. Mueller Bros. F. & C. Co.*, 80 Tex. 189, 15 S. W. 1055; *Garett v. Gaines*, 6 Tex. 435.

70. *Littrell v. Wilcox*, 11 Mont. 77, 27 Pac. 394; *State v. Gurney*, 17 Neb. 523, 23 N. W. 524.

[a] **"The relationship of the judge to one of the creditors cannot affect the filing and verification of his claims. The acts to be done by the judge are purely ministerial, involving no discretion whatever."** *Hayes v. Collier*, 47 Ala. 726.

[b] **Entry of Consent Order.**—Where an order of reference is made by consent of the parties the entry of such order upon the record is a matter of course, and a disqualified judge in making such entry exercises no judicial function. *Bell v. Vernoooy*, 18 Hun (N. Y.) 125.

71. **Idaho.**—*Gordon v. Conor*, 5 Idaho 673, 51 Pac. 747. **Miss.**—*Dodd v. Kelly*, 107 Miss. 471, 65 So. 561. **Mont.** *State ex rel. Goodman v. District Court*, 46 Mont. 492, 128 Pac. 913. **Wash.** *Garvey v. Skamser*, 69 Wash. 259, 124

Hence a disqualified judge may make orders pertaining to the arrangement of the calendar or the regulation of the order of business,<sup>72</sup> but he has no authority to direct and control the election of a special judge.<sup>73</sup> It is not improper for a judge to receive an indictment which he is disqualified from trying,<sup>74</sup> but he cannot preside at the arraignment of the defendant.<sup>75</sup> A disqualified judge has the power to continue in force a temporary restraining order until the case can be heard by another judge,<sup>76</sup> or to execute a mandate of the appellate court in a case in which he is disqualified to act judicially.<sup>77</sup> But he

Pac. 688. **Wyo.**—*Murdica v. State*, 22 Wyo. 196, 137 Pac. 574.

[a] He has no authority to make orders setting a day for the trial of a cause, determining the number of special jurors to be drawn and summoned and to draw the special jurors, as these orders "were not, in their nature, mere formal proceedings. Two of them were strictly judicial functions, and the third one was confided to the presiding judge for very wise and obvious reasons." *Salm v. State*, 89 Ala. 56, 8 So. 66.

[b] He cannot make an order granting leave to file a petition in the nature of quo warranto proceedings, as such order is clearly an exercise of the judicial discretion of the judge. *State v. Burks*, 82 Tex. 584, 18 S. W. 662.

[c] He Cannot Render a Default Judgment.—"It was the duty of the disqualified judge to let the cause stand until a qualified judge should be present, or to transfer it to the circuit court without an application by the defendant for a change of venue. The latter was not bound to appear before such interested judge for any purpose. He had a right to presume that the statute would be obeyed, and was, therefore, not chargeable with laches in failing to appear to the action, and was not liable to a default." *Fechheimer v. Washington*, 77 Ind. 366.

72. **Cal.**—*Livermore v. Brundage*, 64 Cal. 299, 30 Pac. 848; *People v. De La Guerra*, 24 Cal. 73; *People v. Ebey*, 6 Cal. App. 769, 93 Pac. 379. **Colo.** *People v. District Court*, 60 Colo. 1, 152 Pac. 149. **Mont.**—*State v. District Court*, 30 Mont. 547, 77 Pac. 318. **Wash.**—*State v. Yakey*, 64 Wash. 511, 117 Pac. 265.

[a] An order to show cause in a proceeding for change of name may be made by a disqualified judge as it

relates to the arrangement of the calendar and requires no judicial discretion. *In re Los Angeles Trust Co.*, 158 Cal. 603, 112 Pac. 56.

73. *Lacy v. Barrett*, 75 Mo. 469.

74. *State v. Goddard*, 162 Mo. 198, 62 S. W. 697; *State v. Anderson*, 96 Mo. 241, 9 S. W. 636.

[a] He may make an order to spread an indictment upon the minutes of the court, as such order is a mere formal act awarding no process and deciding no question. *Glasgow v. State*, 9 Baxt. (Tenn.) 485.

[b] Receiving Report of Grand Jury.—A disqualified judge is not prevented from receiving the report of the grand jury although there be embodied in the report an indictment in which he would not be qualified to sit on the trial. *Cock v. State*, 8 Tex. App. 659.

75. Under a statute enumerating the grounds for disqualification of a judge and providing that the statute does not apply to the arrangement of the calendar or to the regulation of the order of business, nor the power of transferring the action or proceeding to some other court, or the hearing of the application for a transfer of the cause, a disqualified judge has no power to preside at the arraignment of the defendant or the hearing of his plea, or other preliminary steps of the prosecution of the case beyond those necessary to regulate the order of business and arrange the calendar. *People v. Ebey*, 6 Cal. App. 769, 93 Pac. 379.

76. *State v. Yakey*, 64 Wash. 511, 117 Pac. 265.

77. *Cullins v. Overton*, 7 Okla. 470, 54 Pac. 702.

[a] But compare *Dawson v. Dawson*, 29 Mo. App. 521, holding that a disqualified judge cannot make orders in a case, which was tried before another

has no authority to make an order of dismissal of an action on a motion to transfer a cause,<sup>78</sup> to hear a motion for a change of venue on the ground of convenience of witnesses<sup>79</sup> or prejudice in the county.<sup>80</sup>

A disqualified judge likewise has no power to declare a bond forfeited,<sup>81</sup> to receive a verdict,<sup>82</sup> to make an order extending the time to prepare a bill of exceptions,<sup>83</sup> or to present amendments thereto,<sup>84</sup> or to sign a bill of exceptions.<sup>85</sup>

**2. Validity and Effect of His Judicial Acts.**—Where the disqualification of a judge rests upon a statutory prohibition his judicial

judge, purporting to be in compliance with the terms of the mandate of the supreme court as a "disqualification, when once ascertained, extends through the whole progress of the cause, and to every order or ruling that might be made therein."

[b] He has the power to issue an order in compliance with the decision of the supreme court in the case, because the execution of an order of the supreme court does not involve or require the exercise of judicial discretion. *State v. Collins*, 5 Wis. 339.

78. *People v. De La Guerra*, 24 Cal. 73.

79. *Granite Mt. Min. Co. v. Durfee*, 11 Mont. 222, 27 Pac. 919.

[a] "If a disqualified judge in a given cause may pass upon the question of the convenience of witnesses requiring the cause to be tried in a certain county, then he may, as such judge, pass upon all questions preliminary to the trial, act upon demurrers, motions to strike out pleadings or parts thereof, or reform the pleadings, shape the issues in the action, grant continuances, and do other acts prejudicial to the parties. The object of the law in granting a change of venue in any case is to give parties fair and impartial trials, where self-interest, the relation of client and attorney, or of kinship to one of the parties, on the part of the trial judge, will not place the other party at a disadvantage. The beneficent objects of the rule would be to a great extent defeated if a disqualified judge acts in such matters as usually arise in a cause prior to the trial." *Gordon v. Connor*, 5 Idaho 673, 51 Pac. 747.

80. *Murdica v. State*, 2 Wyo. 196, 137 Pac. 574.

81. *Marks v. Smith*, 4 Ga. App. 129, 60 S. E. 1016.

82. *State v. Finder*, 12 S. D. 423, 81 N. W. 959.

83. *Johnson v. German Am. Ins. Co.*, 150 Cal. 336, 88 Pac. 985.

[a] An order extending time for filing a bill of exceptions made by a disqualified judge is absolutely void, as such an order "is a judicial act, involving the exercise of judicial discretion. Such an order may be made by the judge only 'upon good cause shown' to him. He is the sole judge of the sufficiency of the showing, and when he makes such order he judicially determines the showing to be sufficient, and as a result thereof grants a privilege to one of the parties to the action to which such party would not otherwise be entitled. He thus judicially acts in an action in which he is disqualified to act at all." *Johnson v. German Am. Ins. Co.*, 150 Cal. 336, 88 Pac. 985.

84. *Frevort v. Swift*, 19 Nev. 363, 11 Pac. 273.

85. *State v. Wofford*, 111 Mo. 526, 20 S. W. 236.

[a] "It is manifest that no part of the proceeding in a case more imperatively demands fair, unprejudiced and impartial action than that of settling and allowing the bill of exceptions. The other proceedings, in the progress of the case, are subject to review in the appellate courts, but usually the bill of exceptions settles finally and conclusively the facts and issues of law, upon which the judgment of the appellate court is to rest. And we do not hesitate in the conclusion that the judge of the court was not competent to pass upon the bill of exceptions." *State ex rel. Sansome v. Wofford*, 111 Mo. 526, 20 S. W. 236.

acts generally are held void,<sup>86</sup> even, in some jurisdictions, though the parties attempt by stipulation to confer jurisdiction upon him.<sup>87</sup> But in

86. **Ala.**—*Heydenfeldt v. Towns*, 27 Ala. 423. **Cal.**—*People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933; *Estate of White*, 37 Cal. 190. **Conn.**—*State v. Hartley*, 75 Conn. 104, 52 Atl. 615. **Ind.**—*Feehheimer v. Washington*, 77 Ind. 366. **Ky.**—*Chism v. Evans*, 9 Ky. L. Rep. 765. **Mass.**—*Hall v. Thayer*, 105 Mass. 219, 7 Am. Rep. 513; *Sigourney v. Sibley*, 21 Pick. 101, 32 Am. Dec. 248. **Mich.**—*Sandusky Grain Co. v. Sanilac Circuit Judge*, 184 Mich. 126, 150 N. W. 329; *Jones v. Hoffman*, 150 Mich. 129, 113 N. W. 316; *Bliss v. Caille Bros. Co.*, 149 Mich. 601, 113 N. W. 317; *Horton v. Howard*, 79 Mich. 642, 44 N. W. 1112, 19 Am. St. Rep. 198; *West v. Wheeler*, 49 Mich. 505, 13 N. W. 836; *Shannon v. Smith*, 31 Mich. 452. **Mo.**—*Ex parte Bedard*, 106 Mo. 616, 17 S. W. 693. **Neb.**—*Harrington v. Hayes County*, 81 Neb. 231, 115 N. W. 773, 129 Am. St. Rep. 680. **Nev.**—*Frevert v. Swift*, 19 Nev. 363, 11 Pac. 273. **N. H.**—*Stearns v. Wright*, 51 N. H. 600; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Russell v. Perry*, 14 N. H. 152. **N. Y.**—*In re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *People v. Whitridge*, 144 App. Div. 493, 129 N. Y. Supp. 300. **Tenn.**—*Reams v. Kearns*, 5 Coldw. 217. **Tex.**—*Templeton v. Giddings*, 12 S. W. 851; *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604; *Chambers v. Hodges*, 23 Tex. 104; *Johnson v. Johnson* (Tex. Civ. App.), 89 S. W. 1102; *Frieburg v. Isbell* (Tex. Civ. App.), 25 S. W. 988. **Wis.**—*McIntosh v. Bowers*, 143 Wis. 74, 126 N. W. 548.

[a] Where "it is expressly declared by a constitutional or statutory provision that in a certain specified case a judge shall not sit, or shall not act, or shall take no part in the decision, the almost uniform current of authority is to the effect that any judgment rendered by such judge in such a case is coram non iudice and void." *Case v. Hoffman*, 100 Wis. 314, 356, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945, 44 L. R. A. 728.

[b] **He Acts Without Jurisdiction.** *Schoonmaker v. Clearwater*, 41 Barb. (N. Y.) 200.

**As to Waiver of Right To Object.** See *supra*, IX, D.

[c] Where a judge inadvertently sits in a cause where he is disqualified, his orders or judgment are nevertheless void. *Davis Colliery Co. v. Charlevoix Sugar Co.*, 155 Mich. 228, 118 N. W. 929.

[d] **Confirmation of Sale at Which He Purchased.**—A judge who bought the property at a guardian's sale is disqualified to make an order confirming such sale and the order is void. "It has been uniformly held in this state that the acts of the judge, in a case where it is subject to any of the disqualifications mentioned in the constitution, are void. . . . It is, however, conceded . . . that the order of confirmation of the sale of the certificate by the judge of the court, who purchased it, was void, by reason of the constitutional inhibition. But their insistence is that, notwithstanding its invalidity, he not being disqualified when the order of sale was granted, such order was valid, and that he did not become disqualified until he became the purchaser at the sale which he had ordered. And that therefore the sale to him was valid, and the approval of the guardian's final account by another judge was, in effect, a confirmation of the sale. This contention, in our opinion, is founded upon such a narrow construction of the constitutional inhibition against a judge sitting in a case wherein he 'may be interested' as would, in many cases, thwart its obvious purpose." *Nona Mills Co. v. Wingate*, 51 Tex. Civ. App. 609, 113 S. W. 182.

87. **Me.**—*Blaisdell v. Inhab. of York*, 110 Me. 500, 87 Atl. 361. **N. Y.**—*Oakley v. Aspinwall*, 3 N. Y. 547. **Tex.**—*Seabrook v. First Nat. Bank* (Tex. Civ. App.), 171 S. W. 247.

[a] "It has been uniformly held in this state that the acts of a judge in a cause where he is subject to any of the disqualifications mentioned in the constitution, are void. . . . We think the disqualification extends even to consent decrees. . . . And we fail to see if his acts (that is, of a disqualified judge) are deemed coram non iudice, why the rendering of a consent decree by him should be regarded differently from any other disposition

some cases it is held that where the statute though disqualifying a judge to act contains no express prohibition to sit in a cause, the acts of a disqualified judge are merely voidable.<sup>88</sup> So too, in jurisdictions in which judges notwithstanding statutory prohibitions are permitted to act by consent of the parties, the disabilities created by the statute render the proceedings erroneous only and not void.<sup>89</sup> And where the disqualification is not predicated upon a statute the acts of a disqualified judge are merely voidable,<sup>90</sup> though it has been held that there is no foundation for any distinction between the cases in which

of the case. . . . If there be any order that such judge may cause to be entered, they must be such as are merely formal, and not in any way affecting the merits of the case. The decree was of no effect, and was not evidence of title in plaintiff in error. It is possible, in the case of such a decree, that the acts of the parties under it might place them in a position of estoppel to deny its effect as fixing their rights, but there are no circumstances in this record which would warrant such a conclusion." *Jouett v. Gunn*, 13 Tex. Civ. App. 84, 35 S. W. 194.

88. *In re Taber*, 13 S. D. 62, 82 N. W. 398. See *Utz & Dunn Co. v. Regulator Co.*, 213 Fed. 315, 130 C. C. A. 17, as to the federal statute.

[a] In *In re Taber*, 13 S. D. 62, 82 N. W. 398, it was held under a statute providing that where the judge is disqualified for one of the enumerated grounds he shall certify such disqualification to the circuit court of the county, that the acts of such disqualified judge are not void, but voidable merely. It is said there: "In most of the states, statutes have been passed which, in direct terms, prohibit judges from acting in certain specified cases. And the general effect of the statutory prohibitions in the several states is undoubtedly to change the rule of the common law so far as to render those acts of a judge involving the exercise of judicial discretion, in a case wherein he is disqualified from acting, not voidable merely, but void. The language of the statutory prohibition to which this effect is attributed is, generally, that the judge in the cases mentioned therein 'shall not sit,' or 'shall not act,' or 'shall not preside,' or 'shall not have any voice,' or 'cannot sit.' . . . This statute does not in express terms inhibit a judge who

is disqualified under its provisions from continuing to act."

89. *Ala.*—*Hayes v. Collier*, 47 Ala. 726. *Ga.*—*Rogers v. Felker*, 77 Ga. 46. *Ia.*—*Floyd County v. Cheney*, 57 Iowa 160, 10 N. W. 324. *Mo.*—*State v. Ross*, 118 Mo. 23, 23 S. W. 196. *N. H.*—*Fowler v. Brooks*, 64 N. H. 423, 13 Atl. 417, 10 Am. St. Rep. 425.

90. *Ala.*—*Hutto v. Walker County*, 185 Ala. 505, 64 So. 313; *Jeffersonian Pub. Co. v. Hilliard*, 105 Ala. 576, 17 So. 112; *Trawick's Heirs v. Trawick's Admrs.*, 67 Ala. 271; *Hine v. Hussey*, 45 Ala. 496; *Heydenfeldt v. Towns*, 27 Ala. 423; *Ex parte Dew*, 7 Ala. App. 437, 62 So. 261. *Ga.*—*Rogers v. Felker*, 77 Ga. 46. *Ind.*—*Board of Comrs. v. Justice*, 133 Ind. 89, 30 N. E. 1085, 36 Am. St. Rep. 528. *Nev.*—*Frevort v. Swift*, 19 Nev. 363, 11 Pac. 273. *N. H.*—*Fowler v. Brooks*, 64 N. H. 423, 13 Atl. 417, 10 Am. St. Rep. 425; *Stearns v. Wright*, 51 N. H. 600. *N. J.*—*State v. Crane*, 36 N. J. L. 394. *N. Y.*—*Foot v. Stiles*, 57 N. Y. 369. *S. D.*—*In re Taber*, 13 S. D. 62, 82 N. W. 398. *W. Va.*—*Butcher v. Kunst*, 65 W. Va. 384, 64 S. E. 967; *Forest Coal Co. v. Doolittle*, 54 W. Va. 210, 46 S. E. 238; *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370.

[a] "At common law . . . it seems to be well settled that whilst no judge ought to act where, from interest or any other cause, he is disqualified, yet his action in such a case is regarded as an irregularity or error, not affecting his jurisdiction and to be corrected by vacating or reversing his action except in cases of those inferior tribunals from which no appeal or writ of error lies. . . ." *Louisville & N. R. Co. v. Taylor*, 93 Va. 226, 24 S. E. 1013. See also *Case v. Hoffman*, 100 Wis. 314, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945.

a statute prohibits a judge to sit and those in which he is inhibited by the common law from sitting.<sup>91</sup>

Where the court is composed of several judges the disqualification of one of them does not affect the power of the court to hear a cause if the disqualified judge does not participate,<sup>92</sup> but his participation invalidates the action of the court.<sup>93</sup>

**X. SPECIAL JUDGES.**—A. **EXTENT OF POWERS.**—During the term of his office a special judge possesses the same powers as the regular judge<sup>94</sup> for all the purposes for which he is elected,<sup>95</sup> and when elected to hear a cause he acquires full authority over such cause throughout all of its stages.<sup>96</sup> His powers, however, are con-

91. *Forest Coal Co. v. Doolittle*, 54 W. Va. 210, 46 S. E. 238.

92. *Van Rensselaer v. Witbeck*, 2 Lans. (N. Y.) 498; *City of Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668.

[a] **Disqualified Judge as Part of Quorum.**—Under a statute providing that any three of the justices constitute a quorum, a disqualified judge may sit for the purpose of making a quorum, although he cannot act or participate in the determination of the cause. *Nephi Irrigation Co. v. Jenkins*, 8 Utah 452, 32 Pac. 699.

[b] In *Walker v. Rogan*, 1 Wis. 597, two out of three of the justices of the court were disqualified from acting and the parties stipulated that the remaining justice might hear the case and decide it, which decision should be entered as the decree of the court, and though at least one of the disqualified justices had to be present upon the rendition of the judgment in order to make a quorum, the decree was held valid.

93. *People v. Connor*, 142 N. Y. 130, 36 N. E. 807; *Oakley v. Aspinwall*, 3 N. Y. 547; *Converse v. McArthur*, 17 Barb. (N. Y.) 410.

94. *Ind.*—*Lerch v. Emmett*, 44 Ind. 331. *Ky.*—*Bush v. Lisle*, 86 Ky. 504, 6 S. W. 330. *La.*—*Halphen v. Guilbeau*, 38 La. Ann. 724. *Mo.*—*Ex parte Clay*, 98 Mo. 578, 11 S. W. 998; *Naffzieger v. Reed*, 98 Mo. 87, 11 S. W. 315; *State v. Sneed*, 91 Mo. 552, 4 S. W. 411. *N. Y.*—*Aldinger v. Pugh*, 132 N. Y. 403, 30 N. E. 745. *N. D.*—*State v. Heiser*, 20 N. D. 357, 127 N. W. 72. *Okla.*—*Barbe v. Territory*, 19 Okla. 119, 91 Pac. 783. *R. I.*—*State v. Chappell*, 26 R. I. 375, 58 Atl. 1009. *S. C.*—*State v. Powers*, 59 S. C. 200, 37 S. E. 690. *Tenn.*—*Low v. State*, 111 Tenn. 81, 78

*S. W.* 110. *Tex.*—*Powers v. State*, 23 Tex. App. 42, 5 S. W. 153. *Wash.*—*Demaris v. Barker*, 33 Wash. 200, 74 Pac. 362. *W. Va.*—*Carper v. Cook*, 39 W. Va. 346, 19 S. E. 379.

[a] **Suspending Rule of Court.** When elected to preside during the disability of the regular judge of the court, he is authorized to suspend a rule of court setting aside a term for the trial of criminal cases to the exclusion of civil matters. *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Paducah Land, C. & I. Co. v. Cochran*, 18 Ky. L. Rep. 465, 37 S. W. 67.

95. *Noffzieger v. Reed*, 98 Mo. 87, 11 S. W. 315.

96. *Ga.*—*Glover v. Morris*, 122 Ga. 768, 50 S. E. 956; *Landrum v. Chamberlin*, *Boynton & Co.*, 73 Ga. 727. *Ind.*—*Woodsmall v. State*, 181 Ind. 613, 105 N. E. 155, 899; *Mayer v. Haggerty*, 138 Ind. 628, 38 N. E. 42; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Pottlitzer v. Citizens Trust Co.*, 60 Ind. App. 45, 108 N. E. 36. *Kan.*—*Keys v. Keys*, 83 Kan. 92, 109 Pac. 985. *Ky.*—*Sublett v. Gardner*, 144 Ky. 190, 137 S. W. 864; *Dupoyster v. Clarke*, 121 Ky. 694, 90 S. W. 1. *Mo.*—*State v. Wear*, 129 Mo. 619, 31 S. W. 608; *State v. Moberly*, 121 Mo. 604, 26 S. W. 364; *Ward v. Bell*, 157 Mo. App. 524, 137 S. W. 1026; *Holliday v. Mansker*, 44 Mo. App. 465. *Neb.*—*Nebraska Mfg. Co. v. Maxon*, 23 Neb. 224, 36 N. W. 492. *Wash.*—*Fisher v. Puget Sound Co.*, 34 Wash. 578, 76 Pac. 107; *State v. Sachs*, 3 Wash. 691, 29 Pac. 446. *W. Va.*—*State v. Stevenson*, 64 W. Va. 392, 62 S. E. 688, 19 L. R. A. (N. S.) 713.

[a] The particular cause in which the special judge is called to try "with

fined to the cause or causes which he was elected to hear and he cannot consolidate one cause with another which he had not been authorized to hear.<sup>97</sup>

A special judge may pass upon an application for a change of venue.<sup>98</sup> The authority of the special judge is derived from the statute and after he acquires jurisdiction over a cause he cannot be divested thereof by the regular judge,<sup>99</sup> and his authority is not affected by the resignation of the regular judge during the progress of a trial commenced by him.<sup>1</sup>

**B. EFFECT ON POWERS OF REGULAR JUDGE.**—The authority of the regular judge in respect to matters entrusted to a special judge is necessarily superseded,<sup>2</sup> and it is error for him to assume jurisdiction of a cause, the trial of which was commenced before a special judge by reason of the absence of the regular judge,<sup>3</sup> and the latter cannot set aside a judgment rendered by the former.<sup>4</sup> Nor has a regular judge the power to sign a bill of exceptions in a case tried before a special judge.<sup>5</sup>

Where under the statute but one session of the court can be held at one time the regular judge cannot sit during the term of the special judge,<sup>6</sup> but in the absence of such statute the regular judge may hold

all its incidents from the beginning to the end, passes under the exclusive control and jurisdiction of the special judge, subject to revert to the control of the regular judge in the event that the special judge becomes incapacitated or refuses to act." *Perkins v. Hayward*, 124 Ind. 445, 24 N. E. 1033.

[b] **Effect of Amendment and New Process.**—Where upon the death of some of the plaintiffs an amended complaint is filed making the heirs of the decedent parties to the action and an alias summons is thereupon issued, the authority of the special judge is not affected thereby as the cause remains the same. *Noffzieger v. Reed*, 98 Mo. 87, 11 S. W. 315.

97. *Texas, etc. Ry. Co. v. Cahill (Tex.)*, 23 S. W. 232.

[a] **Other Cases Consolidated With It.**—But where he is elected to try a case with which others had been previously consolidated he acquires jurisdiction over each of the consolidated cases. *Mills v. Paul (Tex.)*, 30 S. W. 242.

98. *State v. Gilman*, 97 Mo. App. 296, 70 S. W. 943.

99. *Benjamin v. Evansville, etc. R. Co.*, 28 Ind. 416; *State v. Moberly*, 121 Mo. 604, 26 S. W. 364.

1. *Clayton & Co. v. Wallace*, 41 Ga.

468; *Beauchamp v. Com.*, 4 Ky. L. Rep. 27.

2. *Ind.*—*Perkins v. Hayward*, 124 Ind. 445, 24 N. E. 1033. *Wash.*—*State v. Sachs*, 3 Wash. 691, 29 Pac. 446. *W. Va.*—*State v. Stevenson*, 64 W. Va. 392, 62 S. E. 688, 19 L. R. A. (N. S.) 713.

3. *Bohannon v. Tarbin*, 25 Ky. L. Rep. 515, 76 S. W. 46; *State v. Stevenson*, 64 W. Va. 392, 62 S. E. 688, 19 L. R. A. (N. S.) 713.

[a] But where a cause is improperly referred to a special judge, the regular judge may before the special judge has acted assume jurisdiction of the cause. *Russell v. Russell*, 11 Ky. L. Rep. 547, 12 S. W. 709.

4. *State v. Sachs*, 3 Wash. 691, 29 Pac. 446. But see *contra*, *Graziani v. Denny*, 53 Cal. Dec. 39, 162 Pac. 397.

5. *Cowall v. Altheul*, 40 Ark. 172; *Lee v. Hills*, 66 Ind. 474.

[a] Where the special judge has signed a bill of exceptions for the purpose of authenticating its correctness and the regular judge signs it thereafter, the signature of the latter will be deemed surplusage. *Illinois Cent. R. Co. v. Bowles*, 71 Miss. 994, 16 So. 235.

6. *Okla.*—*Williams v. Strauss*, 4 Okla. 160, 44 Pac. 273. *Ore.*—*Baisley*

court while the special judge is trying a cause in his stead.<sup>7</sup> In some jurisdictions it is provided by statute that in case of failure of the invited judge to appear within a certain time the regular disqualified judge must order a change of the place of trial,<sup>8</sup> while in other jurisdictions the regular judge under such circumstances may appoint another special judge.<sup>9</sup>

**C. DURATION AND TERMINATION OF AUTHORITY.—1. Generally.** The powers of a special judge ordinarily expire with the adjournment of the term at which he is elected,<sup>10</sup> though in some jurisdictions a special judge may continue the trial of a cause which he is elected to hear after the adjournment of the term of the court.<sup>11</sup> The parties by proceeding with such trial may waive any objections to the continuance beyond the term, of a trial by a special judge.<sup>12</sup>

The authority of a special judge appointed to act during the disability of the regular judge, of course, is not limited to the term, but continues during such disability.<sup>13</sup> Where the authority of the judge is confined to a particular cause, it terminates with the final disposition of that cause.<sup>14</sup> It does not necessarily cease, however, with

*v. Baisley*, 15 Ore. 183, 13 Pac. 888. **Tex.**—*Bedford v. Stone*, 43 Tex. Civ. App. 200, 95 S. W. 1086.

[a] **Judge Pro Tem Is a Substitute.** The "organic law of the state provides for one district judge in each judicial district. . . . There is but one district court and one district judge in a district. The officer is not to be duplicated; and when a term commences in one county, the court everywhere else in the district is closed or suspended. A judge pro tem. is only a substitute, and never a duplicate." *In re Millington*, 24 Kan. 214.

7. *Dial v. Com.*, 142 Ky. 32, 133 S. W. 976; *Paducah Land, C. & I. Co. v. Cochran*, 18 Ky. L. Rep. 465, 37 S. W. 67.

8. *State ex rel. Lohman v. District Court*, 49 Mont. 247, 141 Pac. 659.

9. *State v. Hudspeth*, 159 Mo. 178, 60 S. W. 136; *State v. Silva*, 130 Mo. 440, 32 S. W. 1007; *Fordyce v. State*, 115 Wis. 608, 92 N. W. 430.

10. **Ind.**—*Greenup v. Crooks*, 50 Ind. 410. **Ky.**—*Crane v. Brooke*, 109 Ky. 647, 60 S. W. 404; *Small v. Reeves*, 104 Ky. 289, 46 S. W. 726; *Childers v. Little*, 96 Ky. 376, 29 S. W. 319. **Miss.** *Hale Com. Co. v. Crook & Co.*, 87 Miss. 445, 40 So. 20, 1006. **N. C.**—*Royal v. Thornton*, 150 N. C. 293, 63 S. E. 1040. **Okla.**—*Co-Operative Gin & Elev.*

*Co. v. Asbury*, 40 Okla. 141, 142 Pac. 802; *Cantwell v. Patterson*, 40 Okla. 497, 139 Pac. 517; *Howell v. State*, 6 Okla. Crim. 627, 117 Pac. 723. **S. C.** *Stokes v. Murray*, 94 S. C. 18, 77 S. E. 712.

[a] **He has no authority to render a decree at a term of court subsequent to that at which he was elected.** *Goodbar Co. v. Stewart*, 70 Ark. 407, 68 S. W. 250.

[b] **A conviction of a crime at a trial held before a special judge at a term subsequent to that at which he was elected is void.** *Low v. State*, 111 Tenn. 81, 78 S. W. 110.

11. **Ind.**—*Perkins v. Hayward*, 124 Ind. 445, 24 N. E. 1033; *Cincinnati R. Co. v. Rowe*, 17 Ind. 568. **Ky.**—*Phillips v. Phillips*, 149 Ky. 206, 148 S. W. 51; *Dupoyster v. Clarke*, 121 Ky. 694, 90 S. W. 1. **Mo.**—*State v. Davidson*, 69 Mo. 509.

[a] **At Adjourned Session.**—A special judge may try a case at a session adjourned for that purpose. *Dillard v. State*, 65 Ark. 404, 46 S. W. 533.

12. *Ellington v. State*, 7 Okla. Crim. 252, 123 Pac. 186.

13. *Warner v. Ford, etc. Co.*, 123 Ky. 103, 93 S. W. 650.

14. **Cal.**—*Matthews v. Superior Court*, 68 Cal. 638, 10 Pac. 128. **Ga.** *Norris v. Pollard*, 75 Ga. 358. **Ind.**

the entry of the judgment but continues over matters connected therewith.<sup>16</sup> Hence, a special judge appointed to hear a cause is vested with the power to hear a motion to vacate the findings<sup>16</sup> and to set aside a judgment entered by him.<sup>17</sup> A special judge having inadvertently neglected to sign his minutes, may subsequently supply the omission,<sup>18</sup> and he may enter a final judgment after the trial term, where such judgment was rendered by him during the term.<sup>19</sup>

**2. Settling Bill of Exceptions.**—So too, a special judge may settle a bill of exceptions in a case tried before him,<sup>20</sup> and in the event that an order extending the time for the presentation of a bill of exceptions had been made by a special judge during his term, he is empowered to settle such bill of exceptions after the adjournment of his term.<sup>21</sup>

**3. New Trial.**—The power of a special judge extends to the hearing of a motion for a new trial in the cause heard before him,<sup>22</sup>

Mayer *v.* Haggerty, 138 Ind. 628, 38 N. E. 42; Jones *v.* Peters, 28 Ind. App. 383, 62 N. E. 1019. Mo.—State *v.* Wear, 129 Mo. 619, 31 S. W. 608; State *v.* Sneed, 91 Mo. 552, 4 S. W. 411. Neb.—Nebraska Mfg. Co. *v.* Maxon, 23 Neb. 224, 36 N. W. 492. Wash. Fisher *v.* Puget Sound Co., 34 Wash. 578, 76 Pac. 107.

15. Hentig *v.* Thomas, 7 Kan. App. 115, 53 Pac. 80.

[a] Contempt proceedings (1) for violation of an injunction granted by a special judge may be held before him. State *v.* Voorhies, 50 La. Ann. 807, 24 So. 276. (2) But in Kissel *v.* Lewis, 27 Ind. App. 302, 61 N. E. 209, it is held that upon the entry of a decree for a permanent injunction the authority of the special judge ceases, as such entry is a final disposition of the cause, and the special judge has no power to hear subsequent contempt proceedings instituted by reason of a violation of such injunction.

16. Fisher *v.* Puget Sound Co., 34 Wash. 578, 76 Pac. 107.

17. Harris *v.* Musgrave, 72 Tex. 18, 9 S. W. 90.

18. Ind.—Bietman *v.* Hopkins, 109 Ind. 177, 9 N. E. 720. Ky.—Sublett *v.* Gardner, 144 Ky. 190, 137 S. W. 864. Tenn.—Spencer *v.* Armstrong, 12 Heisk. 707.

19. Pennington *v.* State, 13 Tex. App. 44.

20. Ark.—Watkins *v.* State, 37 Ark. 370. Fla.—Bacon *v.* State, 22 Fla. 46.

Ind.—Shugart *v.* Miles, 125 Ind. 445, 25 N. E. 551. Kan.—Missouri, K. & T. Ry. Co. *v.* City of Fort Scott, 15 Kan. 435. Ky.—McFarland *v.* Benton, 10 Ky. L. Rep. 873. Mo.—Holliday *v.* Mansker, 44 Mo. App. 465. W. Va. Carper *v.* Cook, 39 W. Va. 346, 19 S. E. 379.

See 4 STANDARD PROC. 334.

[a] Where he did not hear the evidence he cannot settle a bill of exceptions, although a motion for a new trial is made before him. Travellers' Ins. Co. *v.* Leeds, 38 Ind. 444. See also Finch *v.* Travellers' Ins. Co., 87 Ind. 302.

21. Fla.—Bacon *v.* State, 22 Fla. 46. Ind.—Lerch *v.* Emmett, 44 Ind. 331. Kan.—Missouri P. Ry. Co. *v.* Preston, 63 Kan. 819, 66 Pac. 1050; Missouri Ry. Co. *v.* City of Fort Scott, 15 Kan. 435. Mo.—Holliday *v.* Mansker, 44 Mo. App. 465. W. Va.—Carper *v.* Cook, 39 W. Va. 346, 19 S. E. 379.

[a] In the absence of an order (1) fixing the time for the settlement of a bill of exceptions, a special judge is without authority to settle a bill of exceptions after expiration of his term. Columbia Mfg. Co. *v.* Stoddard Mfg. Co., 61 Kan. 640, 60 Pac. 320. (2) But in the absence of the special judge at the day fixed for settlement of a bill of exceptions, it may be continued to the next term and the special judge may settle and sign it at that time. McFarland *v.* Burton, 89 Ky. 294, 12 S. W. 336.

22. Clayton & Co. *v.* Wallace, 41 Ga.

or in a cause heard before a regular judge on account of whose disability the special judge is sitting.<sup>23</sup> And a special judge elected to try a particular cause may retry the cause upon the granting of a new trial either upon motion or reversal on appeal.<sup>24</sup>

**D. OBJECTIONS TO SPECIAL JUDGE.**—Objections to a special judge must be made prior to the hearing of the cause,<sup>25</sup> and in the absence of a timely objection, neither the validity of the appointment of the special judge<sup>26</sup> nor his qualification<sup>27</sup> or his power to act in the cause<sup>28</sup> can be questioned. Hence objections to a special judge

468; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

23. *Bremen Bank v. Umrath*, 55 Mo. App. 43.

24. *State v. Sneed*, 91 Mo. 552, 4 S. W. 411.

[a] But where a cause remanded for a new trial was heard before a special judge by reason of disqualification of the regular judge and the latter has been succeeded in office by another judge who is not disqualified, the new trial must be heard before the new regular judge. *Lacy v. Barrett*, 75 Mo. 469.

25. *Ala.*—*Kimball v. Penney*, 117 Ala. 245, 22 So. 899. *Ark.*—*Adams v. State*, 11 Ark. 466. *Cal.*—*Oakland v. Hart*, 129 Cal. 98, 61 Pac. 779. *Ind.*—*Ripley v. Mutual Home & S. Assn.*, 154 Ind. 155, 56 N. E. 89; *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071. *Kan.*—*Missouri Pac. R. Co. v. Preston*, 63 Kan. 819, 66 Pac. 1050; *List v. Jockheck*, 59 Kan. 143, 52 Pac. 420. *Ky.*—*Smith v. Com.*, 20 Ky. L. Rep. 1848, 50 S. W. 241; *Kentucky R. Co. v. Kenney*, 82 Ky. 154. *Mo.*—*State ex rel. Morrison v. Stanton*, 235 Mo. 222, 138 S. W. 337; *Field v. Mark*, 125 Mo. 502, 28 S. W. 1004. *Tex.*—*Schultze v. McLeary*, 73 Tex. 92, 11 S. W. 924; *Campbell v. McFadden*, 9 Tex. Civ. App. 379, 31 S. W. 436.

26. *Ark.*—*Blagg v. Fry*, 105 Ark. 256, 151 S. W. 699. *Cal.*—*Oakland v. Hart*, 129 Cal. 98, 61 Pac. 779. *Fla.*—*Tillman v. State*, 58 Fla. 113, 50 So. 675, 138 Am. St. Rep. 100. *Ind.*—*Lillie v. Trentman*, 130 Ind. 16, 29 N. E. 465; *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071; *Taylor v. Bosworth*, 1 Ind. App. 54, 27 N. E. 115. *Kan.*—*Missouri Pac. Ry. Co. v. Preston*, 63 Pac. 444, *affirmed*, 63 Kan. 819, 66 Pac. 1050. *Ky.*—*Tabor v. Armstrong*, 30 Ky. L. Rep. 938, 99 S. W. 957. *Mo.*

*State v. Wear*, 145 Mo. 162, 46 S. W. 1099; *State v. Gilmore*, 110 Mo. 1, 19 S. W. 218. *N. Y.*—*In re Hathaway*, 71 N. Y. 238. *Okla.*—*Ellington v. State*, 7 Okla. Crim. 252, 123 Pac. 186. *Tex.*—*Hall v. Jankofsky*, 9 Tex. Civ. App. 504, 29 S. W. 515. *Wash.*—*State v. Sachs*, 3 Wash. 691, 29 Pac. 446.

27. *Ky.*—*Salter v. Salter's Creditors*, 6 Bush 624; *Trice v. Com.*, 14 Ky. L. Rep. 272. *Mo.*—*State v. Van Wye*, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627; *State v. Miller*, 111 Mo. 542, 20 S. W. 243. *Tex.*—*Western Union Tel. Co. v. Neel*, 35 S. W. 29; *Ford v. First Nat. Bank*, 34 S. W. 684; *Campbell v. McFadden*, 9 Tex. Civ. App. 379, 31 S. W. 436. *Wash.*—*First Nat. Bank v. Parker*, 28 Wash. 234, 68 Pac. 756, 92 Am. St. Rep. 828.

[a] Where the parties proceed to a trial of a cause before a special judge, who failed to take the oath of office, they will not afterwards be heard to urge the objection that the special judge did not qualify. *Grant v. Holmes*, 75 Mo. 109.

28. *Ark.*—*Sweeptzer v. Gaines*, 19 Ark. 96. *Cal.*—*People v. Mellon*, 40 Cal. 648. *Ga.*—*Baldwin v. Ragan*, 6 Ga. App. 529, 65 S. E. 335. *Ind.*—*Thomas v. Felt*, 21 Ind. App. 265, 52 N. E. 171. *Ky.*—*Spencer County Court v. Com.*, 84 Ky. 36; *Kentucky R. Co. v. Kenney*, 82 Ky. 154; *Tabor v. Armstrong*, 30 Ky. L. Rep. 938, 99 S. W. 957. *Tex.*—*Davis v. Bingham* (Tex. Civ. App.), 46 S. W. 840.

[a] Where a special judge elected to try a cause which is not determined at the term at which he is elected continues to hear the same at a subsequent term and no objection thereto is made by the parties, they will be deemed to have waived any objection on the ground that the special judge was not re-elected at the subsequent

cannot be raised for the first time in the appellate court,<sup>29</sup> and the authority of a special judge can be reviewed on appeal only in cases in which the record discloses the fact that objection thereto had been duly made in the trial court,<sup>30</sup> though it is held that the record should show the manner of appointment of the special judge and the fact of his having been duly qualified to act.<sup>31</sup> The objection to the special judge may be made in any form,<sup>32</sup> and the grounds of such objection as presented in the trial court may be embodied in a bill of exceptions to be presented on appeal.<sup>33</sup>

**E. ACTS OF SPECIAL JUDGE.**—The rulings of a special judge are entitled to the same weight and credit as those of the regular judge,<sup>34</sup> and his authority cannot be collaterally attacked by a party who without objection proceeds to trial before him.<sup>35</sup> Neither can the regularity of his acts within his jurisdiction be attacked by writ of prohibition,<sup>36</sup> and a judgment of ouster upon a writ of quo warranto does not affect a judgment previously rendered by a special judge unless it appears from the record of the cause that objection to the authority of such judge was made before the hearing.<sup>37</sup>

term. *Small v. Reeves* (Ky.), 37 S. W. 682.

[b] **Judge Appointed During Course of Trial.**—And where during a trial of a cause the regular judge was compelled to absent himself for several days and a special judge took his place, the parties consenting that the trial proceed from that point, no objection can be raised thereafter that the special judge failed to begin the trial anew. *Burrage v. State*, 101 Miss. 598, 58 So. 217.

29. **Ark.**—*Sweeptzer v. Gaines*, 19 Ark. 96. **Ind.**—*Bowen v. Swander*, 121 Ind. 164, 22 N. E. 725; *Board of Comrs. v. Seaton*, 90 Ind. 158; *Winterrowd v. Messick*, 37 Ind. 122; *Watts v. State*, 33 Ind. 237; *Wilson v. Whitsell*, 24 Ind. 306. **Kan.**—*Highby v. Ayres*, 14 Kan. 331. **Ky.**—*Vandever v. Vandever*, 3 Mete. 137. **Mo.**—*Carter v. Prior*, 78 Mo. 222. **S. C.**—*State v. Anone*, 2 Nott & M. 27. **Tex.**—*Shultz Bros. v. Lempert*, 55 Tex. 273; *Western Union Co. v. Neel* (Tex. Civ. App.), 35 S. W. 29. **Wash.**—*First Nat. Bank v. Parker*, 28 Wash. 234, 68 Pac. 756, 92 Am. St. Rep. 828. **W. Va.**—*Winans v. Winans*, 22 W. Va. 678.

30. **Ark.**—*Sweeptzer v. Gaines*, 19 Ark. 96. **Ind.**—*Schlunegger v. State*, 113 Ind. 295, 15 N. E. 269; *Kenney v. Phillippy*, 91 Ind. 511; *Thomas v. Felt*, 21 Ind. App. 265, 52 N. E. 171. See *State v. Murdock*, 86 Ind. 124; *Negley v. Wilson*, 14 Ind. 215. **Mo.**—*State v.*

*Gilmore*, 110 Mo. 1, 19 S. W. 218; *Green v. Walker*, 99 Mo. 68, 12 S. W. 353. **Neb.**—*Taylor v. Tilden*, 3 Neb. 339. **Tex.**—*Smith v. State*, 6 S. W. 40; *Shultz Bros. v. Lempert*, 55 Tex. 273. **Wash.**—*State v. Sachs*, 3 Wash. 691, 29 Pac. 446. **W. Va.**—*State v. Newman*, 49 W. Va. 724, 39 S. E. 655; *Winans v. Winans*, 22 W. Va. 678.

31. **Ala.**—*Horton v. Pool*, 40 Ala. 629. **Ga.**—*Worsham v. Murchison*, 66 Ga. 715. **Ky.**—*Slone v. Slone*, 2 Mete. 239. **Mo.**—*Smith v. Haworth*, 53 Mo. 88. **Tenn.**—*Low v. State*, 111 Tenn. 81, 78 S. W. 110. **Tex.**—*Shultz Bros. v. Lempert*, 55 Tex. 273.

32. *Small v. Reeves*, 104 Ky. 289, 46 S. W. 726, formal motion or affidavit unnecessary.

33. *White v. Reagan*, 25 Ark. 622.

34. *State v. Wear*, 145 Mo. 162, 46 S. W. 1099.

35. **Cal.**—*People v. Mellon*, 40 Cal. 648. **Ind.**—*Crawford v. Lawrence*, 154 Ind. 288, 56 N. E. 673; *Adams v. Gowan*, 89 Ind. 358; *State v. Murdock*, 86 Ind. 124. **La.**—*State v. Debailion*, 36 La. Ann. 828. **Mo.**—*State v. Miller*, 111 Mo. 542, 20 S. W. 243. **Tex.**—*Hall v. Jankofsky*, 9 Tex. Civ. App. 504, 29 S. W. 515. **Wash.**—*Smith v. Sullivan*, 33 Wash. 30, 73 Pac. 793.

36. *Epperson v. Rice*, 102 Ala. 668, 15 So. 434.

37. *Caldwell's Admr. v. Bell*, 6 Ark. 227.

**XI. DE FACTO JUDGES.**—A de facto judge while exercising the functions of his office possesses all the powers of a judge de jure,<sup>38</sup> and his acts are as valid and binding upon the public as those of a regular judge,<sup>39</sup> although he failed to qualify,<sup>40</sup> or his election or appointment was irregular,<sup>41</sup> or the statute under which he was appointed is declared unconstitutional,<sup>42</sup> or is repealed,<sup>43</sup> or his election or appointment is subsequently declared void.<sup>44</sup>

And where a judge believing that his term commences immediately proceeds to hold court while in fact his term has not begun, his acts are nevertheless valid.<sup>45</sup> But where a judge is appointed in violation of an express statute,<sup>46</sup> or is appointed orally,<sup>47</sup> or the court over which he assumes to preside has been abolished by law,<sup>48</sup> he is not a judge de facto as he has no color of title and his acts are void from the beginning.

In the absence of a showing to the contrary it will be presumed that a judge de facto was duly qualified to act,<sup>49</sup> and where the parties proceed without objection to trial before a judge de facto all ob-

38. *Brady v. Howe*, 50 Miss. 607.

39. **U. S.**—*In re Manning*, 139 U. S. 504, 11 Sup. Ct. 624, 35 L. ed. 264. **Colo.**—*Rude v. Sisack*, 44 Colo. 21, 96 Pac. 976. **Fla.**—*State v. Gleason*, 12 Fla. 190. **Kan.**—*In re Corum*, 62 Kan. 271, 62 Pac. 661, 84 Am. St. Rep. 382. **Ky.**—*Eversole v. Steele*, 6 Ky. L. Rep. 525. **N. C.**—*State v. Turner*, 119 N. C. 841, 25 S. E. 810. **Ohio.**—*Ex parte Strang*, 21 Ohio St. 610. **Tenn.**—*Blackburn v. State*, 3 Head 690. **W. Va.**—*State v. Carter*, 49 W. Va. 709, 39 S. E. 611. **Wis.**—*In re Burke*, 76 Wis. 357, 45 N. W. 24.

40. **Kan.**—*In re Hawes*, 62 Kan. 288, 62 Pac. 673. **Mo.**—*State v. Miller*, 111 Mo. 542, 20 S. W. 243. **N. Y.**—*Pepin v. Lachenmeyer*, 45 N. Y. 27. **W. Va.**—*Tower v. Whip*, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937.

[a] Where a special judge is commissioned by the governor to try a criminal case and he assumes the duties of his office, his acts are valid as those of a de facto judge even though he failed to take the required oath. *Powers v. State*, 83 Miss. 691, 36 So. 6.

41. **U. S.**—*In re Manning*, 139 U. S. 504, 11 Sup. Ct. 624, 35 L. ed. 264. **Ind.**—*Jordan v. Indianapolis Coal Co.*, 52 Ind. App. 542, 100 N. E. 880. **Miss.**—*Brady v. Howe*, 50 Miss. 607. **Mo.**—*Usher v. Western Union Tel. Co.*, 122 Mo. App. 98, 98 S. W. 84. **N. C.**—*State v. Turner*, 119 N. C. 841, 25 S. E. 810; *State*

*v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105. **Tenn.**—*Moore v. State*, 5 Sneed 510. **Wash.**—*Smith v. Sullivan*, 33 Wash. 30, 73 Pac. 793. **W. Va.**—*State v. Carter*, 49 W. Va. 709, 39 S. E. 611. **Wis.**—*State v. Bloom*, 17 Wis. 521.

42. **Ala.**—*Alabama Nat. Bank v. Williams*, 144 Ala. 406, 38 So. 240; *Walker v. State*, 142 Ala. 7, 39 So. 242. **Conn.**—*State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409. **Ky.**—*Nagel v. Bosworth*, 148 Ky. 807, 147 S. W. 940. **Mo.**—*State v. Douglass*, 50 Mo. 593. **Mont.**—*Ex parte Parks*, 3 Mont. 426. **Nev.**—*Walcott v. Wells*, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59.

43. *Turney v. Dibrell*, 3 Baxt. (Tenn.) 235; *Venable v. Curd*, 2 Head (Tenn.) 582.

44. *Masterson v. Matthews*, 60 Ala. 260.

45. *State v. Ely*, 16 N. D. 569, 113 N. W. 711, 14 L. R. A. (N. S.) 638; *McCraw v. Williams*, 33 Gratt. (74 Va.) 510.

46. *State v. Fritz*, 27 La. Ann. 689.

47. *Herbster v. State*, 80 Ind. 484.

48. *Daniel v. Hutcheson*, 4 Tex. Civ. App. 239, 22 S. W. 278.

49. *State v. Murdock*, 86 Ind. 124; *Missouri Pac. Ry. Co. v. Preston*, 63 Kan. 819, 66 Pac. 1050. But see *Cooper v. Lingo*, 17 Ind. 67.

jections to his authority to act are deemed waived.<sup>50</sup> The right of a de facto judge to act can be questioned only in a direct proceeding to which he is a party,<sup>51</sup> such as a proceeding of quo warranto.<sup>52</sup> Neither the authority of a de facto judge<sup>53</sup> nor his acts<sup>54</sup> can be collaterally attacked.<sup>55</sup> Thus, the title to the office of a de facto judge cannot be inquired into on habeas corpus,<sup>56</sup> or upon an appeal from a judgment rendered by the de facto judge.<sup>57</sup>

**XII. COURT COMMISSIONERS.**—The powers of court commissioners are generally defined by statute and they cannot exercise any authority beyond what is expressly conferred upon them;<sup>58</sup> the statute

50. *Crawford v. Lawrence*, 154 Ind. 288, 56 N. E. 673; *Schlunger v. State*, 113 Ind. 295, 15 N. E. 269; *State v. Murdock*, 86 Ind. 124.

51. **U. S.**—*Manning v. Weeks*, 139 U. S. 504, 11 Sup. Ct. 624, 35 L. ed. 264. **Ark.**—*Keith v. State*, 49 Ark. 439, 5 S. W. 880. **Cal.**—*People v. Sassovich*, 29 Cal. 480; *People v. Rosborough*, 14 Cal. 180. **Conn.**—*Brown v. O'Connell*, 36 Conn. 432, 4 Am. Rep. 89. **Ia.**—*Ex parte Strahl*, 16 Iowa 369. **Kan.**—*Missouri Pac. R. Co. v. Preston*, 63 Kan. 819, 66 Pac. 1050; *In re Hewes*, 62 Kan. 288, 62 Pac. 673. **Ky.**—*Orme v. Com.*, 21 Ky. L. Rep. 1412, 55 S. W. 195. **Me.**—*Woodside v. Wagg*, 71 Me. 207. **Mass.**—*Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374. **Miss.**—*Cooper v. Moore*, 44 Miss. 386. **Mont.**—*Ex parte Parks*, 3 Mont. 426. **Nev.**—*Walcott v. Wells*, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59. **N. Y.**—*Nelson v. People*, 23 N. Y. 293. **Ore.**—*State v. Whitney*, 7 Ore. 386. **Pa.**—*Campbell v. Com.*, 96 Pa. 344. **Tenn.**—*Blackburn v. State*, 3 Head 690. **Tex.**—*Ex parte Call*, 2 Tex. App. 497. **Va.**—*McCraw v. Williams*, 33 Gratt. (74 Va.) 510. **W. Va.**—*State v. Carter*, 49 W. Va. 709, 39 S. E. 611. **Wis.**—*In re Manning*, 76 Wis. 365, 45 N. W. 26; *In re Boyle*, 9 Wis. 264.

52. *Clark v. Com.*, 29 Pa. 129. See the title "Quo Warranto."

53. **Ark.**—*Keith v. State*, 49 Ark. 439, 5 S. W. 880. **Cal.**—*People v. Sassovich*, 29 Cal. 480. **Colo.**—*Henderson v. Glynn*, 2 Colo. App. 303, 30 Pac. 265. **Fla.**—*State v. Gleason*, 12 Fla. 190. **Ind.**—*Littleton v. Smith*, 119 Ind. 230, 21 N. E. 886; *State v. Murdock*, 86 Ind. 124. **Kan.**—*Missouri Pac. Ry. Co. v. Preston*, 63 Kan. 819, 66 Pac. 1050. **Ky.**—*Orme v. Com.*, 21 Ky. L. Rep. 1412, 55 S. W. 195. **La.**—*Guilbean v.*

*Cormier*, 32 La. Ann. 930. **Mont.**—*Ex parte Parks*, 3 Mont. 426. **Pa.**—*Clark v. Com.*, 29 Pa. 129.

54. **U. S.**—*McDowell v. United States*, 159 U. S. 596, 16 Sup. Ct. 111, 40 L. ed. 271; *Ball v. United States*, 140 U. S. 118, 11 Sup. Ct. 761, 35 L. ed. 377. **Kan.**—*Briggs v. Voss*, 73 Kan. 418, 85 Pac. 571. **Ky.**—*Orme v. Com.*, 21 Ky. L. Rep. 1412, 55 S. W. 195. **La.**—*State v. Williams*, 35 La. Ann. 742. **Mich.**—*People v. Gobles*, 67 Mich. 475, 35 N. W. 91. **Minn.**—*Burt v. Winona & St. P. R. Co.*, 31 Minn. 472, 18 N. W. 285, 289. **Miss.**—*Rosetto v. City of Bay St. Louis*, 97 Miss. 409, 52 So. 785; *Cooper v. Moore*, 44 Miss. 386. **Mo.**—*State v. Draper*, 48 Mo. 56. **Neb.**—*State v. Moores*, 70 Neb. 56, 99 N. W. 504. **N. J.**—*Byer v. Harris*, 77 N. J. L. 304, 72 Atl. 136. **N. Y.**—*Morris v. People*, 3 Denio 381. **N. D.**—*State v. Bednar*, 18 N. D. 484, 121 N. W. 614. **Ohio.**—*Ex parte Strang*, 21 Ohio St. 610. **Ore.**—*State v. Whitney*, 7 Ore. 386. **Pa.**—*Clark v. Com.*, 29 Pa. 129. **Tex.**—*Hamilton v. State*, 40 Tex. Crim. 464, 51 S. W. 217. **Va.**—*McCraw v. Williams*, 33 Gratt. (74 Va.) 510. **Wis.**—*In re Burke*, 76 Wis. 357, 45 N. W. 24.

55. As to collateral attack generally, see the title "Judgments."

56. **Ia.**—*Ex parte Strahl*, 16 Iowa 369. **Mass.**—*Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374. **Wash.**—*Smith v. Sullivan*, 33 Wash. 30, 73 Pac. 793.

57. *Com. v. Taber*, 123 Mass. 253; *Hamilton v. State*, 40 Tex. Crim. 464, 51 S. W. 217.

58. **Cal.**—*Quiggle v. Trumbo*, 56 Cal. 626. **Mich.**—*People v. Chamblin*, 149 Mich. 653, 113 N. W. 27; *Rowe v. Rowe*, 28 Mich. 353. **Minn.**—*Gere v. Weed*, 3 Minn. 352. **Utah.**—*People v. Hills*, 5 Utah 410, 16 Pac. 405. **Wis.**—*Haight v. Lucia*, 36 Wis. 355; *Bicknell v. Tall-*

in regard thereto must be strictly construed.<sup>59</sup> Nor can their powers be enlarged by consent of the parties.<sup>60</sup> Generally the powers of court commissioners are limited to their respective counties.<sup>61</sup> Where the powers of a court commissioner are derived from an order of court, they are strictly confined to the terms of such order.<sup>62</sup>

The statutes pertaining to court commissioners differ materially in the various jurisdictions. In a number of states court commissioners are vested with judicial powers equal to those of judges of courts of record at chambers,<sup>63</sup> or those of justices of the peace.<sup>64</sup> In others the statute specifically enumerates the powers granted to court commissioners.<sup>65</sup>

Where the statute confers upon them the powers of a judge at chambers, by implication it negatives their power to make orders necessarily involving an adjudication of the cause on the merits<sup>66</sup> and does not include the powers of a court in vacation.<sup>67</sup> Hence, under such statute, a court commissioner has no power to make orders striking out part of a pleading,<sup>68</sup> overruling a demurrer to a complaint,<sup>69</sup> allowing alimony,<sup>70</sup> adjudicating the right to the custody of children,<sup>71</sup> fixing the amount of an appeal bond,<sup>72</sup> issuing attachments for

man, 3 Pinn. 388. **Wyo.**—Huhn v. Quinn, 21 Wyo. 51, 128 Pac. 514.

[a] **A statute conferring upon them power to take testimony** in proceedings for discovery, thus giving them the judicial power to determine what is relevant to the issue, is unconstitutional and void. Mulhern v. Grove, 111 Mich. 528, 70 N. W. 15.

59. People v. Hills, 5 Utah 410, 16 Pac. 405.

60. Jackson v. Puget Sound L. Co., 5 Cal. Unrep. Cas. 966, 52 Pac. 838.

61. Fenelon v. Butts (Wis.), 5 N. W. 784.

[a] **But a writ of habeas corpus** may be issued under the statute, to an adjoining county in case there is no judicial officer there authorized to issue such writ. State v. Hill, 10 Minn. 63.

[b] **Certiorari may be allowed** by a court commissioner although the proceedings did not occur in his county. Loder v. Littlefield, 39 Mich. 374.

62. Jackson v. Puget Sound L. Co., 123 Cal. 97, 55 Pac. 788; Watts v. Newberry, 107 Va. 233, 57 S. E. 657.

63. Mich.—Mulhern v. Grove, 111 Mich. 528, 70 N. W. 15; De Myer v. McGonegal, 32 Mich. 120. **Minn.** Gere v. Weed, 3 Minn. 352. **N. Y.** Harris v. Mason, 10 Wend. 568; Jackson v. Jackson, 3 Cow. 73. **Wash.** Howard v. Hanson, 49 Wash. 314, 95

Pac. 265. **Wis.**—Pfister v. Smith, 95 Wis. 51, 69 N. W. 984; Pellage v. Pellage, 32 Wis. 136. **Wyo.**—Huhn v. Quinn, 21 Wyo. 51, 128 Pac. 514.

64. People v. Hills, 5 Utah 410, 16 Pac. 405.

[a] **Waiting an Hour for Appearance.**—But in the absence of a statute pertaining thereto a court commissioner is not obliged to wait an hour for appearance of defendant after the time at which the summons is made returnable. Fowler v. Bredin, 98 Mich. 133, 56 N. W. 1110.

65. Malone v. Bosch, 104 Cal. 680, 38 Pac. 516.

66. In the Matter of Burger, 39 Mich. 203; In the Matter of Buddington, 29 Mich. 472; Huhn v. Quinn, 21 Wyo. 51, 128 Pac. 514.

67. Gere v. Weed, 3 Minn. 352. But compare Harris v. Mason & Safford, 10 Wend. (N. Y.) 568, holding that under a statute authorizing judges to perform an act in vacation a court commissioner likewise is empowered to act in the matter.

68. Balkins v. Baldwin, 84 Wis. 212, 54 N. W. 403.

69. Gere v. Weed, 3 Minn. 352.

70. Thorp v. Thorp, 2 Mich. N. P. 209.

71. Rowe v. Rowe, 28 Mich. 353.

72. Anonymous, 8 Wis. 388.

contempt,<sup>73</sup> or to accept a plea of guilty in a criminal case.<sup>74</sup>

But under such statute a court commissioner may make an order for service of summons by publication,<sup>75</sup> compel an attorney to produce his authority for commencing an action,<sup>76</sup> issue a warrant of arrest,<sup>77</sup> accept bail,<sup>78</sup> exonerate bail,<sup>79</sup> grant injunctions,<sup>80</sup> dissolve an attachment levied upon real property,<sup>81</sup> enter a judgment by default,<sup>82</sup> tax costs in proceedings before him,<sup>83</sup> hear proceedings supplementary to execution,<sup>84</sup> restrain a defendant upon such proceedings from transferring property not exempt from execution,<sup>85</sup> hear proceedings for condemnation of lands,<sup>86</sup> extend the time for serving a bill of exceptions,<sup>87</sup> approve an appeal bond,<sup>88</sup> and make an order to stay proceedings pending a motion for a new trial.<sup>89</sup>

A court commissioner has no power under any circumstances to review the action of a court.<sup>90</sup> Thus he cannot hear a motion to dissolve an injunction.<sup>91</sup> Nor is he empowered to appoint a receiver.<sup>92</sup> Under some statutes a court commissioner may issue a writ of habeas corpus and determine the matter involved,<sup>93</sup> provided that the inquiry does not contemplate a review of the proceedings of a court.<sup>94</sup> In some jurisdictions a court commissioner may hear eviction proceedings,<sup>95</sup> but where it appears that the question of title is necessarily involved in the proceedings he loses jurisdiction of the matter;<sup>96</sup> nor

73. *Haight v. Lucia*, 36 Wis. 355.

74. *State v. Philip*, 44 Wash. 615, 87 Pac. 955.

75. *Pfister v. Smith*, 95 Wis. 51, 69 N. W. 984.

76. *Harris v. Mason*, 10 Wend. (N. Y.) 568.

77. *Hoskins v. Baxter*, 64 Minn. 226, 66 N. W. 969.

78. *Daniels v. People*, 6 Mich. 381; *Hoskins v. Baxter*, 64 Minn. 226, 66 N. W. 969; *Gere v. Weed*, 3 Minn. 352.

79. *De Myer v. McGonegal*, 32 Mich. 120.

80. *Pulver v. Grooves*, 3 Minn. 359.

81. *Edgarton v. Hinchman*, 7 Mich. 352.

82. *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397.

83. *Watson v. Randall*, 44 Mich. 514, 7 N. W. 84.

84. *Howard v. Hanson*, 49 Wash. 314, 95 Pac. 265.

85. *In re Perry*, 30 Wis. 268.

86. *Smith v. School Dist.*, 40 Mich. 143.

87. *Pellage v. Pellage*, 32 Wis. 136.

88. *Hemstead v. Cargill*, 46 Minn. 141, 48 N. W. 686.

89. *Jackson v. Jackson*, 3 Cow. (N. Y.) 73.

[a] But an order to stay proceedings made by a commissioner after the cause is set for hearing is a nullity. *Lansing v. Mickles*, 2 How. Pr. (N. Y.) 37.

90. *In the Matter of Burger*, 39 Mich. 203; *Boinay v. Coats*, 17 Mich. 411.

91. *Stone v. Bunker Hill, etc. Co.*, 28 Cal. 497.

92. *Quiggle v. Trumbo*, 56 Cal. 626.

93. *State v. Hill*, 10 Minn. 63; *Potter v. Frohbach*, 133 Wis. 1, 112 N. W. 1087.

94. *In the Matter of Burger*, 39 Mich. 203; *In the Matter of Buddington*, 29 Mich. 472.

95. Mich.—*Meeske v. Miller*, 138 Mich. 87, 101 N. W. 52; *Mulder v. Coblett*, 54 Mich. 80, 19 N. W. 756. N. Y. *Lansing v. Mickles*, 2 How. Pr. 37. Utah.—*Hyndman v. Stowe*, 9 Utah 23, 33 Pac. 227.

96. *Jenkinson v. Winans*, 109 Mich. 524, 67 N. W. 549; *Butler v. Bertrand*, 97 Mich. 59, 56 N. W. 342.

may the right of a homestead be adjudicated in a summary proceeding held before a court commissioner.<sup>97</sup>

Under some statutes court commissioners are authorized to perform certain judicial functions during the absence of the judge, such as granting an injunction in any cause in which the judge could have granted it, if present,<sup>98</sup> or acting as a judge of probate in the absence of the regular judge,<sup>99</sup> or vacating a judgment by default;<sup>1</sup> but such power is subject to review by the court.<sup>2</sup> Court commissioners have no power to regulate the order of taking proof before them.<sup>3</sup>

An affidavit of prejudice does not divest a court commissioner of jurisdiction of a cause instituted before him under statutory authority.<sup>4</sup>

Certiorari is the proper remedy to test the decision of a court commissioner upon jurisdictional grounds.<sup>5</sup> A refusal to permit the testimony to be taken by a stenographer does not present a jurisdictional question justifying the issuance of a writ of prohibition.<sup>6</sup>

**XIII. UNITED STATES COMMISSIONERS.**—A United States commissioner is a judicial officer possessing independent though subordinate judicial and ministerial powers.<sup>7</sup> His powers and duties are prescribed by the statute.<sup>8</sup> He is authorized to carry into effect the

97. *Riggs v. Sterling*, 51 Mich. 157, 16 N. W. 320.

98. *McMichael v. Grady*, 34 Fla. 219, 15 So. 765.

99. *Kelley v. Edwards*, 38 Mich. 210.  
1. *Freiberg v. La Clair*, 78 Wis. 164, 47 N. W. 178.

2. *Superior, etc. Co. v. Dunphy*, 93 Wis. 188, 67 N. W. 428.

3. *Brown v. Brown*, 22 Mich. 242.

4. *State ex rel. Mau v. Ausherman*, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548.

5. *Potter v. Frohbach*, 133 Wis. 1, 112 N. W. 1087.

6. *State ex rel. Mau v. Ausherman*, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548.

7. *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. 98, 47 L. ed. 130; *Todd v. United States*, 158 U. S. 278, 15 Sup. Ct. 889, 39 L. ed. 982; *In re Wong Fock*, 81 Fed. 558; *Reagan v. United States*, 35 Ct. Cl. (U. S.) 90. See *In re Eaves*, 30 Fed. 21.

[a] United States Commissioners are neither judges nor courts, nor do they hold courts, although they sometimes act in a quasi judicial capacity, so far as power and jurisdiction is conferred upon them. *United States v. Tom Wah*, 160 Fed. 207.

[b] They are "in legal effect mag-

istrates, and in no sense administrative officials or assistants of the court." *Dennison v. The United States*, 25 Ct. Cl. (U. S.) 304.

[c] **In Criminal Matters.**—"United States commissioners are not conservators of the peace and have no control of police regulations in their districts except where express powers are conferred by a statute of the United States. Their powers and duties in criminal matters are not, therefore, as extensive as those of justices of the peace, but are confined to those which they must necessarily exercise as examining and committing magistrates in enforcing the criminal laws of the United States, and within this limit of jurisdiction they must conform, as near as may be, to the forms and modes of procedure required by law of justices of the peace. *United States v. Harden*, 10 Fed. 802.

**8. U. S.**—*United States v. Allred*, 155 U. S. 591, 15 Sup. Ct. 231, 39 L. ed. 273; *In re Wong Fock*, 81 Fed. 558; *In re Eaves*, 30 Fed. 21. **Ind. Ter.** *Hughes Bros. Mfg. Co. v. Reagan*, 4 Ind. Ter. 472, 69 S. W. 940. **Okla.** *Hoeker v. Carroll*, 35 Okla. 290, 129 Pac. 56.

[a] He possesses the power of courts only so far as the acts of Con-

award or arbitration of any consul of a foreign nation,<sup>9</sup> to issue warrants for deserting foreign seamen,<sup>10</sup> to issue warrants for offenses against the United States,<sup>11</sup> to take affidavits,<sup>12</sup> to take oaths and acknowledgments,<sup>13</sup> to take depositions in any case pending in the United States courts,<sup>14</sup> to accept bail,<sup>15</sup> to discharge poor convicts imprisoned for non-payment of fines,<sup>16</sup> to institute prosecutions for crimes against the elective franchise<sup>17</sup> and the internal revenue laws,<sup>18</sup> to summon masters of vessels to appear before him and show cause why process should not issue against such vessel,<sup>19</sup> to discharge from arrest or imprisonment on mesne or final process,<sup>20</sup> to take appeal bonds in admiralty,<sup>21</sup> and to hold to the security of the peace and for good behavior in cases arising under the constitution and laws of the United States.<sup>22</sup>

So too, a United States commissioner has authority to appoint persons to execute his warrants or other process in relation to crimes against the elective franchise and the civil rights of citizens.<sup>23</sup> In the performance of his duties he is subject to the rules<sup>24</sup> as well as to the supervision and control of the court in the same manner as masters in chancery and registers in bankruptcy.<sup>25</sup> The powers of commissioners are co-extensive with the limits of the judicial districts for which they are appointed,<sup>26</sup> and in criminal matters are confined to offenses against the laws of the United States,<sup>27</sup> though they are

gress confer such power upon him. *United States v. Tom Wah*, 160 Fed. 207.

[b] **As Probate Judge.**—"The jurisdiction of the commissioner as ex officio probate judge to appoint guardians for insane and incompetent persons is derived from the statute, and in order to obtain such jurisdiction it must affirmatively appear that the essential provisions of the statute were complied with." *Martin v. White*, 146 Fed. 461, 76 C. C. A. 671.

9. U. S. Comp. St., §1248.

10. U. S. Comp. St., 1913, §§7630, 10129.

[a] **But he has no power to direct their restoration to the ship from which they deserted.** *United States v. Kelly*, 108 Fed. 538.

11. U. S. Comp. St., 1913, §1674.

12. U. S. Comp. St., §4546.

13. U. S. Comp. St., §3259.

14. U. S. Comp. St., 1913, §1472.

15. U. S. Comp. St., §1571; *United States v. Volz*, 14 Blatchf. 15, 28 Fed. Cas. No. 16,627.

16. U. S. Comp. St., §1706.

17. U. S. Comp. St., §§3928, 3935.

18. U. S. Comp. St., 1913, §1677.

19. U. S. Comp. St., 1913, §8335.

20. U. S. Comp. St., 1913, §1637; *Hayes v. Canada, A. & P. S. S. Co.*, 184 Fed. 821, 108 C. C. A. 175.

21. *The Canary No. 2*, 22 Fed. 536.

22. U. S. Comp. St., §1247.

23. U. S. Comp. St., 1913, §3937; *In re Upchurch*, 38 Fed. 25.

24. *United States v. McGourin*, 106 Fed. 288, 45 C. C. A. 291.

25. *United States v. Allred*, 155 U. S. 591, 15 Sup. Ct. 231, 39 L. ed. 273.

[a] **The court may assume control of proceedings pending before a court commissioner whenever it shall seem expedient.** *United States v. Berry*, 4 Fed. 779.

26. *United States v. Luey Guey Auck*, 115 Fed. 252; *In re Wahll*, 42 Fed. 822; *United States v. Harden*, 10 Fed. 802; *Hocker v. Carroll*, 35 Okla. 290, 129 Pac. 56.

27. *United States v. Hand*, 6 McLean 274, 26 Fed. Cas. No. 15,296.

[a] **A United States commissioner is without jurisdiction to conduct the examination of a person who is charged with an offense not amenable to federal jurisdiction.** *Ex parte Perkins*, 29 Fed. 900.

in Alaska and formerly were in Indian Territory, vested with the powers of a justice of the peace.<sup>28</sup>

The statute does not provide for a uniform mode of procedure before commissioners but they are required to act in conformity with the usual mode of procedure prevailing in the state in which they are appointed.<sup>29</sup> A United States commissioner is authorized to adjourn a hearing, such authority being incidental to the power to hear and determine.<sup>30</sup> As a committing magistrate his jurisdiction is dependent upon a sworn statement of facts, and a complaint on information and belief is insufficient.<sup>31</sup> His duty as such magistrate is to determine whether there is sufficient evidence against the defendant to warrant his being held for the grand jury.<sup>32</sup> The sufficiency of the evidence on which an accused was committed is not open to review in a proceeding by habeas corpus.<sup>33</sup>

A United States commissioner has no power to punish for contempt in proceedings before him, but such power rests in the court which appointed him.<sup>34</sup> The official acts of a United States commissioner are *prima facie* valid,<sup>35</sup> and where the commissioner had jurisdiction any errors or irregularities in the proceedings cannot be attacked collaterally.<sup>36</sup> Certiorari is the proper remedy to vacate a judgment of a United States commissioner, where he had no jurisdiction.<sup>37</sup>

28. **U. S.**—*American Exp. Co. v. Lankford*, 93 Fed. 380, 35 C. C. A. 353. **Alaska.**—*Myers v. Swineford*, 1 Alaska 10. **Ind. Ter.**—*Hughes Bros. Mfg. Co. v. Reagan*, 4 Ind. Ter. 472, 69 S. W. 940.

29. *United States v. Dunbar*, 83 Fed. 151, 27 C. C. A. 488; *United States v. Beavers*, 125 Fed. 778; *United States v. Sauer*, 73 Fed. 671; *United States v. Harden*, 10 Fed. 802; *United States v. Rundlett*, 2 Curt. 41, 27 Fed. Cas. No. 16,208; *United States v. Horton*, 2 Dill. 94, 26 Fed. Cas. No. 15,393.

[a] "This provision of the statute has given rise to diversity of practice in the several states, and this want of uniformity has caused some apparent conflict in judicial decisions." *In re Eaves*, 30 Fed. 21.

[b] In the examination of persons charged with an offense his powers are those common to examining magistrates of the various states. *Ex parte Jones*, 96 Fed. 200; *United States v. Harden*, 10 Fed. 802; *United States v. Horton*, 2 Dill. 94, 26 Fed. Cas. No. 15,393; *United States v. Case*, 8 Blatchf. 250, 25 Fed. Cas. No. 14,742.

30. *United States v. Ewing*, 140 U. S. 142, 11 Sup. Ct. 743, 35 L. ed. 388; *Finn v. Hoyt*, 52 Fed. 83; *United States*

*v. Rundlett*, 2 Curt. 41, 27 Fed. Cas. No. 16,208.

31. *Ex parte Lane*, 6 Fed. 34, Howell N. P. 263; *In re Rule of Court*, 3 Woods 502, 20 Fed. Cas. No. 12,126. See 12 STANDARD PROC. 126, and generally the title "**Preliminary Examination.**"

32. *Ex parte Jones*, 96 Fed. 200; *Hirschbeck v. United States*, 63 Fed. 949.

[a] **Probable Cause.**—Upon examination of a person charged with a crime, the commissioner can only determine whether there is probable cause that the accused committed the crime but he has no power to pass upon the credibility of witnesses or to find any fact. *United States v. Hughes*, 70 Fed. 972.

33. *Ex parte Jones*, 96 Fed. 200; *United States v. Worms*, 4 Blatchf. 332, 28 Fed. Cas. No. 16,765; *In re McDonnell*, 11 Blatchf. 79, 16 Fed. Cas. No. 8,771.

34. *United States v. Beavers*, 125 Fed. 778; *In re Perkins*, 100 Fed. 950.

35. *Hoyt v. Hammekin*, 14 How. (U. S.) 346, 14 L. ed. 449; *England Bros. v. Young*, 26 Okla. 494, 110 Pac. 895.

36. *Stevens v. Fuller*, 136 U. S. 468, 10 Sup. Ct. 911, 34 L. ed. 461.

37. *Franklin v. Bottoms*, 4 Ind. Ter. 711, 76 S. W. 287.

but when acting as an examining magistrate a commissioner is a mere officer of the court, as to whom the writ of prohibition is never employed.<sup>38</sup>

**In Extradition Cases.** — Such commissioners generally are empowered to act in extradition cases.<sup>39</sup> Such proceeding before the commissioner is not in the nature of a trial, but rather of a preliminary examination for the purpose of determining whether the accused shall be surrendered to the foreign government, in which the crime is alleged to have been committed.<sup>40</sup>

**Deportation Cases.** — A commissioner has the power to make an order of deportation under the Chinese exclusion act, and in hearings thereunder he acts judicially;<sup>41</sup> his findings need only show that the person to be deported was unlawfully within the United States.<sup>42</sup>

38. *United States v. Berry*, 4 Fed. 779.

39. *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. 98, 47 L. ed. 130; *Ex parte Lane*, 6 Fed. 34, Howell N. P. 263. See generally the title "Extradition."

40. *Wright v. Henkel*, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. ed. 948; *Benson v. McMahon*, 127 U. S. 457, 8 Sup. Ct. 1240, 32 L. ed. 234.

41. *Chin Bak Kan v. United States*, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. ed. 1121; *Fong Mey Yuk v. United States*, 113 Fed. 898, 51 C. C. A. 528; *United States v. Luey Guey Auck*, 115 Fed. 252; *In re Tsu Tse Mee*, 81 Fed. 562; *In re Wong Fock*, 81 Fed. 558. See 11 STANDARD PROC. 910.

As to exclusion and deportation of aliens see the title "Immigration."

42. *In re Tsu Tse Mee*, 81 Fed. 562.

# JUDICIAL SALES

By the Editorial Staff.

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Admiralty;	Judgments and Decrees,
Attachment;	Enforcement of;
Creditors' Suits;	Mortgages;
Decedents' Estates;	Partition;
Infants;	Returns;
Insane Persons;	Sequestration.

For forms, see 9 STANDARD PROC. 749, and the index to this work.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. DEFINITIONS, DISTINCTIONS AND ILLUSTRATIONS.**

A judicial sale is one made under the process of a court having competent authority to order it, by an officer legally appointed and commissioned to sell.<sup>1</sup> All sales made by order or decree of court re-

1. *Williamson v. Berry*, 8 How. (U. S.) 495, 547, 12 L. ed. 1170, *quoted in the following*: *Lawson v. De Bolt*, 78 Ind. 563; *Texas & P. Ry. Co. v. Gay*, 86 Tex. 571, 26 S. W. 599.

[a] For other definitions, see the following: *U. S.*—*Nevada Nickel Syndicate v. National Nickel Co.*, 103 Fed. 291; *Chew v. Hyman*, 7 Fed. 7. *Ark.*—*Nash v. Delinquent Lands*, 111 Ark. 158, 163 S. W. 1147. *Cal.*—*Halleck v. Guy*, 9 Cal. 181, 70 Am. Dec. 643. *Colo.*—*Union Trading Co. v. Drach*, 58 Colo. 550, 146 Pac. 767. *Ga.*—*Ousley v. Bailey*, 111 Ga. 783, 36 S. E. 750. *Ind.*—*Staser v. Gaar, Scott & Co.*, 38 Ind. App. 696, 78 N. E. 987. *Minn.*—*Lord v. Hawkins*, 39 Minn. 73, 38 N. W. 689. *N. J.*—*Campbell v. Parker*, 59 N. J. Eq. 342, 45 Atl. 116. *Pa.*—*Moore v. Shultz*, 13 Pa. 98, 53 Am. Dec. 446. *S. C.*—*Cathcart v. Sugenhimer*, 18 S. C. 123. *Va.*—*Richardson v. Jones*, 106 Va. 540, 56 S. E. 343; *McAllister v. Harman*, 101 Va. 17, 42 S. E. 920; *Alexander v. Howe*, 85 Va. 198, 7 S. E. 248; *Terry v. Cole's Exr.*, 80 Va. 695. *W. Va.*—*Atkins v. Washington, etc. College*, 54 W. Va. 32, 46 S. E. 253.

As to the order of sale, see *infra*, IV.

[b] It is not the object of the sale, but the mode and manner, the action and decree of the court and the parties being called to judgment which gives it character and renders it judicial. *Sackett v. Twining*, 18 Pa. 199, 57 Am. Dec. 599; *Patton v. Collier*, 90 Tex. 115, 37 S. W. 413.

quiring confirmation by the court are judicial sales.<sup>2</sup> It is indispensable that the sale be made by authority of some court having jurisdiction,<sup>3</sup> that it be made in a pending suit,<sup>4</sup> and generally that the sale be confirmed by the court ordering it,<sup>5</sup> but it is not necessary that it be made at public auction.<sup>6</sup>

Illustrations. — The term "judicial sales" includes sales by assignees for benefit of creditors,<sup>7</sup> sales in partition,<sup>8</sup> sales by receivers,<sup>9</sup> sales on foreclosure of tax liens in tax suits,<sup>10</sup> and sales in bankruptcy proceedings.<sup>11</sup> So also a sale under a decree of the court of probate,<sup>12</sup>

2. *George v. Pracheil*, 92 Neb. 81, 137 N. W. 880; *Kazebeer v. Nunemaker*, 82 Neb. 732, 118 N. W. 646.

3. **U. S.**—*Shriver's Lessee v. Lynn*, 2 How. 43, 11 L. ed. 172; *Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co.*, 165 Fed. 162, 91 C. C. A. 196, sale by guardian without authority to do so not a judicial sale. **Ill.**—*Chambers v. Jones*, 72 Ill. 275. **Tenn.**—*Rucker v. Moore*, 1 Heisk. 726.

As to necessity for order or decree of sale, see *infra*, IV, A.

4. **Neb.**—*Neligh v. Keene*, 16 Neb. 407, 20 N. W. 277. **Va.**—*Alexander v. Howe*, 85 Va. 198, 7 S. E. 248; *Terry v. Cole's Exr.*, 80 Va. 695. **Eng.**—*Midhurst v. Waite*, 3 Burr. 1259, 1262, 97 Eng. Reprint 821.

[a] "A judicial sale is made pendente lite; whereas, an execution sale is made after litigation in the case is ended, for, as we have before seen, a judicial act is something done during the pendency of a suit. The suit does not end with a decree of sale; the proceeding still continues until final confirmation." *Rover Jud. Sales*, §§1, 18; *Williamson v. Berry*, 8 How. 495." *Alexander v. Howe*, 85 Va. 198, 7 S. E. 248; *Terry v. Cole's Exr.*, 80 Va. 695.

5. See *infra*, XI, B.

[a] It is the confirmation by the court, and not the bids or propositions to buy that constitute the sale a judicial one. *Hess v. Rader*, 26 Gratt. (67 Va.) 746.

6. *Hess v. Rader*, 26 Gratt. (67 Va.) 746.

Whether sale shall be public or private, see *infra*, IX, C, 2.

7. *Peele v. Ohio & Indiana Oil Co.*, 158 Ind. 374, 63 N. E. 763; *Wright v. Gelvin*, 85 Ind. 128; *Lawson v. De Bolt*, 78 Ind. 563; *Dresbach v. Stein*, 41 Ohio St. 70.

8. **Ala.**—*Cates v. Johnson*, 109 Ala. 126, 19 So. 416; *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297. **Cal.**—*Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167. **Ill.**—*Speck v. Pullman Palace Car Co.*, 121 Ill. 33, 12 N. E. 213. **Ind.**—*Staser v. Gaar, Scott & Co.*, 38 Ind. App. 696, 78 N. E. 987. **Miss.**—*Gulf Coast Canning Co. v. Foster*, 17 So. 683. **Mo.**—*45 S. W. 368*; *Burden v. Taylor*, 124 Burnham's Heirs v. Hitt, 143 Mo. 414, Mo. 12, 27 S. W. 349; *Evans v. Snyder*, 64 Mo. 516; *Hewitt v. Lally*, 51 Mo. 93. **Neb.**—*George v. Pracheil*, 92 Neb. 81, 137 N. W. 880; *Kazebeer v. Nunemaker*, 82 Neb. 732, 118 N. W. 646. **Nev.**—*Dazet v. Landry*, 21 Nev. 291, 30 Pac. 1064. **Pa.**—*Kaufmann v. Pittsburg*, 248 Pa. 41, 93 Atl. 779; *Girard Life Ins., etc. Co. v. F. & M. Nat. Bank*, 57 Pa. 388; *Sackett v. Twining*, 18 Pa. 199, 57 Am. Dec. 599.

9. **U. S.**—*In re Illinois Third Nat. Bank*, 9 Biss. 535, 4 Fed. 775. **Ala.**—*Rome & D. R. Co. v. Sibert*, 97 Ala. 393, 12 So. 69. **Ga.**—*Southern Cotton Mills v. Ragan*, 138 Ga. 504, 75 S. E. 611. **Ind.**—*Cressler v. Tri-State L. & T. Co.*, 182 Ind. 572, 107 N. E. 68. **N. J.**—*Campbell v. Parker*, 59 N. J. Eq. 342, 45 Atl. 116. **N. Y.**—*Matter of Denison*, 114 N. Y. 621, 21 N. E. 97. **Tex.**—*Dilley v. Jasper Lumber Co.* (Tex. Civ. App.), 114 S. W. 878.

10. *Indiana & Ark. Lumber & Mfg. Co. v. Milburn*, 161 Fed. 531, 88 C. C. A. 473.

11. *Carlisle v. Cassady*, 20 Ky. L. Rep. 562, 46 S. W. 490. See *McCracken v. Kuhn*, 73 Ind. 149; *Ketchum v. Schicketanz*, 73 Ind. 137; *Roberts v. Shroyer*, 68 Ind. 64.

[a] *Receiver in Bankruptcy*.—*Ames Co. v. Slocomb Mercantile Co.*, 166 Ala. 99, 51 So. 994.

12. **U. S.**—*Davis v. Gaines*, 104 U. S. 386, 26 L. ed. 757; *Grignon's Lessee*

such as a sale by a guardian,<sup>13</sup> or by an administrator or executor under an order of the court<sup>14</sup> is a judicial sale, but an executor's sale under a power in a will is not.<sup>15</sup> Sales under judgments in actions foreclosing mortgages are judicial sales,<sup>16</sup> but sales under a power in the mortgage<sup>17</sup> or under a power in a deed of trust<sup>18</sup> are not.

*v. Astor*, 2 How. 319, 11 L. ed. 283; *Thompson v. Tolmie*, 2 Pet. 157, 7 L. ed. 381. **Ala.**—*Bland v. Bowie*, 53 Ala. 152. **Ark.**—*Lumpkins v. Johnson*, 61 Ark. 80, 32 S. W. 65; *Apel v. Kelsey*, 47 Ark. 413, 2 S. W. 102. **Cal.**—*Halleck v. Guy*, 9 Cal. 182, 70 Am. Dec. 643. **La.**—*Jones v. Read*, 1 La. Ann. 200. **Mo.**—*Blickensderffer v. Hanna*, 231 Mo. 93, 132 S. W. 678; *Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572; *Throckmorton v. Pence*, 121 Mo. 50, 25 S. W. 843. **N. J.**—*Podesta v. Binns*, 69 N. J. Eq. 387, 60 Atl. 815. **Pa.**—*Moore v. Shultz*, 13 Pa. 98, 53 Am. Dec. 446; *Vandever v. Baker*, 13 Pa. 121.

**13. U. S.**—*United States Bank v. Ritchie*, 8 Pet. 128, 8 L. ed. 890. **Ark.**—*Greer v. Anderson*, 62 Ark. 213, 35 S. W. 215; *Alexander v. Hardin*, 54 Ark. 480, 16 S. W. 264; *Black v. Walton*, 32 Ark. 321; *Guyann v. McCauley*, 32 Ark. 97. **Cal.**—*Westergreen v. Beer*, 25 Cal. App. 775, 145 Pac. 543. **Ill.**—*Hart v. Burch*, 130 Ill. 426, 22 N. E. 831, 6 L. R. A. 371; *Musgrave v. Conover*, 85 Ill. 374; *Ayers v. Baumgarten*, 15 Ill. 444; *Young v. Keogh*, 11 Ill. 642. **Ind.**—*Maxwell v. Campbell*, 45 Ind. 360. See *Davidson v. Koepler*, 76 Ind. 398. **N. J.**—*Titman v. Riker*, 43 N. J. Eq. 122, 10 Atl. 397.

As to guardian's sales generally, see 12 STANDARD PROC. 827.

**14. U. S.**—*Grignon's Lessee v. Astor*, 2 How. 319, 11 L. ed. 283; *Thompson v. Tolmie*, 2 Pet. 157, 7 L. ed. 381; *May v. Logan*, 30 Fed. 250; *Chew v. Hyman*, 7 Fed. 7, 10 Biss. 240. **Ala.**—*McCully v. Chapman*, 58 Ala. 325; *Bland v. Bowie*, 53 Ala. 152. **Ark.**—See *Thorn v. Ingram*, 25 Ark. 52. **Cal.**—See *Horton v. Jack*, 115 Cal. 29, 46 Pac. 920; *Halleck v. Guy*, 9 Cal. 181, 70 Am. Dec. 643. **Fla.**—See *Myers v. Nourse*, 5 Fla. 516. **Ga.**—See *Green v. Freeman*, 126 Ga. 274, 55 S. E. 45; *Harwell v. Foster*, 102 Ga. 38, 28 S. E. 967. **Haw.**—*Unauna v. Armstrong*, 3

*Hawaii* 705. See *Kauwa v. Dowsett*, 3 Hawaii 625. **Ill.**—See *Bozza v. Rowe*, 30 Ill. 198, 83 Am. Dec. 184. **Mich.**—*Averill v. Jackson City Bank*, 114 Mich. 20, 72 N. W. 15; *Osman v. Traphagen*, 23 Mich. 80. **Minn.**—*Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792. **Miss.**—*Maynard v. Cocke*, 18 So. 374. **Mo.**—*Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572; *Throckmorton v. Pence*, 121 Mo. 50, 25 S. W. 843. See *Agan v. Shannon*, 103 Mo. 661, 15 S. W. 757. **Neb.**—*Motley v. Motley*, 53 Neb. 375, 73 N. W. 738, 68 Am. St. Rep. 608; *Maul v. Hellman*, 39 Neb. 322, 58 N. W. 112. **N. Y.**—*Delaplaine v. Lawrence*, 3 N. Y. 301. **N. C.**—*Mauney v. Pemberton*, 75 N. C. 219; *Mason v. Osgood*, 64 N. C. 467; *Thompson v. Cox*, 53 N. C. 311. **Ore.**—*Stadelman v. Miner*, 155 Pac. 708, 715. **Pa.**—*Armstrong's Appeal*, 68 Pa. 409; *Sackett v. Twining*, 18 Pa. 199, 57 Am. Dec. 599; *Vandever v. Baker*, 13 Pa. 121; *King v. Gunnison*, 4 Pa. 171. **Tex.**—See *Ball v. Collins*, 5 S. W. 622; *Wells v. Mills*, 22 Tex. 302; *Williams v. McDonald*, 13 Tex. 322; *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735. **Utah.**—See *In the Matter of Walker's Est.*, 6 Utah 369, 23 Pac. 930. **Va.**—*Terry v. Cole's Exr.*, 80 Va. 695.

As to executor's and administrator's sales generally, see 6 STANDARD PROC. 543, et seq.

**15. In re Pearson's Estate, 102 Cal. 569, 36 Pac. 934; *Goodell v. Sanford*, 31 Mont. 163, 77 Pac. 522.**

**16. Stone v. Bassett**, 4 Minn. 298; *Texas & Pac. Ry. Co. v. Gay*, 86 Tex. 571, 26 S. W. 599.

**17. Seymour v. National Bldg. & L. Assn.**, 116 Ga. 285, 45 S. E. 518, 94 Am. St. Rep. 131 (whether the power authorizes a public or private sale); *Willard v. Finnegan*, 42 Minn. 476, 44 N. W. 985, 8 L. R. A. 50.

As to mortgage sales generally, see the title "Mortgages."

**18. Finger v. Taylor (Miss.)**, 71 So.

**Non-judicial Sales Distinguished.**—Non-judicial sales are usually made by a public officer acting ministerially under statutory, not judicial, authority, and they need no confirmation.<sup>19</sup>

**Execution Sales Distinguished.**—Strictly speaking a sheriff's sale under an execution is not a judicial sale.<sup>20</sup> In an ordinary execution sale, the sheriff is not the instrument or agent of the court but he acts as a ministerial officer of the law.<sup>21</sup> Generally the sale of any specific property is not directed,<sup>22</sup> and ordinarily the sale, when made, need

269. *Campare, Chew v. Hyman*, 7 Fed. 7.

[a] **Where Court Directs and Approves Sale.**—(1) Where the party executing a deed of trust went into the hands of a receiver, who was also trustee in the deed, and where the court granted permission to sell under the deed and afterwards confirmed the sale, the sale is not a judicial sale. The permission of the court and the confirmation are surplusage. *Finger v. Taylor* (Miss.), 71 So. 269. (2) But in *Parsons v. Little*, 28 App. Cas. (D. C.) 218, the court inclines to the view that a sale under a decree directing the trustees of a deed of trust to sell the property is a judicial sale, without actually deciding so.

19. **U. S.**—*Griffin v. Thompson*, 2 How. 244, 256, 11 L. ed. 253; *In re Haywood Wagon Co.*, 219 Fed. 655, 135 C. C. A. 391. **Haw.**—*Smith v. Pacific Heights Ry. Co.*, 17 Hawaii 96. **Md.** *Harrison v. Harrison*, 1 Md. Ch. 331. **Minn.**—*First Nat. Bank v. Rogers*, 22 Minn. 224. **Miss.**—*Redus v. Hayden*, 43 Miss. 614. **Neb.**—See *Bachle v. Webb*, 11 Neb. 423, 9 N. W. 473. **N. C.** *Mebane v. Mebane*, 80 N. C. 34. **Tenn.** *Lasell v. Powell*, 7 Coldw. 277.

20. **Ark.**—*Hershey v. Latham*, 42 Ark. 305. **Ill.**—*Young v. Keogh*, 11 Ill. 642. **Ind.**—*Lawson v. De Bolt*, 78 Ind. 563. *Contra, Jackman v. Nowling*, 69 Ind. 188; *Taylor v. Stockwell*, 66 Ind. 505. **Kan.**—*Norton v. Reardon*, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459. **Minn.**—*Johnson v. Laybourn*, 56 Minn. 332, 57 N. W. 933; *Willard v. Finnegan*, 42 Minn. 476, 44 N. W. 985, 8 L. R. A. 50; *First Nat. Bank v. Rogers*, 22 Minn. 224. **Mo.** *Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572. *Contra, Hewitt v. Weatherby*, 57 Mo. 276; *Hewitt v. Lally*, 51 Mo. 93. **Neb.**—*Bachle v. Webb*, 11 Neb. 423, 9 N. W. 473.

**N. C.**—*Dula v. Seagle*, 98 N. C. 458, 4 S. E. 549. **Ohio.**—See *Curtis' Lessee v. Norton*, 1 Ohio 278. **Vt.**—*Griffith v. Fowler*, 18 Vt. 390, 394.

[a] "The word execution has always been understood to mean a writ to give possession of a thing recovered by judgment or decree. It is clearly distinguishable from a mere order of sale." *Girard Life Ins., etc. Co. v. F. & M. Bank*, 57 Pa. 388, 397.

[b] **Under Statute Requiring Confirmation of Execution Sale.**—While in *Griffith v. Bogert*, 18 How. (U. S.) 158, 15 L. ed. 307, the court calls a sale under execution a judicial sale it was decided under a statute under which execution sales were required to be confirmed.

[c] **In Georgia and Mississippi** a judicial sale includes an execution sale. *Seymour v. National B. & L. Assn.*, 116 Ga. 285, 42 S. E. 518, 94 Am. St. Rep. 131; *Forbes Piano Co. v. Hennington*, 98 Miss. 51, 53 So. 777, Ann. Cas. 1913A, 1216.

As to execution sales generally, see the title "Judgments and Decrees, Enforcement of."

21. **Ga.**—*Ousley v. Bailey*, 111 Ga. 783, 36 S. E. 750. **Minn.**—*First Nat. Bank v. Rogers*, 22 Minn. 224. **Mo.** *Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572. **Neb.** *Parrat v. Neligh*, 7 Neb. 456. **N. C.** *Dula v. Seagle*, 98 N. C. 458, 4 S. E. 549.

[a] **A sale made by a sheriff** under an ordinary execution is a ministerial act, while a sale made by a commissioner and confirmed by the court is a judicial act. *Dawson v. Litsey*, 10 Bush (Ky.) 408.

22. **Ark.**—*Hershey v. Latham*, 42 Ark. 305. **Md.**—*Andrews v. Scotton*, 2 Bland 629, 637. **Minn.**—*Hastings First Nat. Bank v. Rogers*, 22 Minn. 224. **Mo.**—*Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572.

not be reported<sup>23</sup> or confirmed;<sup>24</sup> whereas judicial sales in theory are made by the court itself through an officer appointed for the purpose who makes his report to the court and confirmation thereof is necessary.<sup>25</sup> The mode and manner of a judicial sale is always subject to the direction of the court.<sup>26</sup> The relationship of the bidders at the two sales is different also.<sup>27</sup>

**Private Sales Distinguished.**—In the case of private sales, the contract of sale is complete when the agreement is signed, but in judicial sales the purchaser is not entitled to the benefit of the contract until it is confirmed by proper authority.<sup>28</sup>

**Auction Sales Distinguished.**—At an ordinary auction sale, the power of the auctioneer ceases the moment the hammer falls and the contract of purchase is then closed, but this is not true of judicial or decretal sales, where the commissioner has a reasonable discretion as to the manner of conducting the sale.<sup>29</sup>

**II. NATURE OF THE PROCEEDINGS.**—Proceedings for judicial sales are generally in the nature of proceedings in rem,<sup>30</sup> although

23. **U. S.**—*In re Haywood Wagon Co.*, 219 Fed. 655, 135 C. C. A. 391. **Ark.**—*Hershey v. Latham*, 42 Ark. 305. **Mo.**—*Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572.

As to report, see *infra*, X.

24. **U. S.**—*In re Haywood Wagon Co.*, 219 Fed. 655, 135 C. C. A. 391. **Ark.**—*Hershey v. Latham*, 42 Ark. 305. **Ky.**—*Dawson v. Litsey*, 10 Bush 408. **Mo.**—*Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572. **N. C.**—*McKee v. Lineberger*, 69 N. C. 217.

As to confirmation generally, see *infra*, XI.

[a] By statute in Nebraska all sales under writs of execution must be reported and confirmed. *Bachle v. Webb*, 11 Neb. 423, 9 N. W. 473.

25. **U. S.**—*In re Haywood Wagon Co.*, 219 Fed. 655, 135 C. C. A. 391. **Haw.**—*Smith v. Pacific Heights Ry. Co.*, 17 Hawaii 96, *affirmed*, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. ed. 803. **Ky.**—*Busey v. Hardin*, 2 B. Mon. 407. **Md.**—*Harrison v. Harrison*, 1 Md. Ch. 331. **Miss.**—*Redus v. Hayden*, 43 Miss. 614. **N. C.**—*Joyner v. Futrell*, 136 N. C. 301, 48 S. E. 649; *Dula v. Seagle*, 98 N. C. 458, 4 S. E. 549; *Mebane v. Mebane*, 80 N. C. 34.

As to necessity for report and confirmation, see *infra*, X, XI.

26. **Ark.**—*Hershey v. Latham*, 42 Ark. 305. **Ga.**—See Civ. Code, §5427;

*Fears v. S.*, 102 Ga. 274, 29 S. E. 463. **Ky.**—*Preston v. Breckinridge*, 86 Ky. 619, 6 S. W. 641; *Dawson v. Litsey*, 10 Bush 408; *Forman v. Hunt*, 3 Dana 614. **Md.**—*Andrews v. Scotton*, 2 Bland 629, 635. **Minn.**—*First Nat. Bank v. Rogers*, 22 Minn. 224. **Mo.**—*Noland v. Barrett*, 122 Mo. 190, 26 S. W. 692, 43 Am. St. Rep. 572. **N. M.**—*Cattle Co. v. Schofield*, 9 N. M. 136, 49 Pac. 954. **Tenn.**—*Lasell v. Powell*, 7 Coldw. 277. See *Johnson v. Evans*, 1 Tenn. Ch. App. 603. **Vt.**—*Griffith v. Fowler*, 18 Vt. 390, 394.

27. *McKee v. Lineberger*, 69 N. C. 217.

[a] Relationship of bidders at sheriff's sales and judicial sales is altogether different. In the latter case the bidder is under the court's protection and control, whereas in the former case the sheriff makes the sale by himself without any confirmation or other act of the court. *McKee v. Lineberger*, 69 N. C. 217.

As to bidding, see *infra*, IX, K.

28. **U. S.**—*Williamson v. Berry*, 8 How. 495, 547, 12 L. ed. 1170. **Ga.**—*Hall v. Taylor*, 133 Ga. 606, 66 S. E. 478. **Va.**—*Carr v. Carr*, 88 Va. 735, 14 S. E. 368. **W. Va.**—*Hyman & Co. v. Smith*, 13 W. Va. 744.

29. *Head v. Clark*, 88 Ky. 362, 11 S. W. 203.

30. **U. S.**—*Florentine v. Barton*, 2 Wall. 210, 17 L. ed. 783; *Beauregard*

sometimes they are partly in rem, and partly in personam.<sup>31</sup> Judicial sales are involuntary,<sup>32</sup> or forced sales within the meaning of the homestead laws.<sup>33</sup> The rule is elementary that in a judicial sale the court is the vendor,<sup>34</sup> acting for and in behalf of all parties interested;<sup>35</sup> although it has been held that it acts as the agent of the defendant,<sup>36</sup> and not the plaintiff.<sup>37</sup> The officer designated to sell acts as the agent of the court in executing the sale, under its guidance and superintendence,<sup>38</sup> and he is not the agent or under the

r. New Orleans, 18 How. 497, 15 L. ed. 469; Grignon's Lessee v. Astor, 2 How. 319, 11 L. ed. 283. **Ala.**—Satcher v. Satcher's Admr., 41 Ala. 26, 91 Am. Dec. 498. **Ind.**—Kellogg v. Tout, 65 Ind. 146. **Ia.**—Morrow v. Weed, 4 Iowa 77, 66 Am. Dec. 122. **S. C.**—Bofil v. Fisher, 3 Rich. Eq. 1, 55 Am. Dec. 627.

See the title "Proceedings in Rem."

[a] The proceeding to subject realty of a decedent to the payment of his debts is not in rem, or a common-law proceeding, but is purely statutory in Oregon. Stadelman v. Miner (Ore.), 155 Pac. 708, 712.

31. Downing v. Palmateer, 1 Mon. (Ky.) 64; Kershaw v. Thompson, 4 Johns. Ch. (N. Y.) 609. See Haines v. Beach, 3 Johns. Ch. (N. Y.) 459.

32. Brady v. Carteret Realty Co., 67 N. J. Eq. 641, 60 Atl. 938, 110 Am. St. Rep. 502, 3 Ann. Cas. 421.

33. Lanahan v. Sears, 102 U. S. 318, 26 L. ed. 180, in Texas.

34. **U. S.**—Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co., 165 Fed. 162, 91 C. C. A. 196; Nevada Nickel Syndicate v. National Nickel Co., 103 Fed. 391. **Ala.**—Howison v. Oakley, 118 Ala. 215, 23 So. 810; Rome & D. R. Co. v. Sibert, 97 Ala. 393, 12 So. 69; Bland v. Bowie, 53 Ala. 152. **Ark.**—Wells v. Lenox, 108 Ark. 366, 159 S. W. 1099; Neal v. Andrews, 53 Ark. 445, 14 S. W. 646; State Nat. Bank v. Neel, 53 Ark. 110, 13 S. W. 700, 22 Am. St. Rep. 185. **Fla.**—Macfarlane v. Macfarlane, 50 Fla. 570, 39 So. 995. **Ga.**—Southern Cotton Mills v. Ragan, 138 Ga. 504, 75 S. E. 611. **Ill.**—Hart v. Burch, 130 Ill. 426, 22 N. E. 831, 6 L. R. A. 371. **Ky.** Hess v. Deppen, 125 Ky. 424, 101 S. W. 362, 15 Ann. Cas. 670; Campbell v. Johnston, 4 Dana 177, 186. **Md.** Conroy v. Carroll, 82 Md. 127, 33 Atl. 423; Mackubin v. Boarman, 54 Md. 390; Schindel v. Keedy, 43 Md. 413; Hurt v. Stull, 4 Md. Ch. 391; Glenn

v. Clapp, 11 Gill & J. 1. **Mich.**—Peirson v. Fisk, 99 Mich. 43, 57 N. W. 1080. **Miss.**—Campe v. Saucier, 68 Miss. 278, 8 So. 846, 24 Am. St. Rep. 273; Tooley v. Kane, Smed. & M. Ch. 518. **Neb.**—Stephenson v. Murdock, 89 Neb. 818, 132 N. W. 406; Neligh v. Keene, 16 Neb. 407, 20 N. W. 277; Parrat v. Neligh, 7 Neb. 456. **Pa.** Armor v. Cochrane, 66 Pa. 308. **W. Va.** Castleman's Admr. v. Castleman, 67 W. Va. 407, 68 S. E. 34.

35. Schindel v. Keedy, 43 Md. 413.

36. Hess v. Deppen, 125 Ky. 424, 101 S. W. 362, 15 Ann. Cas. 670 (compelling him to do what it determines he ought to have done); Cropper v. Brown, 76 N. J. Eq. 406, 74 Atl. 987, 139 Am. St. Rep. 770; Brady v. Carteret Realty Co., 67 N. J. Eq. 641, 60 Atl. 938, 110 Am. St. Rep. 502, 3 Ann. Cas. 421.

37. Hess v. Deppen, 125 Ky. 424, 101 S. W. 362, 15 Ann. Cas. 670.

[a] "The court acts by authority of the law of the land, and the plaintiff is in no sense his principal. If the court makes a mistake, it is a mistake of the law, and not of the plaintiff." Hess v. Deppen, 125 Ky. 424, 101 S. W. 362, 15 Ann. Cas. 670.

38. **U. S.**—Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732; Nevada Nickel Syndicate v. National Nickel Co., 103 Fed. 391. **Ark.**—Sessions v. Peay, 23 Ark. 39. **Fla.**—Macfarlane v. Macfarlane, 50 Fla. 570, 39 So. 995. **Ill.**—Bozza v. Rowe, 30 Ill. 198, 83 Am. Dec. 184. **Md.**—Columbia Paper Bag Co. v. Carr, 116 Md. 541, 82 Atl. 442; Schindel v. Keedy, 43 Md. 413; Bolgiano v. Cooke, 19 Md. 375; Anderson v. Foulke, 2 Har. & G. 346. **Mich.**—Peirson v. Fisk, 99 Mich. 43, 57 N. W. 1080. **Miss.** Tooley v. Kane, Smed. & M. Ch. 518. **Mo.**—Blickensderfer v. Hanna, 231 Mo. 93, 132 S. W. 678. **Neb.**—Stephenson v. Murdock, 89 Neb. 818, 132 N. W. 406; Parrat v. Neligh, 7 Neb. 456.

control of either party.<sup>39</sup> The parties to the sale are the court ordering and approving the sale on one side and the bidder on the other.<sup>40</sup>

**III. CONDITIONS PRECEDENT TO DECREE OR ORDER OF SALE.**—A. **IN GENERAL.**—Various prerequisites to a decree of sale have been held to be necessary,<sup>41</sup> but a compliance with them may be waived by the parties.<sup>42</sup>

B. **NECESSITY FOR LEVY.**—No formal levy is necessary where the decree itself designates the property to be sold.<sup>43</sup>

C. **REMOVING CLOUDS AND IMPEDIMENTS TO SALE, AND ASCERTAINING LIENS.**—It is sometimes required that before a sale is decreed, any cloud on the title or impediment to a fair sale be removed so far as practicable to do so, in order that the property may be sold to the best advantage.<sup>44</sup> Conflicting equities to the property should be first settled,<sup>45</sup> and where liens or other incumbrances upon the property about to be sold exist, such liens and incumbrances, their amounts and priorities must be first ascertained and determined.<sup>46</sup>

Pa.—*Armstrong's Appeal*, 68 Pa. 409; *Armor v. Cochrane*, 66 Pa. 308. W. Va. *Castleman's Admr. v. Castleman*, 67 W. Va. 407, 68 S. E. 34.

39. *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732. But see *Stewart v. Garvin*, 31 Mo. 36; *Neal v. Stone*, 20 Mo. 294.

40. Ky.—*Dawson v. Litsey*, 10 Bush 408. Md.—*Bolgiano v. Cooke*, 19 Md. 375; *Glenn v. Clapp*, 11 Gill & J. 1; *Hurt v. Stull*, 4 Md. Ch. 391; *Andrews v. Scotton*, 2 Bland 629. Mo.—*Blickensderfer v. Hanna*, 231 Mo. 93, 132 S. W. 678. Neb.—*Parrat v. Neligh*, 7 Neb. 456. Pa.—*Armor v. Cochrane*, 66 Pa. 308.

41. See *infra*, this section.

42. *Kennedy v. Bank of Ga.*, 8 How. (U. S.) 586, 12 L. ed. 1209.

[a] A consent decree of sale is a waiver of all technical objections to the order of sale, in so far as to a compliance with the necessary prerequisites thereof. *Kennedy v. Bank of Ga.*, 8 How. (U. S.) 586, 12 L. ed. 1209.

43. U. S.—*Lesamis v. Greenberg*, 223 Fed. 449, 140 C. C. A. 481. Ind.—*Ewing v. Hatfield*, 17 Ind. 513. Kan. *Smith v. Burnes*, 8 Kan. 197. Ore. *German Sav. & Loan Soc. v. Kern*, 38 Ore. 232, 62 Pac. 788, 63 Pac. 1052; *Bank of B. C. v. Page*, 7 Ore. 454.

See also the title "Judgments and Decrees, Enforcement of."

44. *Thomas v. Farmers' Nat. Bank*,

86 Va. 291, 9 S. E. 1122; *Hoge v. Junkin*, 79 Va. 220, 231; *Shultz v. Hansbrough*, 33 Gratt. (74 Va.) 567; *Peers v. Barnett*, 12 Gratt. (53 Va.) 410, 416.

[a] If the party knows of a cloud and does not communicate it to the officer, he cannot interpose an objection on that ground upon ratification of the sale. *Cunningham v. Schley*, 6 Gill (Md.) 207.

As to objections to confirmation generally, see *infra*, XI, J.

45. *Hall v. English*, 47 Ga. 511.

46. U. S.—*United States Bank v. Ritchie*, 8 Pet. 128, 8 L. ed. 890. Ga. See *Smith v. Roberts*, 106 Ga. 409, 32 S. E. 375. Va.—*Sims v. Tyrer*, 96 Va. 14, 30 S. E. 443; *Bristol Iron & Steel Co. v. Caldwell*, 95 Va. 47, 27 S. E. 838; *Alexander v. Howe*, 85 Va. 198, 7 S. E. 248; *Shultz v. Hansbrough*, 33 Gratt. (74 Va.) 567; *Horton v. Bond*, 28 Gratt. (69 Va.) 815; *Buchanan v. Clark*, 10 Gratt. (51 Va.) 164; *Cole's Admr. v. McRae*, 6 Rand. (27 Va.) 644. W. Va.—*Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181; *Payne v. Webb*, 23 W. Va. 558; *Beaty v. Veon*, 18 W. Va. 291; *Marling v. Robrecht*, 13 W. Va. 440; *Anderson v. Nagle*, 12 W. Va. 98; *Rohrer v. Travers*, 11 W. Va. 146; *Wiley v. Mahod*, 10 W. Va. 206. See *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611.

[a] Reference.—Where there are but two liens, a reference is not necessary. *Anderson v. Nagle*, 12 W. Va. 98.

But this rule is not always followed,<sup>47</sup> and has no application to a decree for the rental of the premises,<sup>48</sup> or to a decree for the sale of lands made under a deed of trust or mortgage where the parties have contracted for a sale without an account of liens and no question is raised as to priority of the liens.<sup>49</sup> There may, however, be a waiver of the right to have the debts ascertained and their priorities taken.<sup>50</sup>

**D. THAT RENT WILL NOT PAY JUDGMENT IN LIMITED TIME.**—Some statutes make it a condition precedent to the sale of lands for the satisfaction of liens, that all the land of the debtor liable therefor will not produce rent sufficient to discharge the liens within a stated time.<sup>51</sup> The manner by which this fact shall be determined is not prescribed by the statute.<sup>52</sup> It may be determined through a court commissioner.<sup>53</sup> The full amount of the debtor's property subject to the liens must be ascertained.<sup>54</sup> If after a decree of rental, it appear the rent is insufficient to pay the liens within the time limited, the decree may be set aside and a sale decreed.<sup>55</sup>

**E. PROTECTING INTEREST OF TENANT.**—Before decreeing a sale of land, the court should, it has been held, inquire into and protect the

Recital in decree, see *infra*, IV, D, 5.

47. *Bristow v. Peters*, 6 Ky. L. Rep. 300.

[a] **Discretionary with the court.**  
*Dayton, X. & B. R. Co. v. Lewton*, 20 Ohio St. 401.

48. *Douglass v. McCoy*, 24 W. Va. 722.

49. *Artrip v. Rasnake*, 96 Va. 277, 31 S. E. 4.

50. *Neb.—Craig v. Stevenson*, 15 Neb. 362, 18 N. W. 510. *Va.—Crawford v. Weller*, 23 Gratt. (64 Va.) 835, as where the debtor consented to the sale without their ascertainment. *W. Va.—Parsons v. Thornburg*, 17 W. Va. 356.

[a] **Objection in Appellate Court.**  
However erroneous a decree to sell lands before an account of liens may be, yet if the sale was so made, and a resale is ordered because of the purchaser's failure to pay, it is too late for the latter for the first time and in an appellate court to make the objection. *Redd v. Dyer*, 83 Va. 331, 2 S. E. 283, 5 Am. St. Rep. 272.

51. *Etter v. Scott*, 90 Va. 762, 19 S. E. 776; *Kennerly v. Swartz*, 83 Va. 704, 3 S. E. 348; *Muse v. Friedenwald*, 77 Va. 57; *Horton v. Bond*, 28 Gratt. (69 Va.) 815; *Ewart v. Saunders*, 25 Gratt. (66 Va.) 203; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102; *Newlon*

*v. Wade*, 43 W. Va. 283, 27 S. E. 244; *Rose & Co. v. Brown*, 11 W. Va. 122.

As to renting property pending sale, see *infra*, XIV.

[a] **If no inquiry is asked by the parties**, there may be a decree of sale without it. *Ewart v. Saunders*, 25 Gratt. (66 Va.) 203.

[b] **To entitle one to have his land rented** he must exercise reasonable diligence in claiming the privilege in the court below before the decree of sale is entered. *Arnold v. Casner*, 22 W. Va. 444; *Hill v. Moorehead*, 20 W. Va. 429; *Rose & Co. v. Brown*, 11 W. Va. 122. But see *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244.

52. *Ewart v. Saunders*, 25 Gratt. (66 Va.) 203.

[a] **How Ascertained.**—The insufficiency of the rents and profits to satisfy the judgment within the statutory period may be shown by the pleadings, by the admissions of the parties, by evidence taken or by the report of a commissioner on inquiry ordered. *Horton v. Bond*, 28 Gratt. (69 Va.) 815, 825.

53. *Ewart v. Saunders*, 25 Gratt. (66 Va.) 203.

54. *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244.

55. *Kennerly v. Swartz*, 83 Va. 704, 3 S. E. 348.

interest of a tenant in possession under a lease made prior to judgment.<sup>56</sup>

**F. ASSIGNMENT OF DOWER.**—Before decreeing a sale of the realty of a husband, the widow's dower must be assigned in kind if practicable.<sup>57</sup> If such is impracticable, it may be dispensed with and some other mode adopted.<sup>58</sup>

**IV. JUDGMENT, DECREE OR ORDER OF SALE.—A. NECESSITY FOR.**—Before there can be a valid judicial sale, there must be an order or decree of court authorizing it.<sup>59</sup>

**B. PRESUMPTION AS TO.**—The existence of an order of sale may be

56. *Moore v. Bruce*, 85 Va. 139, 145, 7 S. E. 195.

57. *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709; *White v. White*, 16 Gratt. (57 Va.) 264, 80 Am. Dec. 706; *Blair v. Thompson*, 11 Gratt. (52 Va.) 441.

[a] A decree of sale reserving the right thereafter to make suitable provision for the dower rights of the widow is erroneous. *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709.

58. *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709.

See generally the title "Dower, Proceedings To Recover."

59. **U. S.**—*Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 17 L. ed. 886; *Brignardello v. Gray*, 1 Wall. 627, 17 L. ed. 692; *Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co.*, 165 Fed. 162, 91 C. C. A. 196. **Ala.**—*Sayre v. Elyton Land Co.*, 73 Ala. 85; *Gilchrist v. Shackelford*, 72 Ala. 7. **Ga.**—*Doyle v. African Methodist Church*, 43 Ga. 400. **Ky.**—*Smith v. Commonwealth L. & L. Co.*, 172 Ky. 607, 189 S. W. 912. **La.**—*Mallard v. Dejan*, 45 La. Ann. 1270, 14 So. 238. **Md.**—*Fox v. Reynolds*, 50 Md. 564. **Mich.**—*Houlihan v. Fogarty*, 162 Mich. 492, 127 N. W. 793. **Mo.**—*Burnham v. Hitt*, 143 Mo. 414, 45 S. W. 368; *Melton v. Fitch*, 125 Mo. 281, 28 S. W. 612; *Hughes v. Hughes*, 72 Mo. 136; *Evans v. Snyder*, 64 Mo. 516. But see *Tutt v. Boyer*, 51 Mo. 425, criticised in *Evans v. Snyder*, supra. **Mont.**—*Plains L. & I. Co. v. Lynch*, 38 Mont. 271, 99 Pac. 847, 129 Am. St. Rep. 645; *Broadwater v. Richards*, 4 Mont. 80, 2 Pac. 546. **Neb.**—*Maul v. Hellman*, 39 Neb. 322, 58 N. W. 112; *Parrat v. Neleigh*, 7 Neb. 456. **N. H.**—*Foster v. Huntington*, 5 N. H. 108. **N. J.**—*Compare Campbell v. Parker*, 59 N. J. Eq.

342, 45 Atl. 116. **Ohio.**—*Rhonemus v. Corwin*, 9 Ohio St. 366; *Goforth's Lessee v. Longworth*, 4 Ohio 129, 19 Am. Dec. 588; *Tiernan v. Beam*, 2 Ohio 383, 15 Am. Dec. 557. **Tenn.**—*Ex parte Kirkman*, 3 Head 517, but the court may confirm such a sale in some cases. See *Mason v. Tinsley*, 1 Tenn. Ch. 154, where a father sold the realty of his infant children without an order of the court and filed a bill to have the sale confirmed. The court would not entertain such application until the proceeds were first brought into court. **Tex.**—*Ball v. Collins*, 5 S. W. 622; *Tipplett v. Mize*, 30 Tex. 361, 94 Am. Dec. 313; *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757; *Teague v. Swasey*, 46 Tex. Civ. App. 151, 102 S. W. 458; *O'Connor v. Vineyard* (Tex. Civ. App.), 43 S. W. 55. **Vt.**—*Doolittle v. Holton*, 28 Vt. 819, 67 Am. Dec. 745. **W. Va.**—*First Nat. Bank v. Hyer*, 46 W. Va. 13, 32 S. E. 1000; *Houston v. McCluney*, 8 W. Va. 135.

[a] A sale before the filing and entry of the order of sale is irregular, and will be set aside at the instance of any interested party. *Farmers' & Miller's Bank v. Luther*, 14 Wis. 96.

[b] Where land was sold by consent of all parties under an order of the superior court and no decree, or process of sale issued from the district court, the parties consenting are bound by the sale except for good reason. *International Trust Co. v. Keokuk Electric Street Ry. Co.*, 90 Iowa 90, 57 N. W. 712.

[c] An agreement of the parties as to a sale by the sheriff and the terms thereof cannot confer authority to sell without an order of the court. *Doyle v. African Methodist Church*, 43 Ga. 400.

presumed in the absence of record evidence,<sup>60</sup> or from an order of confirmation.<sup>61</sup> In the absence of evidence that an order of sale issued without a judgment or decree, it will be presumed the order was properly made.<sup>62</sup>

C. JURISDICTION.—To constitute a valid judicial sale, the court must have jurisdiction to order or decree the sale<sup>63</sup> which must have been legally acquired.<sup>64</sup> A county court of one county which has acquired jurisdiction may order the sale of lands in another county in the state,<sup>65</sup> but courts in one state are without jurisdiction to decree the sale of land in another state,<sup>66</sup> unless to the extent that they may make their decree effective by compelling persons within their jurisdiction to make a conveyance.<sup>67</sup>

D. FORM AND CONTENTS.—1. In General.—The decree or order of sale must comply with any statutory requirement,<sup>68</sup> as well as any requirements laid down in the deed of trust, or other written document authorizing the sale;<sup>69</sup> and it must conform to the case set out in the petition.<sup>70</sup> The decree should specifically direct the officer what to do in making the sale, without leaving him to draw conclusions from other sources of information.<sup>71</sup>

60. *Iglehart v. Armiger*, 1 Bland (Md.) 519; *Doolittle v. Holton*, 28 Vt. 819, 67 Am. Dec. 745.

61. *Arnold v. Hodge*, 20 Tex. Civ. App. 211, 49 S. W. 714.

[a] The record of the confirmation may be presumptive of the issuance of an order of sale. *Bartley v. Harris*, 70 Tex. 181, 7 S. W. 797; *Arnold v. Hodge*, 20 Tex. Civ. App. 211, 49 S. W. 714.

62. *Parrat v. Neligh*, 7 Neb. 456.

63. U. S.—*Gila Bend Reservoir Co. v. Gila Water Co.*, 205 U. S. 279, 27 Sup. Ct. 495, 51 L. ed. 801; *Thaw v. Ritchie*, 136 U. S. 519, 10 Sup. Ct. 1037, 34 L. ed. 531; *Beauregard v. New Orleans*, 18 How. 497, 15 L. ed. 469; *Williamson v. Berry*, 8 How. 495, 12 L. ed. 1170; *Grignon's Lessee v. Astor*, 2 How. 319, 11 L. ed. 283. Ill.—*Mulvey v. Carpenter*, 78 Ill. 580; *Chambers v. Jones*, 72 Ill. 275. Mo.—*Carder v. Robertson*, 100 Mo. 269, 13 S. W. 88, 4 Am. St. Rep. 548. Tex.—*Texas & P. R. Co. v. Gay*, 86 Tex. 571, 26 S. W. 599.

[a] A statute conferring power to order a sale of property owned in common where a sale will be more advantageous than partition does not confer power to order a sale to pay debts. *Vail v. Hammond*, 60 Conn. 374, 22 Atl. 954, 25 Am. St. Rep. 330.

64. *Shriver's Lessee v. Lynn*, 2 How. (U. S.) 43, 60, 11 L. ed. 172.

65. *Klaus v. Campbell-Ratcliff Land Co.* (Okla.), 150 Pac. 676; *Dewalt v. Cline*, 35 Okla. 197, 128 Pac. 121.

66. U. S.—*McGoon v. Scales*, 9 Wall. 23, 19 L. ed. 545; *Watts v. Waddle*, 6 Pet. 389, 8 L. ed. 437. Ky.—*Sneed v. Ewing*, 5 J. J. Marsh. 460. N. Y.—*Hawley v. James*, 7 Paige Ch. 213, 32 Am. Dec. 623. Va.—*Wimer v. Wimer*, 82 Va. 890, 5 S. E. 536, 3 Am. St. Rep. 126; *Gibson v. Burgess*, 82 Va. 650; *Poindexter v. Burwell*, 82 Va. 507. See *Barger v. Buckland*, 28 Gratt. (69 Va.) 850. W. Va.—*Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367.

67. See generally the titles "Jurisdiction;" "Mortgages."

68. See generally the statutes.

69. *Campbell v. Johnston*, 4 Dana (Ky.) 177.

[a] Conformity to Contract.—A decree directing a sale at a different place, or a different and less effective mode of advertising is erroneous. *Campbell v. Johnston*, 4 Dana (Ky.) 177.

70. Ark.—*Mays v. Rogers*, 37 Ark. 155. Miss.—*Williams v. Childress*, 25 Miss. 78. W. Va.—*First Nat. Bank v. Hyer*, 46 W. Va. 13, 32 S. E. 1000.

71. *Meyer v. Covington*, 103 Ky. 546, 45 S. W. 769.

2. **Designation of Officer.**—The decree should designate the officer who is to make the sale.<sup>72</sup>

3. **Directing Bond.**—The decree should require a bond and fix the penalty thereof,<sup>73</sup> but a failure to do so is not reversible error.<sup>74</sup>

4. **Description of Property To Be Sold.**—The decree or order of sale is generally required to describe the property to be sold,<sup>75</sup> although in some jurisdictions, this requirement is regarded as directory merely.<sup>76</sup> The description of the property must be sufficiently certain to

Form for order for sale of premises in partition, see 9 STANDARD PROC. 923.

[a] **Implying Duty To Convey.**—"The direction to sell and take the bond and mortgage from the purchaser imparts the duty of conveying to such purchaser." *Peake v. Young*, 40 S. C. 41, 54, 18 S. E. 237.

72. See *Mechanics' S. & B. Loan Assn. v. O'Conner*, 29 Ohio St. 651.

[a] **Direction to Officer.**—Where the order of sale was directed to the sheriff, but a commissioner to sell was named therein and he actually made the sale, the direction of the order to the sheriff was a harmless irregularity. *Taylor v. Ellenberger*, 6 Cal. Unrep. Cas. 725, 65 Pac. 832.

[b] **Showing Capacity.**—A decree that A. B. sell, without showing in what capacity or office he is to sell, is improper. *Rucker v. Moore*, 1 Heisk. (Tenn.) 726.

[c] **Where a regular master commissioner is ordered to sell**, the name of the officer need not appear in the decree, at least it is too late to object after confirmation of the sale. *Mechanics' S. & B. Loan Assn. v. O'Conner*, 29 Ohio St. 651.

**Who may be designated**, see *infra*. IX, B.

73. *Neeley v. Ruleys*, 26 W. Va. 686, even though the statute contains a similar requirement.

[a] A decree directing the execution of the bond before any person other than that named in the statute is erroneous, but may be amended by the appellate court. *Southwestern Va. Mineral Co. v. Chase*, 95 Va. 50, 27 S. E. 826. As to amendment generally, see *infra*, IV, G.

74. *Cooper v. Daugherty*, 85 Va. 343, 7 S. E. 387; *McAllister v. Bodkin*, 76 Va. 809.

[a] **Effect on Rights of Purchaser.**

Where the statute requires a bond, but the court did not require the officer selling to give such bond, the neglect of the court does not affect the rights of an innocent purchaser in a collateral suit after such sale had been duly confirmed. *Norman v. Olney*, 64 Mich. 553, 31 N. W. 555; *Fender v. Powers*, 62 Mich. 324, 28 N. W. 880; *Drake v. Kinsell*, 38 Mich. 232; *Nicholl v. Nicholl*, 8 Paige (N. Y.) 349.

75. **U. S.**—See *Railroad Co. v. Swasey*, 23 Wall. 405, 23 L. ed. 136. **Cal.** *Gaskill v. Moore*, 4 Cal. 233. **Ga.** *Davie v. McDaniel*, 47 Ga. 195. **Ky.** *Terry v. Swinford*, 19 Ky. L. Rep. 712, 41 S. W. 553; *Ross v. Adams*, 13 Bush 370. **Mo.**—*Melton v. Fitch*, 125 Mo. 281, 28 S. W. 612. **Neb.**—*Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900, 65 N. W. 1059. **Tex.**—*McBee v. Johnson*, 45 Tex. 634. **W. Va.** *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959. **Eng.**—*Dixon v. Pyner*, 14 Jur. 217, 7 Hare 331, 68 Eng. Reprint 135; *Knott v. Cottee*, 27 Beav. 33, 54 Eng. Reprint 13; *Cobden v. Maynard*, 1 N. R. 354; *In re Garmeson*, 21 Wkly. Rep. 98.

[a] **Identification of Property.**—The property to be sold must be judicially identified by the court before it can be judicially sold. It is not sufficient to refer to a master to ascertain and report the facts. *Railroad Co. v. Swasey*, 23 Wall. (U. S.) 405, 23 L. ed. 136.

[b] **An order of court directing the sale of all the lands of a decedent is not void for failure to describe the property.** *Kulbreth v. Drew Co. Timber Co. (Ark.)*, 188 S. W. 810.

76. *Davie v. McDaniel*, 47 Ga. 195; *Robertson v. Johnson*, 57 Tex. 62; *Davis v. Touchstone*, 45 Tex. 490; *McBee v. Johnson*, 45 Tex. 634; *Kleinecke v. Woodward*, 42 Tex. 311; *Wells v. Polk*, 36 Tex. 120; *Norwood v. Snell* (Tex. Civ. App.), 69 S. W. 642.

identify it," but it is sufficient to refer to the petition or other document in the case which properly describes it.<sup>78</sup> A mere clerical error in the description in the order of sale will not vitiate the entire proceeding where the other papers in the case correctly describe the premises.<sup>79</sup>

**5. Priorities and Amount of Debts.**—The decree is sometimes required to show upon its face the amount and priority of all debts and

**77. U. S.**—*Railroad Co. v. Swasey*, 23 Wall. 405, 23 L. ed. 136. **Ill.**—*Tilton v. Pearson*, 67 Ill. App. 372. **Ky.**—*Noland v. Noland's Admr.*, 12 Bush 426; *Harrison's Exrx. v. Taylor*, 19 Ky. L. Rep. 1191, 43 S. W. 723; *Bartlett's Admr. v. Gray*, 4 Ky. L. Rep. 615. **Mo.**—*Melton v. Fitch*, 125 Mo. 281, 28 S. W. 612. **N. C.**—*Blythe v. Hoots*, 72 N. C. 575. **Ohio.**—*Ream v. Wolls*, 61 Ohio St. 131, 55 N. E. 176. **Tex.**—*Hermann v. Likens*, 90 Tex. 448, 39 S. W. 282, reversing 37 S. W. 981; *Allday v. Whitaker*, 66 Tex. 669, 1 S. W. 794; *Graham v. Hawkins*, 38 Tex. 628. See *Aldridge v. Pardee*, 24 Tex. Civ. App. 254, 60 S. W. 789, affirmed, 97 Tex. 709.

[a] **Illustrations.**—A description as "part of the west half of the northwest quarter of section nineteen, township 21, range 11, containing seventy-two acres in Vermillion county" is insufficient. *Tilton v. Pearson*, 67 Ill. App. 372.

[b] A description "beginning at Pike street on the east side of York street, in this city, running thence north 296½ feet, more or less" is insufficient. *Meyer v. Covington*, 103 Ky. 546, 45 S. W. 769.

[c] **By Name of Owner.**—A description directing the sale of "the lands and mills belonging to the estate of T. M. deceased" is sufficient. *Monk v. Horne*, 38 Miss. 100, 75 Am. Dec. 94.

[d] **By Name by Which Land Is Known.**—An order describing the land to be sold "as three hundred and twenty acres of land known as the head-right of W. H. M." sufficiently describes the land. *Robertson v. Johnson*, 57 Tex. 62. To same effect, see *Flenner v. Walker*, 5 Tex. Civ. App. 145, 23 S. W. 1029.

[e] **By Name of Vendor.**—A description of the land as 320 acres "bought

from J. A. Davis," held to be sufficient. *Davis v. Touchstone*, 45 Tex. 490.

[f] **Reference to a lease** describing the property, sufficient. *Gaskill v. Moore*, 4 Cal. 233. But see *Terry v. Swinford*, 19 Ky. L. Rep. 712, 41 S. W. 553.

**78. Ark.**—*Montgomery v. Johnson*, 31 Ark. 74. **Mo.**—*Adams v. Larrimore*, 51 Mo. 130. **Mont.**—*Plains L. & I. Co. v. Lynch*, 38 Mont. 271, 99 Pac. 847, 129 Am. St. Rep. 645. **Tex.**—*Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325; *Hurley v. Barnard*, 48 Tex. 83; *Ferguson v. Templeton* (Tex. Civ. App.), 32 S. W. 148.

*Contra*, *Meyer v. Covington*, 103 Ky. 546, 45 S. W. 769; *Lawless v. Barger*, 9 Bush (Ky.) 665.

**79. Ill.**—*Schnell v. Chicago*, 38 Ill. 382, 87 Am. Dec. 304. **Minn.**—See *Buntin v. Root*, 66 Minn. 454, 69 N. W. 330. **Mont.**—*Plains L. & I. Co. v. Lynch*, 38 Mont. 271, 99 Pac. 847, 129 Am. St. Rep. 645.

[a] **Wrong Range.**—A clerical error in describing the land as in range 25 instead of 26 in the order will not vitiate the entire proceeding where the estate was interested only in the tract of land to be sold and where the petition, notices of sale, order of confirmation and the deed correctly described the land and the order of sale referred to the petition. *Plains L. & I. Co. v. Lynch*, 38 Mont. 271, 99 Pac. 847, 129 Am. St. Rep. 645.

[b] **Wrong County.**—A mistake by misdirection, merely describing land situate in one county when in fact it was in another, did not render it impossible to ascertain whether its locality could be truly ascertained through the description contained in the order when considered as a whole. *Lindsay v. Jaffray*, 55 Tex. 626.

all liens charged on the property,<sup>80</sup> and the persons to whom they are to be paid.<sup>81</sup>

**6. Allowing Time for Redemption.**—In some states it is required that the decree contain a provision allowing the defendant time for payment of the amount charged upon the property before sale.<sup>82</sup>

**7. Notice and Advertisement.**<sup>83</sup>—Where judicial sales are not regulated by statute, the judgment or decree therefor must direct the manner of giving of notice.<sup>84</sup> This is sometimes required by statute which is mandatory.<sup>85</sup> If the notice is directed to be published

**80. U. S.**—*Railroad Co. v. Swasey*, 23 Wall. 405, 23 L. ed. 136. **Tenn.** *Young v. Young*, 12 Lea 335; *Lewis v. Baker*, 1 Head 385. **Va.**—*Iaeger v. Bossieux*, 15 Gratt. (56 Va.) 83, 183, 76 Am. Dec. 189. **W. Va.**—*Hull's Admr. v. Hull's Heirs*, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800; *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562; *McCleary v. Grantham*, 29 W. Va. 301, 311, 11 S. E. 949; *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242; *Anderson v. Nagle*, 12 W. Va. 98.

[a] **A reference to a report for these facts is insufficient, especially where the report is complicated.** *Hull's Admr. v. Hull's Heirs*, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800; *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562; *McCleary v. Grantham*, 29 W. Va. 301, 311, 11 S. E. 949; *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242.

[b] **A decree that the fund be paid into court where the priorities will be determined afterwards is improper.** *Iaeger v. Bossieux*, 15 Gratt. (56 Va.) 83, 103, 76 Am. Dec. 189.

**Ascertaining liens as prerequisite to decree** see *supra*, III, C.

**81. Hull's Admr. v. Hull's Heirs**, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800; *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562; *McCleary v. Grantham*, 29 W. Va. 301, 311, 11 S. E. 949; *Kanawha Valley Bank v. Wilson*, 25 W. Va. 242.

**82. Ark.**—*Williams v. Ewing*, 31 Ark. 229, 236, holding such direction proper. *Tenn.*—*Lewis v. Baker*, 1 Head 385. **Va.**—*Kyles v. Tait's Admr.*, 6 Gratt. (47 Va.) 44. See *Strayer v. Long's Exr.*, 89 Va. 471, 16 S. E. 357. **W. Va.**—*King v. Burdett*, 44 W. Va. 561, 29 S. E. 1010; *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562; *Rohrer v. Travers*, 11 W. Va. 146; *Wiley v. Mahood*, 10 W. Va. 206; *Pecks v. Chambers*, 8 W. Va. 210.

[a] **Depriving Defendant of Opportunity.**—To refer the matter to the master to ascertain and report at the next term the amount due, and in the meantime direct the sale is erroneous practice. *Lewis v. Baker*, 1 Head (Tenn.) 385; *Codwise v. Taylor*, 4 Sneed (Tenn.) 346.

[b] **If the defendant has not been damaged, the proceeding will not be set aside for failure to give the defendant time to redeem.** *Crawford v. Weller*, 23 Gratt. (64 Va.) 835, 851.

**83. As to notice of sale, see** *infra*, VII.

**84. Ala.**—*Bozeman v. Bozeman*, 82 Ala. 389, 2 So. 732; *Brown v. Brown's Admr.*, 41 Ala. 215. **Ill.**—*Sowards v. Pritchett*, 37 Ill. 517. **Minn.**—*Maki v. Maki*, 106 Minn. 357, 119 N. W. 51. **Tenn.**—*Rucker v. Moore*, 1 Heisk. 726.

**As to manner of giving notice, see** *infra*, VII.

[a] **Necessity for Order.**—Where statute provides for notice by posting or by publication if the judge shall so order, there is no authority for publication of notice unless the court orders it. *Halleck v. Moss*, 17 Cal. 339.

[b] **Publication of the notice before the decree of sale was signed, but after the finding of the court had been made, is a mere irregularity which cannot affect the jurisdiction of the court, and could only be taken advantage of by appeal.** *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

[c] **There can be no blank space left to be filled in to fix the time and place.** *Osborn v. Baxter*, 4 Cush. (Mass.) 406.

**85. Gauley Coal Land Assn. v. Spies**, 61 W. Va. 19, 55 S. E. 903; *Beaty v. Veon*, 18 W. Va. 291. See *Maxwell v. Burbridge*, 44 W. Va. 248, 28 S. E. 702.

[a] **Where advertisement in a news-**

in a newspaper, the time of such publication should be stated.<sup>86</sup>

**8. Appraisement.**—The decree or judgment need not direct an appraisement of the property.<sup>87</sup>

**9. Time and Place of Sale.**<sup>88</sup>—Generally it is required that the order of sale specify the time<sup>89</sup> and place of sale.<sup>90</sup> While it is usual for the decree to direct the sale to be held on a court day,<sup>91</sup> the failure to do so is not, it has been held, error.<sup>92</sup>

paper is required, the decree must direct the person appointed to make the sale to so advertise the sale. *Gauley Coal Land Assn. v. Spies*, 61 W. Va. 19, 55 S. E. 903; *Duncan v. Custard*, 24 W. Va. 730.

[b] **Where No Newspaper in County.** If the court enters into an inquisition and finds there is no newspaper in the county, the decree should state that fact and the other notice required by law must be provided for. *Gauley Coal Land Assn. v. Spies*, 61 W. Va. 19, 55 S. E. 903.

[c] **Lands in Several Counties.**—If the land to be sold is composed of several tracts not contiguous lying in more than one county, advertising must be directed in each county. *Gauley Coal Land Assn. v. Spies*, 61 W. Va. 19, 55 S. E. 903.

86. *Beaty v. Veon*, 18 W. Va. 291.

87. *Graves v. Long*, 87 Ky. 441, 9 S. W. 297, it is the commissioner's duty to have it done without such direction.

As to appraisement generally, see *infra*, VI.

88. As to time and place of sale, see *infra*, IX, A.

89. *Ark.*—*Stout v. Brown*, 64 Ark. 312, 42 S. W. 415, attachment sale. *Cal.*—*In re Dorsey*, 75 Cal. 258, 17 Pac. 209. *Ga.*—*Title Guarantee & L. Co. v. Holverson*, 95 Ga. 707, 22 S. E. 533. *Mass.*—*Osborn v. Baxter*, 4 Cush. 406. *Minn.*—*Maki v. Maki*, 106 Minn. 357, 119 N. W. 51. *Miss.*—See *Yerger v. Ferguson*, 55 Miss. 190.

[a] **Specifying Day.**—The decree must order the sale to be made on a certain day when the sale is to be made on the premises; when it is to be made at the courthouse door it is sufficient to direct the sale to be held on the first day of some court to be held for the county. *Owsley v. Cook*, 1 Ky. Op. 518.

[b] A decree for sale "on some

day fixed by law for judicial sales" is error. *McClaskey v. O'Brien*, 16 W. Va. 791, 860.

As to executor's sales, see 6 STANDARD PROC. 563.

As to time of sale, see *infra*, IX, A.

90. *Ala.*—*Bozeman v. Bozeman*, 82 Ala. 389, 2 So. 732; *Brown v. Brown's Admr.*, 41 Ala. 215. *Ark.*—*Stout v. Brown*, 64 Ark. 312, 42 S. W. 415, attachment sale. *Ky.*—*Underwood's Admr. v. Cartwright*, 20 Ky. L. Rep. 809, 47 S. W. 580. *Mass.*—*Osborn v. Baxter*, 4 Cush. 406. *Minn.*—*Maki v. Maki*, 106 Minn. 357, 119 N. W. 51. *Miss.*—*Vannerson v. Cord*, Smed. & M. Ch. 345.

As to place of sale, see *infra*, IX, A.

[a] **Where Decree Is Silent.**—A sale will not be set aside merely because the decree is silent as to the place where it is to be made, when in fact it was at the courthouse door of the county where the land lay. *Hooper v. Young*, 58 Ala. 585.

[b] An order of sale authorizing a sale "according to law" based on a petition to sell at a certain place is a direction for sale in accordance with the petition. *Jemison v. Gaston*, 21 Tex. 266.

91. *Scott v. Graves*, 153 Ky. 221, 154 S. W. 1084; *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611.

92. *Ky.*—*Scott v. Graves*, 153 Ky. 221, 154 S. W. 1084, the judge may fix some other day. *Mo.*—*Patton v. Hanna*, 46 Mo. 314, the failure of the order to direct whether the sale should be had at a term of the circuit or county court will not vitiate the title under the sale, but the order should be amended. *W. Va.*—*Long v. Perine*, 41 W. Va. 314, 23 S. E. 611.

But see *Mobley v. Nave*, 67 Mo. 546; *McClurg v. Dollarhide*, 51 Mo. 347, holding that a sale not made during the session of the probate court is void, and the deed passes no title.

10. **Terms of Sale.**—The decree should specify the terms and conditions of sale,<sup>93</sup> but an omission to do so will be cured by the confirmation of the sale.<sup>94</sup>

11. **Order in Which Property Is To Be Sold.**—If the property of several parties not equally liable for the debt is to be sold, the decree should direct the order in which the property is to be sold.<sup>95</sup>

12. **Dispensing With Confirmation.**—Where statute requires that the sale be confirmed before conveyance of the property, a decree of sale dispensing with this requirement is fatally erroneous.<sup>96</sup>

13. **Disposition of Funds.**—The decree, it has been held, should direct the officer what disposition he shall make of the proceeds of the sale.<sup>97</sup>

14. **Putting Purchaser in Possession.**—The decree should not authorize the purchaser to be put in possession prior to the confirmation of the sale;<sup>98</sup> but such a direction does not vitiate it.<sup>99</sup>

**E. NATURE AND EFFECT.**—An order or decree of sale is interlocutory,<sup>1</sup> and in the absence of fraud or undue advantage is conclusive upon the parties and all other courts as to the merits of the

93. *Ala.*—Weakley v. Gurley's Admr., 60 Ala. 399. *Ark.*—Stout v. Brown, 64 Ark. 312, 42 S. W. 415. *Ill.*—Harding v. Le Moynes, 114 Ill. 65, 29 N. E. 188; Sowards v. Pritchett, 37 Ill. 517; Moline W. P. & Mfg. Co. v. Webster, 26 Ill. 233. *Ky.*—Underwood's Admr. v. Cartwright, 20 Ky. L. Rep. 809, 47 S. W. 580. *Mont.*—Plains L. & I. Co. v. Lynch, 38 Mont. 271, 99 Pac. 847, 129 Am. St. Rep. 645. *Tex.*—McBee v. Johnson, 45 Tex. 634. *W. Va.*—Building & Loan Assn. v. Westfall, 55 W. Va. 305, 47 S. E. 74, decree must direct whether sale is for cash or credit, and terms, as provided in §1, ch. 132, Code.

[a] **Whether for Cash or Credit.** Where the notice of sale provided for a cash sale, the objection that the order of sale does not direct a sale for cash is immaterial where in effect it implies a cash sale by directing that it shall be free from the liens. *Cressler v. Tri-State L. & T. Co.*, 182 Ind. 572, 107 N. E. 68. See also *Weakley v. Gurley's Admr.*, 60 Ala. 399.

**As to terms and conditions of sale,** see *infra*, IX, D.

94. *Neely v. Lee Wilson & Co.* (Ark.), 190 S. W. 431; *Plains L. & I. Co. v. Lynch*, 38 Mont. 271, 99 Pac. 847, 129 Am. St. Rep. 645.

**Effect of confirmation on irregularities generally,** see *infra*, XI, O.

95. *Horton v. Bond*, 28 Gratt. (69 Va.) 815, 825.

**As to the order of sale,** see *infra*, IX, C, 3.

96. *United States Bank v. Ritchie*, 8 Pet. (U. S.) 128, 8 L. ed. 890.

**As to confirmation generally,** see *infra*, XI.

97. *Arnold v. Casner*, 22 W. Va. 444.

**As to collection and distribution of proceeds,** see *infra*, XVII.

[a] **Disposition of Proceeds.**—The decree of sale should direct that the cash payment shall be retained by the commissioner making the sale, or be paid into bank to the credit of the suit, subject to the order of the court. The money then will, upon confirmation of the report or upon setting the sale aside, be disposed of in the way that shall then seem proper. *Arnold v. Casner*, 22 W. Va. 444.

98. *Adler v. Meyer*, 73 Miss. 863, 19 So. 893.

99. *Vicksburg & M. R. R. Co. v. McCutchen*, 52 Miss. 645, it simply anticipates what would be done after the sale.

1. *Ala.*—*Bland v. Bowie*, 53 Ala. 152, and kept alive by the continuance of the cause. *Ind.*—*Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577. *Va.*—*Southwestern Va. Mineral L. Co. v. Chase*, 95 Va. 50, 27 S. E. 826.

controversy.<sup>2</sup> The decree of sale, not the process or order of sale issued thereon, is the authority empowering the officer to make the sale,<sup>3</sup> but where the court makes an order of sale without a formal decree the order of sale is the sheriff's warrant of authority.<sup>4</sup>

**F. ENTRY OF ORDER NUNC PRO TUNC.**—An order of sale may be entered by the court nunc pro tunc as of the time it was actually made, where by mistake or inadvertence it was not entered when made.<sup>5</sup>

**G. AMENDMENT AND MODIFICATION.**—The order may be amended nunc pro tunc when it is necessary to make the record speak the truth,<sup>6</sup> and the court has the inherent right to modify the time or manner of its enforcement by a subsequent order.<sup>7</sup>

2. **U. S.**—*Green v. Bogue*, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. ed. 1061; *Shriver's Lessee v. Lynn*, 2 How. 43, 11 L. ed. 172; *Whiting v. United States Bank*, 13 Pet. 6, 10 L. ed. 33. **Ala.** *Morrison v. Morrison*, 105 Ala. 637, 17 So. 109. **Cal.**—*Estate of Leonis*, 138 Cal. 194, 71 Pac. 171. **Md.**—*Slingluff v. Stanley*, 66 Md. 220, 7 Atl. 261.

3. **U. S.**—*Seamen v. Northwestern Mut. L. Ins. Co.*, 86 Fed. 493, 30 C. C. A. 212. **Ill.**—*Quick v. Collins*, 197 Ill. 391, 64 N. E. 288; *Wilson v. Ford*, 190 Ill. 614, 60 N. E. 876; *Karnes v. Harper*, 48 Ill. 527; *Augustine v. Doud*, 1 Ill. App. 588. **Neb.**—*Stephenson v. Murdock*, 89 Neb. 818, 132 N. W. 406; *Passumpsic Savings Bank v. Maulick*, 60 Neb. 469, 83 N. W. 672, 83 Am. St. Rep. 539; *Johnson v. Colby*, 52 Neb. 327, 72 N. W. 313; *Parrat v. Neligh*, 7 Neb. 456; *Rector v. Rotton*, 3 Neb. 177.

But see *Kellogg v. Tout*, 65 Ind. 146, holding the copy of the decree is the proper authority of the sheriff to make the sale.

4. *Plains L. & I. Co. v. Lynch*, 38 Mont. 271, 99 Pac. 847, 129 Am. St. Rep. 645; *Broadwater v. Richards*, 4 Mont. 80, 2 Pac. 546; *Dipff v. Heder*, 6 Tex. Civ. App. 685, 26 S. W. 118.

[a] The order of sale (1) is the warrant of authority by which the administrator acts, and without it he cannot sell. *Plains L. & I. Co. v. Lynch*, 38 Mont. 271, 99 Pac. 847, 129 Am. St. Rep. 645; *Broadwater v. Richards*, 4 Mont. 80, 2 Pac. 546. (2) But after all, it is but a determination that the sale is necessary and an authority to make the sale. *Plains L. & I. Co. v. Lynch*, *supra*.

[b] Compared to Execution Sale. The order of sale occupies the same

relation to a sale by an administrator that a judgment or decree does to an execution sale by a sheriff. *Evans v. Snyder*, 64 Mo. 516.

5. **Ark.**—*Bouldin v. Jennings*, 92 Ark. 299, 122 S. W. 639. **Ga.**—*Attaway v. Carswell*, 89 Ga. 343, 15 S. E. 472. **N. J.**—*In re Voorhees' Case*, 57 N. J. Eq. 291, 42 Atl. 567. **N. Y.**—*Palmer v. Terwilliger*, 95 App. Div. 35, 88 N. Y. Supp. 526. **N. C.**—*Maxwell v. Blair*, 95 N. C. 317. **Wis.**—*In re Streiff's Estate*, 146 Wis. 230, 131 N. W. 358.

6. *Butler v. Emmett*, 8 Paige (N. Y.) 12.

[a] But a decree not actually meant to be made in final form cannot be entered as such nunc pro tunc in order to give validity to an act done by a judicial officer under a supposition that the decree was final instead of interlocutory. *Gray v. Brignardello*, 1 Wall. (U. S.) 627, 17 L. ed. 692.

[b] Where a decree refers to a commissioner's report for the priorities of the creditors, and the decree and the report can be safely amended to avoid uncertainty, an amendment will be allowed. *McCleary v. Grantham*, 29 W. Va. 301, 11 S. E. 949.

[c] Where a decree by mistake required an advertisement of six months instead of six weeks the court refused to amend it. *Guise v. Middleton, Smed. & M. Ch. (Miss.)* 89.

7. *Mootry v. Grayson*, 104 Fed. 613, 44 C. C. A. 83; *Rhodes v. Bell*, 230 Mo. 138, 130 S. W. 465.

[a] The court may modify the order by changing the terms of sale from a private to a public sale. *Rhodes v. Bell*, 230 Mo. 138, 130 S. W. 465.

[b] Extension of Time To Comply With Bid.—The court may make an

**H. VACATION AND REVOCATION.**—The order of sale may be set aside or vacated by the court in the same manner as other decrees.<sup>8</sup> And if the court was without jurisdiction to make it, the order should be revoked,<sup>9</sup> which may be done by the issuance of a second order.<sup>10</sup>

**I. APPEAL.**—An order directing,<sup>11</sup> or refusing to direct<sup>12</sup> a sale may generally be appealed. A reversal of the decree or judgment after the sale is had does not invalidate the sale, if the court had jurisdiction to render the judgment or decree.<sup>13</sup>

**J. REVIVOR AND RENEWAL.**—Generally a decree rendered in the lifetime of the parties may be executed without revivor after the death of the sole defendant,<sup>14</sup> and the death of the plaintiff after a decree but before sale<sup>15</sup> does not abate the suit and invalidate the

order extending the time of payment.

**Idaho.**—*In re* Great Western Beet Sugar Co., 22 Idaho 328, 125 Pac. 799, 43 L. R. A. (N. S.) 671. **Tenn.**—See *Munson v. Payne*, 9 Heisk. 672. **Va.** *Long v. Weller's Exr.*, 29 Gratt. (70 Va.) 347. See *Tebbs v. Lee*, 76 Va. 744. **Eng.**—*Saunders v. Gray*, 4 Myl. & Cr. 519, 41 Eng. Reprint 198; *Tanner v. Radford*, 4 Myl. & Cr. 518, 41 Eng. Reprint 198. See *Robertson v. Skelton*, 13 Beav. 91, 19 L. J. Ch. (N. S.) 561, 51 Eng. Reprint 36. **Can.**—*Langevin v. Garon*, 2 L. C. R. 125; *Denison v. Denison*, 4 Ch. Chamb. 37.

8. See 6 STANDARD PROC. 564.

**[a] The Vendee of the Purchaser is a Necessary Party.**—*Ramey v. Francis Day & Co.*, 169 Ky. 469, 184 S. W. 380.

9. *Wall v. Clark*, 19 Tex. 321.

**[a] Insufficient Description as Ground.**—The fact that the property liable under the decree is not described in the execution or order of sale is sufficient to authorize the court to recall the order of sale, and set aside the appraisement made thereunder. *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900, 65 N. W. 1059.

10. *Pace v. Fishback*, 10 Tex. Civ. App. 450, 31 S. W. 424.

11. See 2 STANDARD PROC. 181; 6 STANDARD PROC. 568.

12. See 6 STANDARD PROC. 568.

13. **U. S.**—*McGoon v. Scales*, 9 Wall. 23, 19 L. ed. 545. **Ill.**—*Fergus v. Woodworth*, 44 Ill. 374. **Ind.**—*Doe ex dem. Noble v. Swiggett*, 5 Blackf. 328. **Miss.** *Henderson v. Herrod*, 23 Miss. 434. **Neb.** *Hollister v. Mann*, 40 Neb. 572, 58 N. W. 1126. **Okla.**—*Threadgill v. Colcord*, 16 Okla. 447, 85 Pac. 703.

**[a] When the plaintiff is the purchaser,** the reversal of an erroneous judgment will not set aside a sale or render it void ipso facto. *Blake v. Wolfe*, 111 Ky. 840, 1143, 64 S. W. 910, 98 Am. St. Rep. 434. See also *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 230, 68 Am. Dec. 723; *Benningfield v. Reed*, 8 B. Mon. (Ky.) 102; *Yocum v. Foreman*, 14 Bush (Ky.) 494; *Dist. of Clifton v. Pfirman*, 33 Ky. L. Rep. 529, 110 S. W. 406.

**As ground for setting aside the sale,** see *infra*, XII, D, 7.

14. **U. S.**—*Whiting v. United States Bank*, 13 Pet. 6, 10 L. ed. 33. **Ind.** *Kellogg v. Tout*, 65 Ind. 146, 150. **N. Y.** *Hays v. Thomae*, 56 N. Y. 521, *affirming Harrison v. Simons*, 3 Edw. Ch. 394.

**[a] Death of the mortgagor after confirmation of the sale but before delivery of the deed** does not necessitate a revival of the action under an express statute in Kentucky. *Johnson's Admr. v. Haskins*, 18 Ky. L. Rep. 852, 38 S. W. 687.

**As to revivor generally,** see the title, "Judgments and Decrees, Revival of."

15. *Lynde v. O'Donnell*, 12 Abb. Pr. (N. Y.) 286, 21 How. Pr. 34; *Laidley v. Jasper*, 49 W. Va. 526, 39 S. E. 169, death of the plaintiff after verdict does not necessitate a revival.

**[a] Similar to Execution Sale.**—The copy of the decree or order of sale are in the nature of a fi. fa. and if put into the hands of the officer before the death of the plaintiff, there is no necessity for a revivor. *Lynde v. O'Don-*

subsequent sale, though there is authority to the contrary.<sup>16</sup> Some statutes provide that when a sale is not made by reason of failure of the term or otherwise, the order of sale must be renewed.<sup>17</sup>

**V. PROCESS TO THE OFFICER.**—A judgment or decree for the sale of certain specific property is not carried into effect by a writ of execution as in the case of common-law judgments generally.<sup>18</sup> Instead thereof, the person directed to make the sale is furnished a copy of the decree of sale,<sup>19</sup> or under statute, a process directing the sale.<sup>20</sup> There is no absolute necessity of issuing a copy of the decree or an order of sale to the officer to empower him to act,<sup>21</sup> unless the statute requires it.<sup>22</sup> An order of sale cannot lawfully limit the power

nell, 12 Abb. Pr. (N. Y.) 286, 21 How. Pr. 34; *Craig's Admx. v. Fox*, 16 Ohio 563.

As to sale on execution after death of plaintiff, see the title "Judgments and Decrees, Enforcement of."

[b] But an order of sale cannot issue on a decree after the death or marriage of the plaintiff. *Craig's Admx. v. Fox*, 16 Ohio 563.

16. *Glenn v. Clapp*, 11 Gill & J. (Md.) 1; *Wheatley's Lessee v. Harvey*, 1 Swan (Tenn.) 484. But see *Bryant v. McCollum*, 4 Heisk. (Tenn.) 511.

[a] If before confirmation of the sale, the sole plaintiff die, a subsequent confirmation without revivor is void. *Wheatley's Lessee v. Harvey*, 1 Swan (Tenn.) 484.

17. See generally the statutes, and *Walser v. Gilchrist*, 220 Mo. 314, 119 S. W. 413; *Carson v. Hughes*, 90 Mo. 173, 2 S. W. 127; *Hughes v. Hughes*, 72 Mo. 136. See, however, *Hamer v. Cook*, 118 Mo. 476, 24 S. W. 180, holding the judgment was ample authority to sell until all the land was sold and a renewal order was not necessary.

[a] A sale without a renewal when one is required by the statute is void. *Walser v. Gilchrist*, 220 Mo. 314, 119 S. W. 413; *Carson v. Hughes*, 90 Mo. 173, 2 S. W. 127; *Hughes v. Hughes*, 72 Mo. 136.

18. *Southern Cal. Lumb. Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115; *Kellogg v. Tout*, 65 Ind. 146.

19. *Southern Cal. Lumb. Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115.

[a] Where a decree directing a sheriff to sell "upon receiving an order therefor" was remanded to another court for execution, and thereupon the

clerk of the latter court issued merely a certified copy of the decree to sell, containing no description of the land, except by reference to other parts of the record a sale made thereunder was irregular and properly set aside. *Rhone-mus v. Corwin*, 9 Ohio St. 366.

20. *Southern Cal. Lumb. Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115; *Martin v. Hostetter* (Okla.), 158 Pac. 1174.

[a] Not a Writ of Execution.—The process referred to in the California Code of Civ. Proc., §684, which provides that when the judgment requires the sale of property, the same may be enforced by "a writ" reciting such judgment, etc., is neither styled an execution, nor is it such in nature. *Southern Cal. Lumb. Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115.

[b] An order of sale issued on a decree directing a sale is a written command under the seal of the court authorizing and directing the officer to whom it is directed to execute its judgment. *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113, citing *Kelley v. Vincent*, 8 Ohio St. 415.

21. *Karnes v. Harper*, 48 Ill. 527; *Jarrett v. Hoover*, 54 Neb. 65, 74 N. W. 429; *Johnson v. Colby*, 52 Neb. 327, 72 N. W. 313; *Fried v. Stone*, 14 Neb. 398, 15 N. W. 698; *Parrat v. Neligh*, 7 Neb. 456; *Rector v. Rotton*, 3 Neb. 171.

[a] The failure of the clerk to attach his seal to the order of sale until after the sale has taken place is a defect curable by amendment. *Wheldon v. Cornett*, 4 Neb. (Unof.) 421, 94 N. W. 626.

22. See generally the statutes, and

conferred by the decree,<sup>23</sup> but if any illegal limitation is put in the order, it has no binding force,<sup>24</sup> and if the defendant is not prejudiced thereby, the sale may be confirmed notwithstanding the limitation.<sup>25</sup>

**VI. APPRAISEMENT.—A. NECESSITY OF.**—Before a judicial sale of property, it is frequently required that the property be first appraised,<sup>26</sup> but this requirement may be waived.<sup>27</sup> Where an ap-

Martin *v.* Hostetter (Okla.), 158 Pac. 1174.

[a] **Seal.**—(1) Where the statute prescribes that the order must be under seal, such direction is mandatory, and an order of sale without the seal of the court is void; and the court has no power to allow the process to be amended by attaching the seal after the sale has been made. *Gordon v. Bodwell*, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341. See also *White v. Taylor*, 46 Tex. Civ. App. 471, 102 S. W. 747. (2) The impression of the seal on the certificate to the cost bill attached to the order of sale and made a part of it does not constitute an attestation of the order of sale. *White v. Taylor*, 46 Tex. Civ. App. 471, 102 S. W. 747.

[b] **An order not styled as statute** requires is void. *Martin v. Hostetter* (Okla.), 158 Pac. 1174; *Richmond v. Robertson* (Okla.), 151 Pac. 203.

[c] **Failure to name the parties** against whom the judgment was rendered does not render the order invalid. *White v. Taylor*, 46 Tex. Civ. App. 471, 102 S. W. 747.

23. *Stephenson v. Murdock*, 89 Neb. 818, 132 N. W. 406; *Jarrett v. Hoover*, 54 Neb. 65, 74 N. W. 429.

[a] **If the decree does not fix a period** within which it shall be executed, the clerk has no authority to designate in the order a date when the order shall be returned. If he does so it has no binding force. *Jarrett v. Hoover*, 54 Neb. 65, 74 N. W. 429.

24. *Stephenson v. Murdock*, 89 Neb. 818, 132 N. W. 406.

25. *Stephenson v. Murdock*, 89 Neb. 818, 132 N. W. 406.

[a] **A copy of the decree** should be attached to or embodied in the order of sale. *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113.

26. See generally the statutes and the following cases: *Ky.*—*Meddis v. Fenley*, 98 Ky. 432, 33 S. W. 197;

*Phelps v. Jones*, 91 Ky. 244, 250, 15 S. W. 668; *Graves v. Long*, 87 Ky. 441, 9 S. W. 297; *Vivion's Admr. v. Vivion*, 21 Ky. L. Rep. 103, 50 S. W. 984. *La.* *Curley's Succession*, 18 La. Ann. 728. *Mo.*—*Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572. *Neb.* *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113; *Jones v. Davis*, 6 Neb. 33 (holding statute constitutional). *Ohio.* *Wiles v. Baylor*, 1 Ohio 509. *Tex.* *Chifflet v. Willis*, 74 Tex. 245, 11 S. W. 1105.

[a] **In Kentucky** (1) where no right to redeem exists, an appraisalment is not required. *McKee v. Stein's Guardian*, 91 Ky. 240, 16 S. W. 583; *Wigginton v. Nehan*, 25 Ky. L. Rep. 617, 76 S. W. 196. (2) But where property is sold for purpose of division at the instance of the owners, an appraisalment is not necessary. *Graves v. Long Assn.*, 87 Ky. 441, 9 S. W. 297; *Southwick v. Grenzenbach*, 12 Ky. L. Rep. 263, 14 S. W. 344.

[b] **Before a guardian's sale**, an appraisalment is not necessary. *Woolbridge v. Jacob's Guardian*, 79 Ky. 250.

[c] **In Iowa** judicial sales made to satisfy judgments rendered since the code must be made without appraisalment. *Babcock v. Gurney*, 42 Iowa 154.

[d] **Statute Not Retrospective.** The statute requiring appraisalment does not apply to a sale for a debt created before the statute took effect. *Sullivan v. Berry's Admr.*, 83 Ky. 198, 4 Am. St. Rep. 147; *Tichenor v. Wood*, 24 Ky. L. Rep. 1109, 70 S. W. 837.

**Where infant's property** is to be sold, see 12 STANDARD PROC. 824.

[e] **If an appraisalment has been set aside**, the property cannot be sold. *Carstens v. Eller*, 60 Neb. 460, 83 N. W. 743.

27. *Ky.*—*Gravitt v. Mountz*, 27 Ky. L. Rep. 945, 87 S. W. 304. *La.*—*Weber v. Gorsuch*, 24 La. Ann. 615; *Broadwell v. Rodrigues*, 18 La. Ann. 68. *Wash.* See *Dennis v. Moses*, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302.

praisement is required and is not waived, an omission thereof will be ground for setting aside the sale in a direct proceeding, but will not render the sale void in a collateral proceeding after confirmation.<sup>28</sup>

**B. OBJECT.**—The object of an appraisement is to give the party whose property is sold the right to redeem if it sells for less than two-thirds of the appraised value,<sup>29</sup> and to advise the court of the value of the realty to assist it in exercising its discretion in approving or disapproving the sale.<sup>30</sup>

**C. WHEN MADE.**—As a general rule the appraisement should be made after the decree of sale,<sup>31</sup> though in some jurisdictions it is a jurisdictional prerequisite to an order of sale.<sup>32</sup> It must of course be made before the property is sold.<sup>33</sup>

**D. APPRAISERS.—1. Number of.**—The statutes provide for the number of appraisers,<sup>34</sup> which is generally three.<sup>35</sup>

**2. Qualifications of.**—It is required that the appraisers be disinterested freeholders,<sup>36</sup> and that they be sworn.<sup>37</sup> The oath may be administered by a deputy sheriff,<sup>38</sup> or by the person designated to make the sale.<sup>39</sup> Where the statute directs the sheriff and two others

28. **Ark.**—*Apel v. Kelsey*, 47 Ark. 413, 2 S. W. 102; *Bell v. Green*, 38 Ark. 78. **Mo.**—*Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572. **Neb.**—*Wheldon v. Cornett*, 4 Neb. (Unof.) 421, 94 N. W. 626 (the entire omission of the appraisement is not jurisdictional, but a mere irregularity); *Neligh v. Keene*, 16 Neb. 407, 20 N. W. 277.

As to setting aside sale generally, see *infra*, XII.

As to collateral attack, see *infra*, XIX.

29. *Mastin v. Zweigart*, 24 Ky. L. Rep. 1920, 72 S. W. 750.

30. *Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572.

31. *Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572.

[a] An appraisement made at the time of the filing the petition for sale is not such an irregularity as to render a sale void on collateral attack especially after confirmation. *Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572.

32. See 12 STANDARD PROC. 824.

33. *Smith v. Biscailuz*, 83 Cal. 344, 358, 21 Pac. 15, 23 Pac. 314; *Strouse v. Drennan*, 41 Mo. 289.

34. See generally the statutes and *Terry v. Swinford*, 19 Ky. L. Rep. 712, 41 S. W. 553.

35. *Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572.

36. See the statutes generally, and *Phoenix Mut. Life Ins. Co. v. Williams*, 3 Neb. (Unof.) 79, 90 N. W. 756; *Lombard v. Pasusta*, 2 Neb. (Unof.) 496, 89 N. W. 255; *Unland v. Crane*, 63 Neb. 451, 88 N. W. 667; *Johnson v. Colby*, 52 Neb. 327, 72 N. W. 313.

[a] A husband is a freeholder, who lives with his wife on land of which she has the title, when occupied by them jointly as a homestead. *Salisbury v. Murphy*, 63 Neb. 415, 88 N. W. 764.

[b] A distant relationship of an appraiser to one of the creditors of a corporation, whose interest is comparatively small does not disqualify him. *Lake Superior Iron Co. v. Brown & Co.*, 44 Fed. 539.

[c] Previous Witnesses for Party. The fact that two of the appraisers had testified for plaintiff as to the value of the property at the trial in which the sale is ordered does not disqualify them to act as appraisers. *Adler & Sons Clothing Co. v. Hellman*, 4 Neb. (Unof.) 557, 95 N. W. 467.

37. *Phelps v. Jones*, 91 Ky. 244, 15 S. W. 668; *La Flume v. Jones*, 5 Neb. 256.

38. *Lambert v. De Santos*, 10 La. Ann. 725.

39. *George v. Keniston*, 57 Neb. 313,

to make the appraisalment, his deputy may act for him.<sup>40</sup>

**E. NOTICE OF APPRAISEMENT.**—The owner of real estate about to be sold under a decree of foreclosure is not entitled to notice of the time and place of making the appraisalment.<sup>41</sup> But some statutes require notice to the parties to appoint appraisers.<sup>42</sup>

**F. DUTIES OF APPRAISERS.—1. Requirement of View.**—Generally the appraisalment must be made upon an actual view, and not perfunctorily,<sup>43</sup> but if the appraisers are familiar with the property and its value, an appraisalment made without an actual view will be upheld.<sup>44</sup>

**2 Deduction of Liens.**—The appraisers are required to deduct all prior liens in making the appraisal,<sup>45</sup> but as this requirement is

77 N. W. 772; *Northwestern Mut. Life Ins. Co. v. Mulvihill*, 53 Neb. 538, 74 N. W. 78.

[a] Even though he himself had not been sworn. *George v. Keniston*, 57 Neb. 313, 77 N. W. 772; *Northwestern Mut. Life Ins. Co. v. Mulvihill*, 53 Neb. 538, 74 N. W. 78.

[b] **Special Commissioner.**—"Conceding that a special commissioner when properly qualified, could swear the appraisers, yet he certainly cannot do so if he himself has not qualified." *Phelps v. Jones*, 91 Ky. 244, 15 S. W. 668.

40. *Union Trust Co. v. King*, 3 Neb. (Unof.) 155, 91 N. W. 190; *Wells v. Frazier*, 64 Neb. 370, 89 N. W. 1033; *Richardson v. Hahn*, 63 Neb. 294, 88 N. W. 527; *Young v. Wood*, 63 Neb. 291, 88 N. W. 528; *Carstens v. Eller*, 60 Neb. 460, 83 N. W. 743; *Johnson v. Colby*, 52 Neb. 327, 72 N. W. 313.

41. *Elgutter v. Northwestern Mut. Life Ins. Co.*, 86 Fed. 500, 30 C. C. A. 218; *Seaman v. Northwestern Mut. Life Ins. Co.*, 86 Fed. 493, 30 C. C. A. 212 (Nebraska cases); *Home Ins. Co. v. Clark*, 1 Neb. (Unof.) 844, 95 N. W. 1056; *Green v. Paul*, 60 Neb. 7, 82 N. W. 98; *Maguin v. Pickard*, 57 Neb. 642, 78 N. W. 295; *Mills v. Hamer*, 55 Neb. 445, 75 N. W. 1105; *Hamer v. McFeggan*, 51 Neb. 227, 70 N. W. 937.

42. *Crowley Bank & Trust Co. v. Hurd*, 138 La. 978, 71 So. 128.

43. *Miller v. Loving*, 59 Kan. 485, 53 Pac. 476; *Lambert v. De Santos*, 10 La. Ann. 725.

[a] The mere entry on one corner of a 240 acre tract at a distance of a half mile from the house and buildings is not a substantial compliance with

the law. *Miller v. Loving*, 59 Kan. 485, 53 Pac. 476.

[b] The fact that the appraisers did not examine the interior of a house to be sold is not proof that the appraisalment was fraudulently made. *Levy v. Hinz*, 3 Neb. (Unof.) 11, 90 N. W. 640.

44. *Pierce v. Reed*, 3 Neb. (Unof.) 874, 93 N. W. 154; *Iowa Loan & Trust Co. v. Estate of Devall*, 63 Neb. 826, 89 N. W. 381; *Reynolds v. Fagan*, 2 Neb. (Unof.) 415, 89 N. W. 170; *Bostwick v. Keller*, 62 Neb. 815, 87 N. W. 1060; *Globe Loan & Trust Co. v. Wood*, 58 Neb. 395, 78 N. W. 721; *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113.

45. *Medland v. Van Etten*, 75 Neb. 794, 106 N. W. 1022; *Johnson v. Colby*, 52 Neb. 327, 72 N. W. 313; *American Inv. Co. v. McGregor*, 48 Neb. 779, 67 N. W. 785; *Rosenfield v. Chada*, 10 Neb. 421, 6 N. W. 630; *Sessions v. Irwin*, 8 Neb. 5. *Compare Ellenbogen v. Griffee*, 55 Ark. 268, 18 S. W. 126.

[a] **Appraising Defendant's Interest Only.**—Appraisers must appraise the property at its value in money, and deduct the liens therefrom, specifically enumerating each lien and the amount due thereon. It is not sufficient to appraise the interest of the debtor therein. *Rosenfield v. Chada*, 10 Neb. 421, 6 N. W. 630; *Sessions v. Irwin*, 8 Neb. 5.

[b] **An error in the appraisalment** whereby a tax lien was deducted twice is without prejudice to the defendant when the land sold for more than two-thirds of the appraised value. *La Selle v. Nicholls*, 56 Neb. 458, 76 N. W. 870.

[c] **In Nebraska** it is the duty of the officer after calling an inquest of

for the benefit of the plaintiff, a failure to do so is not ground for vacating the appraisal,<sup>46</sup> or objecting to confirmation.<sup>47</sup>

**3. Appraisal in Parcels or En Masse.**—Although distinct tracts of land should be separately appraised,<sup>48</sup> it is within the discretion of the court to provide for appraisal of the premises in parcels or en masse as the best interests of the parties may require.<sup>49</sup>

**4. Ascertaining Interest of Individual Defendants.**—Appraisers are not required to ascertain the respective interests of the different defendants in the land appraised.<sup>50</sup>

**G. RETURN OR REPORT.**—After the appraisal, the appraisers must make their return or report<sup>51</sup> in which the value of the property to be sold must be stated.<sup>52</sup> The appraisers themselves may amend their report before it is filed,<sup>53</sup> and may do so by leave of court afterwards.<sup>54</sup>

two disinterested freeholders to apply in writing to the county clerk and other named officials requesting them to certify to him the amount and character of all liens existing against the realty to be sold, prior to the lien under which he desires to sell. *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113.

46. *Ballou v. Sherwood*, 58 Neb. 20, 78 N. W. 383; *American Inv. Co. v. McGregor*, 48 Neb. 779, 67 N. W. 785; *Smith v. Foxworthy*, 39 Neb. 214, 57 N. W. 994; *Craig v. Stevenson*, 15 Neb. 362, 18 N. W. 510.

47. *Ballou v. Sherwood*, 58 Neb. 20, 78 N. W. 383; *American Inv. Co. v. McGregor*, 48 Neb. 779, 67 N. W. 785; *Smith v. Foxworthy*, 39 Neb. 214, 57 N. W. 994; *Craig v. Stevenson*, 15 Neb. 362, 18 N. W. 510.

48. *Kane v. Jonasen*, 55 Neb. 757, 76 N. W. 441; *Laughlin v. Schuyler*, 1 Neb. 409.

[a] Where two lots constitute one tract and have been used as such, they may be appraised and sold together. *Elgutter v. Northwestern Mut. Life Ins. Co.*, 86 Fed. 500, 30 C. C. A. 218; *Johnson v. Colby*, 52 Neb. 327, 72 N. W. 313.

49. *Kane v. Jonasen*, 55 Neb. 757, 76 N. W. 441; *Craig v. Stevenson*, 15 Neb. 362, 18 N. W. 510.

50. *Union Trust Co. v. King*, 3 Neb. (Unof.) 155, 91 N. W. 190; *Wells v. Frazier*, 64 Neb. 370, 89 N. W. 1033.

[a] An appraisal is not invalidated because the names of the owners of the equity of redemption are not stated other than by the designa-

tion "et al" after the name of the principal defendant. *Union Trust Co. v. King*, 3 Neb. (Unof.) 155, 91 N. W. 190; *Wells v. Frazier*, 64 Neb. 370, 89 N. W. 1033.

51. See *Campbell v. Clay*, 6 Bush (Ky.) 498; *Woodcock v. Bowman*, 4 Mete. (Ky.) 40; *Gravitt v. Mountz*, 27 Ky. L. Rep. 945, 87 S. W. 304; *Tomlinson v. McKaig*, 5 Gill (Md.) 256. And see 12 STANDARD PROC. 825.

[a] In Nebraska, (1) a true copy of the appraisal must be filed prior to the advertisement of sale and notice, with the clerk of the court. *Emory v. Boyer*, 2 Neb. (Unof.) 1, 95 N. W. 1061; *Bostwick v. Keller*, 62 Neb. 815, 87 N. W. 1060; *Walker v. Patch*, 52 Neb. 763, 73 N. W. 228; *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113. (2) A copy of the appraisal is deposited "forthwith" within the meaning of the statute, if filed the day following the appraisal. *Wheldon v. Cornett*, 4 Neb. (Unof.) 421, 94 N. W. 626. See also *Hubbard v. Hennessey*, 2 Neb. (Unof.) 816, 90 N. W. 220, four days.

52. *Gravitt v. Mountz*, 27 Ky. L. Rep. 945, 87 S. W. 304.

[a] A report which fails to fix any value to the land is a nullity, but exceptions filed long after confirmation of the sale and payment of the purchase price come too late. *Gravitt v. Mountz*, 27 Ky. L. Rep. 945, 87 S. W. 304.

53. *Ashley v. First Nat. Bk.*, 3 Neb. (Unof.) 18, 90 N. W. 639.

54. *Ashley v. First Nat. Bank*, 3 Neb. (Unof.) 18, 90 N. W. 639.

**H. CONCLUSIVENESS.**—The valuation placed by appraisers is conclusive unless it be set aside for some valid reason.<sup>55</sup>

**I. OBJECTIONS.**—An appraisement may be set aside and a new one ordered upon a proper showing,<sup>56</sup> which must be done, as a general rule, before sale,<sup>57</sup> by a motion to vacate,<sup>58</sup> but it cannot be done in a collateral proceeding.<sup>59</sup> If made after sale, the objection can be made only on the ground of fraud.<sup>60</sup> The objections must be stated with reasonable certainty.<sup>61</sup>

**Grounds.**—Mere irregularities in the appraisement,<sup>62</sup> such as a premature,<sup>63</sup> or tardy<sup>64</sup> appraisement, irregularity as to the oath,<sup>65</sup> or

55. *Wood v. Clark*, 58 Neb. 115, 78 N. W. 396; *Jarrett v. Hoover*, 54 Neb. 65, 74 N. W. 429; *Nye & Schneider Co. v. Fahrenholz*, 49 Neb. 276, 68 N. W. 498, 59 Am. St. Rep. 540; *Vought v. Foxworthy*, 38 Neb. 790, 57 N. W. 538. See also the following: **Ky.**—*Miles v. Lyons*, 20 Ky. L. Rep. 1727, 50 S. W. 15. **La.**—*Erwin v. Chaffe*, 51 La. Ann. 41, 24 So. 596. **Neb.**—*Adler & Sons Clothing Co. v. Hellman*, 4 Neb. (Unof.) 557, 95 N. W. 467; *Hartwick v. Woods*, 4 Neb. (Unof.) 103, 93 N. W. 415; *Taylor v. Reis*, 2 Neb. (Unof.) 533, 89 N. W. 374; *Cole v. Willard*, 62 Neb. 839, 88 N. W. 134; *Omaha Loan & Trust Co. v. Fitzpatrick*, 59 Neb. 303, 80 N. W. 907; *Lockwood v. Cook*, 58 Neb. 304, 78 N. W. 1118; *Nelson v. Alling*, 58 Neb. 606, 79 N. W. 162.

56. *Amato v. Ermann*, 47 La. Ann. 967, 17 So. 505; *Ashley v. First Nat. Bank*, 3 Neb. (Unof.) 18, 90 N. W. 639.

[a] But where no attack has been made on an appraisement, and no legal reasons existed therefor, the court is not authorized in setting it aside. *Kampman v. Nicewaner*, 60 Neb. 208, 82 N. W. 623.

57. **Ky.**—*Harris v. Gunnell*, 10 Ky. L. Rep. 419, 9 S. W. 376. **La.**—*Lambert v. De Santos*, 10 La. Ann. 725. **Neb.**—*Lewis v. Morearty*, 75 Neb. 316, 106 N. W. 447; *Nebraska Loan & Trust Co. v. Dickerson*, 1 Neb. (Unof.) 622, 95 N. W. 774; *Emory v. Boyer*, 2 Neb. (Unof.) 1, 95 N. W. 1061; *Unland v. Crane*, 63 Neb. 451, 88 N. W. 667 (that appraiser was not disinterested); *Ins. Co. of North America v. Ackerman*, 61 Neb. 312, 85 N. W. 287; *Scottish Am. Mort. Co. v. Nye*, 58 Neb. 661, 79 N. W. 553; *Smith Bros. Co. v. Weiss*, 56 Neb. 210, 76 N. W. 564; *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113.

58. See *United States Nat. Bank v. Hanson*, 1 Neb. (Unof.) 87, 95 N. W. 364.

[a] **Motion To Vacate Appraisement.**—The objection that liens were erroneously deducted must be raised before the sale by motion. *United States Nat. Bank v. Hanson*, 1 Neb. (Unof.) 87, 95 N. W. 364.

[b] **Objection that an appraisal is too low** must be made by motion to vacate the appraisement filed before the sale takes place. *Hartsuff v. Huss*, 2 Neb. (Unof.) 145, 95 N. W. 1070; *Hamer v. McFaggan*, 51 Neb. 227, 70 N. W. 937; *Overall v. McShane*, 49 Neb. 64, 68 N. W. 383.

59. *Trowbridge v. Cunningham*, 63 Kan. 847, 66 Pac. 1015.

60. *Harris v. Gunnell*, 10 Ky. L. Rep. 419, 9 S. W. 376; *Lewis v. Morearty*, 75 Neb. 316, 106 N. W. 447; *Phoenix Mut. Life Ins. Co. v. Williams*, 3 Neb. (Unof.) 79, 90 N. W. 756; *Omaha L. & T. Co. v. Borders*, 3 Neb. (Unof.) 3, 90 N. W. 642; *Ins. Co. of North America v. Ackerman*, 61 Neb. 312, 85 N. W. 287; *Mills v. Hamer*, 55 Neb. 445, 75 N. W. 1105; *Best v. Zuttavern*, 53 Neb. 619, 74 N. W. 81. See *Booker v. Louisville*, 25 Ky. L. Rep. 497, 76 S. W. 18.

61. *Union Savings Bank v. Lincoln N. University*, 4 Neb. (Unof.) 70, 93 N. W. 408.

62. See *Terry v. Swinford*, 19 Ky. L. Rep. 712, 41 S. W. 553.

[a] That the appraisers were not as well acquainted with the land as they should have been, will not invalidate the sale. *Terry v. Swinford*, 19 Ky. L. Rep. 712, 41 S. W. 553.

63. *Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572.

64. *Bobb v. Barnum*, 59 Mo. 394.

65. *Moore v. Wingate*, 53 Mo. 398; *McVey v. McVey*, 51 Mo. 406.

in the selection of an appraiser,<sup>66</sup> or an irregularity in that the appraisal was not made by the statutory number of appraisers,<sup>67</sup> are not sufficient to invalidate the sale, and set it aside.

J. NEW APPRAISEMENT. — A new appraisal may sometimes be awarded when the officer is unable to sell for the price required.<sup>68</sup> Some statutes, however, provide that a new appraisal can be made only where land has been twice offered for sale and not sold for want of bidders,<sup>69</sup> or unless the first appraisal has been vacated by the court.<sup>70</sup> If the court in setting aside a sale retains the first appraisal and directs a sale under it, a new appraisal is not necessary.<sup>71</sup>

**VII. ADVERTISEMENT OR NOTICE OF SALE. — A. NECESSITY FOR.** — Inasmuch as the object of the notice is to inform the public that a sale of certain property will occur, to invite them to the sale,<sup>72</sup> and to secure the best possible price for the property,<sup>73</sup> it is generally required that a proper notice of a judicial sale must be given.<sup>74</sup>

66. *Brockway v. Pomeroy*, 75 Neb. 704, 106 N. W. 781, where no injury or prejudice is shown.

67. *Terry v. Swinford*, 19 Ky. L. Rep. 712, 41 S. W. 553; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276.

68. *Schulz v. Hasse*, 227 Ill. 156, 81 N. E. 50.

[a] In a partition suit, where the master was unable to sell for the price named in the decree, the court should adopt some plan to sell the property that will be just and fair. It may in its discretion appoint commissioners to partition the property, or if the property cannot be partitioned without prejudice, to make a new appraisal. *Schulz v. Hasse*, 227 Ill. 156, 81 N. E. 50.

[b] When a purchaser at a judicial sale fails to pay his sale bonds and a second sale is made to satisfy them, an appraisal before the second sale is not necessary. *Wigginton v. Nehan*, 25 Ky. L. Rep. 617, 76 S. W. 196; *McKee v. Stein's Guardian*, 91 Ky. 240, 16 S. W. 583.

69. *Wilson v. New*, 4 Neb. (Unof.) 348, 93 N. W. 941; *Lombard v. Pasusta*, 2 Neb. (Unof.) 496, 89 N. W. 255; *Thompson v. Purcell*, 63 Neb. 445, 88 N. W. 778; *Carstens v. Eller*, 60 Neb. 460, 83 N. W. 743; *Kampman v. Nicewaner*, 60 Neb. 208, 82 N. W. 623; *Johnson v. Colby*, 52 Neb. 327, 72 N. W. 313; *Burkett v. Clarke*, 46 Neb. 466, 64 N. W. 1113.

70. *Thompson v. Purcell*, 63 Neb.

445, 88 N. W. 778; *Beardsley v. Higman*, 58 Neb. 257, 78 N. W. 510.

[a] On Alias Order of Sale. — Where land was sold under an order of sale and the sale vacated for irregularities, and the court issued an alias order of sale on which there was a new and higher appraisal, the making of the second appraisal was not a valid objection on the part of the mortgagor to the confirmation of the sale. *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281, 58 N. W. 695.

71. *Beardsley v. Higman*, 58 Neb. 257, 78 N. W. 510.

72. *Ky.* — *Jarboe v. Colvin*, 4 Bush 70. *Neb.* — *State v. Holliday*, 35 Neb. 327, 53 N. W. 142. *S. C.* — *Baily v. Baily*, 9 Rich. Eq. 392.

73. *Palmour v. Roper*, 119 Ga. 10, 45 S. E. 790; *Sowards v. Pritchett*, 37 Ill. 517.

74. See generally the statutes and the following: *U. S.* — *Evers v. Watson*, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. ed. 520; *United States Bank v. Ritchie*, 8 Pet. 128, 8 L. ed. 890. *Cal.* — *Halleck v. Moss*, 17 Cal. 339. *Ill.* — *Sowards v. Pritchett*, 37 Ill. 517; *Reynolds v. Wilson*, 15 Ill. 394, 60 Am. Dec. 753. *Ky.* — *Clark v. Bell*, 4 Dana 15; *Terry v. Swinford*, 19 Ky. L. Rep. 712, 41 S. W. 553. *Me.* — *Tracy v. Roberts*, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394. *Md.* — *Glenn v. Wootten*, 3 Md. Ch. 514. *Mass.* — *Thomas v. Le Baron*, 8 Mete. 355. *Minn.* — *McCord v. Sullivan*, 85 Minn. 344, 88

This prerequisite cannot be dispensed with by any provision in the decree,<sup>75</sup> nor can a non-compliance with it be subsequently cured by statute.<sup>76</sup>

**B. WHO MAY GIVE NOTICE.**—It has been held that the notice should be given by the person directed to make the sale.<sup>77</sup>

**C. FORM OF NOTICE.**<sup>78</sup>—**1. Title of Court and Cause.**—The advertisement of the sale should give a short style of the cause,<sup>79</sup> but an omission thereof will not render the sale irregular.<sup>80</sup>

**2. Description of Property.**—The notice should give a short description of the property to be sold sufficient to identify it,<sup>81</sup> but a description pointing out the property with reasonable certainty is all

N. W. 989, 89 Am. St. Rep. 561; Hartley v. Croze, 38 Minn. 325, 37 N. W. 449. **Miss.**—Laughman v. Thompson, 6 Smed. & M. 259; Smith v. Denson, 2 Smed. & M. 326. **Mo.**—Valle v. Fleming, 19 Mo. 454, 61 Am. Dec. 566. **N. Y.** *In re Philip*, 95 Misc. 709, 160 N. Y. Supp. 49. **Pa.**—Taylor v. Hoyt, 2 Monag. 206, 15 Atl. 892. **S. C.**—Baily v. Baily, 9 Rich. Eq. 392. **Tenn.**—Rucker v. Moore, 1 Heisk. 726. **Utah.**—In the matter of Walker's Estate, 6 Utah 369, 23 Pac. 930. **W. Va.**—Thompson v. Buffalo L. & C. Co., 88 S. E. 1040; Scott v. Ludington, 14 W. Va. 387.

See 12 STANDARD PROC. 827.

**[a] Where Sale Is Private.**—In Indiana, under statute, when the sale is private no notice is necessary. Maxwell v. Campbell, 45 Ind. 360; Worthington v. Duncan, 41 Ind. 515; Rice v. Cleghorn, 21 Ind. 89.

**[b] Advertisement of Property Not Sold.**—But the failure of the sheriff to legally advertise and offer for sale property which was not sold for want of bidders will not invalidate a subsequent sale made under another order to which no objection is made. Emplie v. McLean, 15 Neb. 629, 19 N. W. 593.

**[c] Whether the want of notice prevented competition or not, or was by design or accident, can make no difference.** Sowards v. Pritchett, 37 Ill. 517.

**As to effect of failure to give, and defects in, see *infra*, VII, F.**

**As to notice of adjourned sale, see *infra*, IX, A, 3, b.**

**Directing notice in decree, see *supra*, IV, D, 7.**

**75. United States Bank v. Ritchie,** 8 Pet. (U. S.) 128, 8 L. ed. 890.

**76. McCord v. Sullivan,** 85 Minn. 344, 88 N. W. 989, 89 Am. St. Rep. 561, since it is jurisdictional.

**77. Price v. Simpson,** 8 Ky. L. Rep. 327.

**[a] It is the duty of the commissioner to advertise the property, and the practice of employing others to post the advertisements directed by the court ought not to be tolerated.** If he has not done so himself he must be able when he makes his report to state from his own knowledge that the advertising was properly done. Price v. Simpson, 8 Ky. L. Rep. 327.

**78. Form of notice of sale under foreclosure or partition, see 9 STANDARD PROC. 750.**

**79. Baxter v. Finlay,** 1 Ch. Chambers (U. C.) 230. See Springer v. Law, 185 Ill. 542, 57 N. E. 435, 76 Am. St. Rep. 57.

**80. Ray v. Oliver,** 6 Paige (N. Y.) 489.

**[a] Where Name of Parties Was Omitted.**—Cunningham v. Schley, 6 Gill (Md.) 207. See Farr v. Sims, Rich. Eq. Cas. (S. C.) 122, 24 Am. Dec. 396.

**81. Ky.**—Terry v. Swinford, 19 Ky. L. Rep. 712, 41 S. W. 553. **Mass.**—New England Hospital v. Sohler, 115 Mass. 50. **Mich.**—Griswold v. Fuller, 33 Mich. 268. **Mo.**—Noland v. Bank of Lee's Summit, 129 Mo. 57, 31 S. W. 341. **Neb.**—Morrison v. Lincoln Sav. Bank & S. D. Co., 1 Neb. (Unof.) 449, 96 N. W. 230; Leigh v. Green, 64 Neb. 533, 90 N. W. 255, 101 Am. St. Rep. 592. **S. C.**—Farr v. Sims, Rich. Eq. Cas. 122, 24 Am. Dec. 396. **Tex.**—Texas Savings Loan Assn. v. Seitzler, 12 Tex. Civ. App. 551, 34 S. W. 348. **W. Va.**—Bradford v. McConihay, 15 W.

that is required.<sup>82</sup> It is generally sufficient to describe the property as it is described in the decree or mortgage under which the sale is made.<sup>83</sup> Abbreviations may be used.<sup>84</sup>

**Facts Affecting Value of Property.**—All improvements on the property,<sup>85</sup> other facts tending to enhance its value and attract bidders,<sup>86</sup> and easements to which it is subject,<sup>87</sup> should be set out in the notice, but it has been held unnecessary to state the several deeds creating incumbrances on it.<sup>88</sup>

**3. Amount of Debt.**—The amount of the debt for which the land is to be sold should be stated,<sup>89</sup> but in the absence of statute requiring it, an omission of this requirement will not invalidate the sale.<sup>90</sup>

Va. 732. *Can.*—*Baxter v. Finlay*, 1 Ch. Chamb. (U. C.) 230.

[a] **Description Held Sufficient.** *Wyman v. Hooper*, 2 Gray (Mass.) 141.

[b] **A description which gives notice where the property is and enables a prospective purchaser to find it for examination is sufficient.** *Mahoney v. Mackubin*, 52 Md. 357.

[c] **An advertisement showing that the property was situated in a particular district in a named county, that it contained 200 acres more or less, and was called "Pleasant Prospect," and assessed in the name of J. C. is a sufficient description.** *Cooper v. Holmes*, 71 Md. 20, 17 Atl. 711.

[d] **The failure of the notice of sale to properly describe the land was a mere irregularity, and did not deprive the court of jurisdiction to make the sale.** *Robertson v. Johnson*, 57 Tex. 62, 64; *Davis v. Touchstone*, 45 Tex. 490; *Fitzwilliams v. Davie*, 18 Tex. Civ. App. 81, 43 S. W. 840.

82. *Stull v. Seymour*, 63 Neb. 87, 88 N. W. 174; *Pearson v. Badger Lumber Co.*, 60 Neb. 167, 82 N. W. 374.

83. *Cal.*—*Anglo-Californian Bank v. Cerf*, 142 Cal. 303, 75 Pac. 902. *Mass.* *Model Lodging House Assn. v. Boston*, 114 Mass. 133. *Neb.*—*Miller v. Lanham*, 35 Neb. 886, 53 N. W. 1010.

84. *Bansemmer v. Mace*, 18 Ind. 27, 81 Am. Dec. 344.

[a] **An abbreviation "w. hf. of the n. w. q. of sec. 35, in t. 23, n., of r. 4, w., etc." is a sufficient description.** *Bansemmer v. Mace*, 18 Ind. 27, 81 Am. Dec. 344.

85. *Heward v. Ridout*, 1 Ch. Chamb. (U. C.) 244; *Baxter v. Finlay*, 1 Ch. Chamb. (U. C.) 230.

[a] **If all the improvements are not set out, the advertisement will be re-**

ferred to a master for resettlement and a new day appointed. *Heward v. Ridout*, 1 Ch. Chamb. (U. C.) 244.

86. See *Chadwick v. Patterson*, 14 Leg. Int. (Pa.) 132, 2 Phila. 275; *McAlpine v. Young*, 2 Ch. Chamb. (U. C.) 171.

[a] **Existence of Lease.**—The omission in an advertisement to state that the premises are leased advantageously is good ground for staying the sale. *McAlpine v. Young*, 2 Ch. Chamb. (U. C.) 171.

[b] **An outlet on an alley is an important advantage which should be described.** *Chadwick v. Patterson*, 2 Phila. (Pa.) 275.

87. *In re Estate of Whiteman*, 36 Leg. Int. (Pa.) 286, 13 Phila. 249.

[a] **A notice at the sale that the property will be sold free of incumbrances is calculated to mislead and will be ground for setting aside the sale where the property is subject to an easement not referred to in the notice.** But an omission to designate the existence of an easement to which the land is subject is not such a misdescription as will avoid the sale where the existence of the easement is ascertainable by recourse to the public records and actual measurement. *In re Estate of Whiteman*, 36 Leg. Int. (Pa.) 286, 13 Phila. 249.

88. *Cunningham v. Schley*, 6 Gill (Md.) 207; *Gibbs v. Cunningham*, 1 Md. Ch. 44.

89. *Terry v. Swinford*, 19 Ky. L. Rep. 712, 41 S. W. 553. See *Springer v. Law*, 185 Ill. 542, 57 N. E. 435, 76 Am. St. Rep. 57.

90. *Iowa Loan & Trust Co. v. Estate of Devall*, 63 Neb. 826, 89 N. W. 381; *Dederick v. Gillespie*, 63 Neb. 422, 83 N. W. 659; *Amoskeag Savings Bank v.*

4. **Statement as to Sale Itself.**—The time,<sup>91</sup> giving the hour thereof,<sup>92</sup> the place,<sup>93</sup> and the terms of the sale,<sup>94</sup> must be stated in the notice, but it is not necessary to state that the land will be sold in parcels, even when the decree has directed it to be sold in that manner.<sup>95</sup>

5. **Signature.**—The notice should be signed.<sup>96</sup>

Robbins, 53 Neb. 776, 74 N. W. 261; Stratton v. Reisdorph, 35 Neb. 314, 53 N. W. 136. See Dewitz v. Joyce-Pruitt Co., 20 N. M. 572, 151 Pac. 237.

[a] **The informality in a notice** by reason of a failure to state, in terms, the amount of principal and interest, where the sum is stated as the amount for which the property will be sold, is not sufficient to avoid the sale. Dewitz v. Joyce-Pruitt Co., 20 N. M. 572, 151 Pac. 237.

91. Blodgett v. Hitt, 29 Wis. 169.

[a] A notice dated Dec. 7 and stating that the sale would take place on the 28th day of Dec. next is valid. Gray v. Shaw, 14 Mo. 341.

92. Bondurant v. Bondurant, 251 Ill. 324, 96 N. E. 306; Trustees of Schools v. Snell, 19 Ill. 156, 68 Am. Dec. 586; Coxe v. Halsted, 2 N. J. Eq. 311.

[a] **The omission to name the hour** did not vitiate the sale where it was fairly conducted at the usual hour for foreclosure sales, there being no fraudulent intent and no injury. Thorwarth v. Armstrong, 20 Minn. 464.

[b] **That (1) the sale will be made between certain named hours** of the business portion of the day is a sufficient statement of the time (Burr v. Borden, 61 Ill. 389; Trustees of Schools v. Snell, 19 Ill. 156, 68 Am. Dec. 586; Coxe v. Halsted, 2 N. J. Eq. 311), although (2) it would be more proper to state the exact hour. Coxe v. Halsted, 2 N. J. Eq. 311.

93. Minn.—Bottineau v. Aetna Life Ins. Co., 31 Minn. 125, 16 N. W. 849. N. Y.—Burnet v. Denniston, 5 Johns. Ch. 35. Wis.—Midlothian Iron Min. Co. v. Dahlby, 108 Wis. 195, 84 N. W. 152; Blodgett v. Hitt, 29 Wis. 169.

[a] **Naming City.**—A notice designating "Duluth, in the county of St. Louis," the place not being otherwise designated, is insufficient, and the sale thereunder void. Hartley v. Croze, 38 Minn. 325, 37 N. W. 449.

[b] **Illustrations.**—(1) A notice des-

ignating the place as "in front of the office of the register of deeds in the county of Fillmore" sufficiently designates the place. Merrill v. Nelson, 18 Minn. 366. (2) "At the front door of the courthouse, in the city of St. Paul" sufficiently designates the place. Thorwarth v. Armstrong, 20 Minn. 464; Golcher v. Brisbin, 20 Minn. 453. (3) A notice stating the sale would be held at the courthouse where the statute requires the sale to be at the auditor's office is valid in the absence of a showing that anyone was misled. Whitney v. Bailey, 88 Minn. 247, 92 N. W. 974.

[c] **The designation of an impossible place**, such as "the front door of the courthouse" when there was in fact no courthouse in the village, or place known as such, amounts to no notice at all, and such notice and a sale thereunder is void. Bottineau v. Aetna Life Ins. Co., 31 Minn. 125, 16 N. W. 849.

94. Abell v. Duparey, 1 Ky. Op. 40; Farr v. Sims, Rich. Eq. Cas. (S. C.) 122, 24 Am. Dec. 396. *Contra*, Paine v. Fox, 16 Mass. 129.

95. Hoffman v. Burke, 21 Hun (N. Y.) 580.

[a] **Notice of Separate Sale.**—Where the decree requires the lots to be sold separately, the published notice need not specially state that the lots will thus be sold, when the notice does contain the information that the lots will be sold in the manner provided by the decree. Carstens v. Eller, 60 Neb. 460, 83 N. W. 743.

[b] **If an interested party wishes such specification** he must request it in good season. Hoffman v. Burke, 21 Hun (N. Y.) 580.

96. Coxe v. Halsted, 2 N. J. Eq. 311.

[a] **Failure of the commissioner to sign his name** above the words "Master Commissioner" on the posted notices, if the notices were otherwise sufficient, is not ground for setting aside the sale. Allsop v. Deposit Bank

**D. MANNER OF GIVING NOTICE.—1. In General.**—The manner of giving notice is generally regulated by statute,<sup>98</sup> or by the order or decree of sale.<sup>99</sup> Notice may be given by publication in newspapers,<sup>1</sup> by posting the notice in conspicuous places,<sup>2</sup> in places designated by the order<sup>3</sup> and sometimes by personal service.<sup>4</sup>

**2. Publication.—a. In General.**—In some jurisdictions, there being no statute regulating the time and manner of giving notice, such matters are within the discretion of the court granting the decree of sale,<sup>5</sup> and are, as a rule, stated in the decree.<sup>6</sup> Where such is the case, it is the duty of the officer directed to make the sale to proceed in pursuance to the decree.<sup>7</sup> If the statute regulates the time and

of Owensboro, 24 Ky. L. Rep. 762, 69 S. W. 1102.

[b] Whether the name is signed by himself, or printed, or signed by another is immaterial. *Coxe v. Halsted*, 2 N. J. Eq. 311.

98. See the statutes.

99. See notes and cases following.

1. *Parrat v. Neligh*, 7 Neb. 456. See *infra*, VII, D, 2.

2. Ill.—*Quick v. Collins*, 197 Ill. 391, 64 N. E. 288; *Wilson v. Ford*, 190 Ill. 614, 60 N. E. 876. Ind.—*Meredith v. Chancey*, 59 Ind. 466. Ky.—*Harris v. Gunnell*, 10 Ky. L. Rep. 419, 9 S. W. 376. Mich.—*Dexter v. Cranston*, 41 Mich. 448, 2 N. W. 674. Tenn.—*Godard v. Cox*, 1 Lea 112.

[a] **Posting Out of Ward.**—A sale duly confirmed will not be set aside in a collateral proceeding because the notices of sale were not posted in three public places in the ward as provided by statute, but were posted in three public places just outside the ward. *Averill v. Jackson City Bank*, 114 Mich. 20, 72 N. W. 15.

[b] **Publication as Posting.**—Where the decree orders that notice be published by posting, publication in a newspaper does not satisfy this requirement. *Halleck v. Moss*, 17 Cal. 339; *Augustine v. Doud*, 1 Ill. App. 588.

[c] **In Kentucky**, posting of notices is not required when the sale is by a master commissioner. *Scott v. Graves*, 153 Ky. 221, 154 S. W. 1084.

3. *Wilson v. Ford*, 190 Ill. 614, 60 N. E. 876; *Watson's Admr. v. Violet*, 2 Duv. (Ky.) 332.

[a] **Three Public Places.**—A requirement that the notice of foreclos-

ure sale be put up in three public places means that it shall be put in the places best calculated to bring the notice home to the mortgagor and to all persons most likely to attend as purchasers. *Denuing v. Smith*, 3 Johns. Ch. (N. Y.) 332.

4. See *infra*, VII, D, 3.

5. Ill.—*Quick v. Collins*, 197 Ill. 391, 64 N. E. 288; *Gould v. Garrison*, 48 Ill. 258; *Sowards v. Pritchett*, 37 Ill. 517, 524. Ky.—*Scott v. Graves*, 153 Ky. 221, 154 S. W. 1084. Miss.—See *Guise v. Middleton, Smed. & M. Ch.* 89, designation by counsel subject to approval of court. N. J.—*Parker v. Allen* (N. J. Eq.), 4 Atl. 300. S. C.—*Ex parte Alexander*, 35 S. C. 409, 14 S. E. 854; *Bulow v. Witte*, 3 S. C. 308; *Baily v. Baily*, 9 Rich. Eq. 392.

[a] The statute as to notice under execution sales does not apply to judicial sales. *Gould v. Garrison*, 48 Ill. 258; *Threadgill v. Colcord*, 16 Okla. 447, 85 Pac. 703.

[b] **In Kentucky** the code provides that judicial sales shall be made after such notice as the court may direct. The only limitations on the power of the court are §14a of Ky. Sts. and the requirement that the advertisement shall be reasonably sufficient to properly advertise the sale. *Scott v. Graves*, 153 Ky. 221, 154 S. W. 1084.

6. Whether decree must direct notice, see *supra*, IV, D, 7.

7. Ill.—*Quick v. Collins*, 197 Ill. 391, 64 N. E. 288; *Gould v. Garrison*, 48 Ill. 258; *Reynolds v. Wilson*, 15 Ill. 394, 60 Am. Dec. 753; *Augustine v. Doud*, 1 Ill. App. 588. Ia.—*Frazier v. Steenrod*, 7 Iowa 339, 71 Am. Dec. 447. Ky.—*Williams v. Woodruff*, 1 Duv. 257;

manner of giving notice,<sup>8</sup> the statute must be complied with,<sup>9</sup> and the officer has no power to sell until such compliance.<sup>10</sup> But it is immaterial if a longer notice be given.<sup>11</sup>

b. *The Newspaper*.—A newspaper in which a notice of sale may be published has been defined to be a publication, usually in sheet form, intended for general circulation, and published regularly at short intervals, containing intelligence of current events and news of general interest.<sup>12</sup> The selection of the newspaper in the absence of

Hahn v. Pindell, 1 Bush 538; Terry v. Swinford, 19 Ky. L. Rep. 712, 41 S. W. 553. **Md.**—Conroy v. Carroll, 82 Md. 127, 33 Atl. 423; Glenn v. Wootten, 3 Md. Ch. 514. **Okla.**—Threadgill v. Colcord, 16 Okla. 447, 85 Pac. 703. **S. C.** Baily v. Baily, 9 Rich. Eq. 392.

8. See generally the statutes, and Gleason v. Boone, 123 Ark. 523, 185 S. W. 1093.

[a] **The mode of giving notice prescribed in the deed of trust takes the place of that prescribed by the statute.** Atkinson v. Washington, etc. College, 54 W. Va. 32, 46 S. E. 253.

9. **U. S.**—Guaranty Trust Co. v. Green Cove Spring R. Co., 139 U. S. 137, 148, 11 Sup. Ct. 512, 35 L. ed. 116; Early v. Doe *ex dem.* Homans, 16 How. 610, 14 L. ed. 1079. **Cal.**—Hellman v. Merz, 112 Cal. 661, 44 Pac. 1079. **La.**—Gernon v. Bestick, 15 La. Ann. 697. **Minn.**—Hartley v. Croze, 38 Minn. 325, 37 N. W. 449. **Neb.**—Lawson v. Gibson, 18 Neb. 137, 24 N. W. 447. **N. M.**—*Compare*, however, Dewitz v. Joyce-Pruitt Co., 20 N. M. 572, 151 Pac. 237. **Wis.**—Pinkerton v. Gates Land Co., 118 Wis. 514, 95 N. W. 1089; Chippewa River L. Co. v. Gates Land Co., 118 Wis. 345, 94 N. W. 37, 95 N. W. 954; McCrubb v. Bray, 36 Wis. 333.

[a] **Variance Between Order and Statute.**—Where the statute required the publication to be in a daily newspaper printed in the county and circulating in the town of New Haven, and the order of the court only required the publication in a newspaper published in the county, but such notice was in fact inserted in a daily paper published in New Haven, the actual compliance with the law rendered the sale valid, in spite of the defect in the order. Lawrence's Appeal, 49 Conn. 411.

10. Vaughn v. Newman, 221 Ill. 576, 77 N. E. 1106, 112 Am. St. Rep. 203;

Reynolds v. Wilson, 15 Ill. 394, 60 Am. Dec. 753.

11. Morton v. Carroll, 68 Miss. 699, 9 So. 896; Taylor v. Coots, 32 Neb. 30, 48 N. W. 964, 29 Am. St. Rep. 426.

12. Hull v. King, 38 Minn. 349, 37 N. W. 792; Hanscom v. Meyer, 60 Neb. 68, 82 N. W. 114, 83 Am. St. Rep. 507, 48 L. R. A. 409.

[a] "The daily and weekly newspapers common to all parts of the country, of general circulation among the people, without regard to class, vocation or calling, devoted to the gathering and dissemination of news of current events of interest to all, and usually espousing and advocating principles of some political party with persistency, if not at all times with consistency, are, without doubt, newspapers within the meaning of the statute." But publications, such as literary, scientific, religious, medical, and legal journals, that are obviously for but one class of people and that class always but a small part of the entire public, are not newspapers, within the legal and ordinary meaning of the word. If, however, the paper in question has the distinguishing features required to make a newspaper, as ordinarily defined, the fact that it also makes a specialty of some particular class of business, and conveys intelligence of particular interest to those engaged in such business will not deprive it of its general classification as a newspaper. Hanscom v. Meyer, 60 Neb. 68, 82 N. W. 114, 83 Am. St. Rep. 507, 48 L. R. A. 409.

[b] **Public Newspaper.**—A secular newspaper of general circulation is a "public newspaper." Maass v. Hess, 140 Ill. 576, 29 N. E. 887.

[c] **Law Journal.**—A small publication in point of size containing no news of a political, religious, commercial, or social nature, but only a few

a statutory designation,<sup>13</sup> rests in the discretion of the court,<sup>14</sup> or officer conducting the sale,<sup>15</sup> though it has been held that it should not be in an obscure paper where the probabilities are that it will be seen by a few persons only.<sup>16</sup> Where it is required that the notice be published in a newspaper printed in the county where the land lies the paper must circulate therein,<sup>17</sup> but the circulation need not be general in any particular city or portion of the county.<sup>18</sup>

**In What Language.**—Unless otherwise directed in the order, it is always intended that the advertisement be inserted in a newspaper in the English language.<sup>19</sup> Some statutes in addition to advertisement in an English newspaper, require an advertisement in a paper in a foreign language also if there is one,<sup>20</sup> but even under such statute it has been held that the notice must be printed in English.<sup>21</sup>

**c. Time of Publication.**—In the absence of statute prescribing the length of time notice of the sale shall be given, a reasonable notice should be given,<sup>22</sup> and what constitutes a reasonable notice is left to

advertisements and notices of conveyances of real estate, building permits, court docket, and commissioners' sales is not a newspaper of general circulation. *Reagan v. Duddy*, 25 Ky. L. Rep. 1664, 78 S. W. 430. See also the following: Ill.—*Pentzel v. Squire*, 161 Ill. 346, 43 N. E. 1064, 52 Am. St. Rep. 373; *Kerr v. Hitt*, 75 Ill. 51. Neb.—*Hanseom v. Meyer*, 60 Neb. 68, 82 N. W. 114, 83 Am. St. Rep. 507, 48 L. R. A. 409. Ohio.—*Bigalke v. Bigalke*, 19 Ohio Cir. Ct. 331.

[d] **A religious weekly** containing a column devoted to news of the day is a "newspaper." *Hull v. King*, 38 Minn. 349, 37 N. W. 792.

13. See *Ruffin v. Johnson*, 5 Heisk. (Tenn.) 604.

[a] **Designation by Governor.**—An act of the legislature providing for a designation by the governor of the newspaper in which legal advertisements should be inserted applied only to public sales made by officers of the court, and not to private sales made by trustees and others. *Ruffin v. Johnson*, 5 Heisk. (Tenn.) 604.

14. *Sessions v. Peay*, 23 Ark. 39.

15. See *State v. Holliday*, 35 Neb. 327, 53 N. W. 142.

[a] **Mandamus.**—The court will not by mandamus direct the officer making the sale to advertise the same in any particular newspaper. *State v. Holliday*, 35 Neb. 327, 53 N. W. 142.

16. *State v. Holliday*, 35 Neb. 327, 53 N. W. 142. See, however, *St. Joseph*

*Mfg. Co. v. Daggett*, 84 Ill. 556, holding the law does not require proof of any specific notoriety or extent of circulation, to make a valid medium for notice by publication.

17. *Dexter v. Cranston*, 41 Mich. 448, 2 N. W. 674.

[a] The notice of sale is not invalid because the newspaper in which it was inserted, although published in the proper county was partly printed outside. *Aetna Life Ins. Co. v. Wortaszewski*, 63 Neb. 636, 88 N. W. 855; *Nebraska L. & S. I. Co. v. McKinley-Lanning L. & T. Co.*, 52 Neb. 410, 72 N. W. 357.

18. *Smith v. Foxworthy*, 39 Neb. 214, 57 N. W. 994.

19. *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401.

[a] **An English advertisement in a German newspaper** is bad. *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401.

20. See generally the statutes.

21. *Tappan v. Dayton*, 51 N. J. Eq. 260, 28 Atl. 1.

22. *Crosby v. Kiest*, 135 Ill. 458, 26 N. E. 589 (three weeks' notice by publication is reasonable); *Sowards v. Pritchett*, 37 Ill. 517; *Trustees v. Snell*, 19 Ill. 155, 68 Am. Dec. 586; *Baily v. Baily*, 9 Rich. Eq. (S. C.) 392.

[a] **Requiring Notice as in Case of Execution Sales.**—"While it would be a good practice to require, by decree, the master to give the same notice that a sheriff is required to give, still, a

the discretion of the court.<sup>23</sup> But statutes sometimes regulate this matter.<sup>24</sup> The courts are divided on the question whether a requirement of advertisement for a certain number of weeks successively intends that the first appearance of the advertisement shall be that number of full weeks before the day of sale, some adhering to the affirmative,<sup>25</sup> and some to the negative<sup>26</sup> of the proposition. Such a statute requires also that the notice appear in each successive issue of the newspaper up to the time of sale.<sup>27</sup>

Whether notice must be advertised up to and including the day of sale depends on the statute or decree directing the giving of notice.<sup>28</sup> Some statutes have express provisions as to the time between the last advertisement and the day of sale.<sup>29</sup>

failure to prescribe such notice in the decree, in the absence of a statute, is not erroneous." *Crosby v. Kiest*, 135 Ill. 458, 26 N. E. 589. To same effect, *Baily v. Baily*, 9 Rich. Eq. (S. C.) 392.

23. *Gould v. Garrison*, 48 Ill. 258; *Baily v. Baily*, 9 Rich. Eq. (S. C.) 392.

24. See generally the statutes.

25. Ill.—*Quick v. Collins*, 197 Ill. 391, 64 N. E. 288. Ind.—*Meredith v. Chancey*, 59 Ind. 466. Mich.—*Bacon v. Kennedy*, 56 Mich. 329, 22 N. W. 824. N. J.—*Parsons v. Lanning*, 27 N. J. Eq. 70. Wis.—*McCrubb v. Bray*, 36 Wis. 333.

[a] The phrase "three weeks successively" evidently means the same thing as "three successive weeks." *In re Cunningham*, 73 Cal. 558, 15 Pac. 136.

26. Ia.—*Frazier v. Steenrod*, 7 Iowa 339, 71 Am. Dec. 447; *Morrow v. Weed*, 4 Iowa 77, 66 Am. Dec. 122. N. M.—*Dewitz v. Joyee-Pruitt Co.*, 20 N. M. 572, 151 Pac. 237. N. Y.—*Wood v. Terry*, 4 Lans. 80. S. C.—*Ex parte Alexander*, 35 S. C. 409, 14 S. E. 854.

27. *Hellman v. Merz*, 112 Cal. 661, 666, 44 Pac. 1079; *In re O'Sullivan's Estate*, 84 Cal. 444, 24 Pac. 281; *Hartley v. Croze*, 38 Minn. 325, 37 N. W. 449.

[a] Where publication is in a daily paper, a notice of a sale to be had on Thursday, April 21, must appear in the issue of April 20. *Hellman v. Merz*, 112 Cal. 661, 666, 44 Pac. 1079.

[b] Where notice is given in a weekly paper the last advertisement must appear not more than seven days before the sale. *Hartley v. Croze*, 38 Minn. 325, 37 N. W. 449; *Tappan v.*

*Dayton*, 51 N. J. Eq. 260, 28 Atl. 1. *Contra*, *Dexter v. Cranston*, 41 Mich. 448, 2 N. W. 674, which holds that when a part of a week intervenes between the regular day of publication notice need not be inserted on the last day of publication previous to the sale if the full notice has been given. Each week commences to run on the day of publication, so that where notice is inserted in the issue of February 23d, the week following thereafter will not end until the next day of publication which is March 2. A notice given on that day of a sale to take place on March 4th is not one published one week next before the sale and it cannot be counted as part of the statutory number of weeks required. If the last notice of a sale to take place on March 4th, then falls on February 23d, the notice is sufficient.

28. See generally the statutes, and *Melton v. Fitch*, 125 Mo. 281, 28 S. W. 612.

[a] **Once Each Week.**—Under a statute requiring notice "once each week for four consecutive weeks prior to the sale," the notice need not be continuous up to the day of sale. *Watkins v. Inge*, 24 Kan. 612.

[b] **Thirty Days Before Sale.**—But where statute requires notice to be given "for at least thirty days before sale," it is otherwise, the word "for" being equivalent to "during." Notice need not be published on the day of the sale, however. *Whitaker v. Beach*, 12 Kan. 492; *Mallory v. Patterson*, 63 Neb. 429, 88 N. W. 686. See also *First Nat. Bank v. Kennedy* (Kan.), 157 Pac. 417.

29. See generally the statutes and

In computing time, either the day of first publication or the day of sale should be included and the other excluded.<sup>30</sup> Sundays and holidays are included when notice for a certain time is prescribed.<sup>31</sup>

d. *Frequency*.—A statute or decree requiring notice to be given for a certain number of weeks,<sup>32</sup> or a certain number of days,<sup>33</sup> does not require daily notice; a weekly notice for the prescribed time is sufficient.<sup>34</sup> But the notice must appear in every regular issue during the required period.<sup>35</sup> But the court is sometimes authorized to direct

Davis v. Magoun, 109 Iowa 308, 80 N. W. 423, under statute requiring last notice to be given at least a week before the day of sale.

[a] **Publication on Day of Sale.** Where the statute provides that "the last publication to be not more than seven days prior to the time appointed for selling the same" the statute is not complied with by publication on the day of sale. *Trenton Trust, etc. Co. v. Fitzgibbon & Crisp Carriage, etc. Co.*, 81 N. J. Eq. 1, 84 Atl. 1042.

[b] **A requirement of ten days' notice of sale** does not require that the last notice shall be published ten days before sale. *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556.

30. *Smith v. Rowles*, 85 Ind. 264; *Meredith v. Chancey*, 59 Ind. 466; *Gray v. Worst*, 129 Mo. 122, 31 S. W. 585.

[a] An advertisement of a sale to occur June 18, published in a weekly paper beginning May 19 and ending June 16, is a compliance with a requirement of sale after advertising thirty days. *Gray v. Worst*, 129 Mo. 122, 31 S. W. 585.

31. *Schenek v. Schenck*, 52 La. Ann. 2102, 28 So. 302.

32. *Cal.*—*In re O'Sullivan's Estate*, 84 Cal. 444, 24 Pac. 281. *Md.*—*Johnson v. Dorsey*, 7 Gill 269. *E. I.*—*In re Harris, Petitioner*, 14 R. I. 637.

[a] **Successively**.—Where the statute provides for publication "three weeks successively," it simply indicates the time and not the manner of publication; the word "successively" refers to weeks and not the publication of the paper. *In re Cunningham*, 73 Cal. 558, 15 Pac. 136.

33. *Md.*—*White v. Malecomb*, 15 Md. 529. *Mo.*—*German Bank v. Stumpf*, 73 Mo. 311. *Neb.*—*Cuyler v. Tate*, 67 Neb. 317, 93 N. W. 675; *Lawson v. Gibson*, 18 Neb. 137, 24 N. W. 447.

[a] Under statute requiring thirty

days' notice, notice is sufficient where the first publication in a weekly paper was on April 26, the last May 24, and where sale was on May 28. *Cuyler v. Tate*, 67 Neb. 317, 93 N. W. 675.

[b] But where the decree directs a sale "after ten days' advertising," notice must be published at least ten times on ten distinct days. While a direction for sale after giving notice for ten days might be construed to mean the same thing, the language of the decree is stronger. *Maxwell v. Burns (Tenn.)*, 59 S. W. 1067.

34. *Ill.*—*Garrett v. Moss*, 20 Ill. 549. *Ia.*—*Frazier v. Steenrod*, 7 Iowa 339, 71 Am. Dec. 447; *Morrow v. Weed*, 4 Iowa 77, 132, 66 Am. Dec. 122. *Kan.*—*Tidd v. Grimes*, 66 Kan. 401, 71 Pac. 844; *Watkins v. Inge*, 24 Kan. 612. *Md.*—*Johnson v. Dorsey*, 7 Gill 269. *Mass.*—*Frothingham v. March*, 1 Mass. 247. *Mich.*—*Munroe v. Winegar*, 128 Mich. 309, 87 N. W. 396. *Mo.*—*Gray v. Worst*, 129 Mo. 122, 31 S. W. 585. *Neb.*—*Cuyler v. Tate*, 67 Neb. 317, 93 N. W. 675; *Lawson v. Gibson*, 18 Neb. 137, 24 N. W. 447. *N. Y.*—*Chamberlain v. Dempsey*, 22 How. Pr. 356, 13 Abb. Pr. 421; *Howard v. Hatch*, 29 Barb. 297; *Wood v. Terry*, 4 Lans. 80. *Ore.*—*Walker v. Goldsmith*, 14 Ore. 125, 12 Pac. 537. *S. C.*—*Ex parte Alexander*, 35 S. C. 409, 14 S. E. 854. *W. Va.*—*Atkinson v. Washington & Jefferson College*, 54 W. Va. 32, 46 S. E. 253; *Benwood v. Wheeling R. Co.*, 53 W. Va. 465, 44 S. E. 271.

[a] **Semi-weekly**.—Publication in each issue of a semi-weekly publication for thirty days is a compliance with the statute. *Omaha Loan & Trust Co. v. Lynch*, 2 Neb. (Unof.) 798, 90 N. W. 217.

35. *Cal.*—*Hellman v. Merz*, 112 Cal. 661, 44 Pac. 1079; *In re O'Sullivan's Estate*, 84 Cal. 444, 24 Pac. 281. *Kan.*

a publication a less number of times than each issue.<sup>36</sup> And the notice need not appear in all the editions of the paper issued on the days of publication.<sup>37</sup> A requirement that publication be had at least once a week for a certain number of weeks successively means that there must be that number of publications not more than seven days apart.<sup>38</sup>

e. *Position of Notice in Paper.*—The notice should appear in an appropriate place in the newspaper.<sup>39</sup>

f. *Matters Relating to Printing and Circulation of Paper.*—An advertisement in a daily paper is not vitiated by the fact that the paper is regularly not printed on Sunday or some other specified day of the week.<sup>40</sup> Nor is the notice invalidated because of incompleteness of a particular issue of the paper, if it reaches all the regular subscribers.<sup>41</sup>

### 3. Personal Notice.—Unless the statute requires personal service

Whitaker v. Beach, 12 Kan. 492; McCurdy v. Baker, 11 Kan. 111. Mo.—German Bank v. Stumpf, 73 Mo. 311. Neb. Mallory v. Patterson, 63 Neb. 429, 88 N. W. 686; Lawson v. Gibson, 18 Neb. 137, 24 N. W. 447. Tenn.—Allen v. Kerr, 13 Lea 256.

[a] But see Petition of Harris, 14 R. I. 637, under a statute requiring notice to be published for four successive weeks, notice may be published weekly in a daily paper. But it would be otherwise if the publication is directed in a daily paper.

[b] *Effect of Intermittent Publication.*—Where notice has not appeared in every issue from its first insertion to the day of sale and the omission to make continuous publication is of such a character, or is attended by such circumstances as to mislead the public and work injury to the party whose property is sold, the sale may be set aside. German Bank v. Stumpf, 73 Mo. 311.

Where paper is not printed on certain days, see *infra*, VII, D, 2, f.

[c] One insertion of the statutory number of days before sale is not a compliance. Whitaker v. Beach, 12 Kan. 492; McCurdy v. Baker, 11 Kan. 111; Lawson v. Gibson, 18 Neb. 137, 24 N. W. 447, *disapproving* Craig's Admx. v. Fox, 16 Ohio 563. See Maxwell v. Burns (Tenn.), 59 S. W. 1067, where the court says by way of dictum "an advertisement on one day published ten days prior to the sale might

well be an advertising ten days before the sale, but it would not be ten days' advertisement."

36. *In re Cunningham*, 73 Cal. 558, 15 Pac. 136.

[a] A statute requiring notice for three weeks successively does not deprive the court of this power. *In re Cunningham*, 73 Cal. 558, 15 Pac. 136.

37. *Everson v. Johnson*, 22 Hun (N. Y.) 115.

38. *Early v. Doe ex dem. Homans*, 16 How. (U. S.) 610, 14 L. ed. 1079; *Hernandez v. Creditors*, 57 Cal. 333.

39. See *State Realty, etc. Co. v. Villaume*, 121 App. Div. 793, 106 N. Y. Supp. 698.

[a] *Printing Notice Under Misleading Heading.*—The fact that one of the published notices appeared in the newspaper under the heading "Surrogate's Notices," there being in addition thereto six other proper publications of the notice, even if a technical irregularity, is immaterial where no one is shown to have been injured, misled, or deceived thereby. *State Realty, etc. Co. v. Villaume*, 121 App. Div. 793, 106 N. Y. Supp. 698.

40. *Weld v. Rees*, 48 Ill. 428; *German Bank v. Stumpf*, 73 Mo. 311, 6 Mo. App. 17; *Kellogg v. Carrico*, 47 Mo. 157.

41. *Cowles v. Phoenix Mut. L. Ins. Co.*, 63 Kan. 883, 65 Pac. 217, where the paper was not sent to other publishers to whom it is sent in exchange.

of notice of sale on the defendant, as is sometimes the case,<sup>42</sup> no personal notice need be served.<sup>43</sup>

E. **PROOF OF.**—Proof of publication may be made by the publisher or his agent,<sup>44</sup> by the person conducting the sale,<sup>45</sup> or by any person having knowledge of the fact.<sup>46</sup> A recital in the record is evidence of the giving of notice.<sup>47</sup>

F. **FAILURE TO GIVE AND DEFECTS IN.**—The failure to give proper notice of sale is always ground for refusing to confirm or for setting aside the sale,<sup>48</sup> and the failure to give any notice renders the sale void for want of jurisdiction.<sup>49</sup> A failure to publish the notice for the required length of time is by some courts regarded as a fatal defect,<sup>50</sup> and by others as a mere irregularity which is cured by con-

42. See generally the statutes and *Lewis v. Woodall*, 4 Houst. (Del.) 543; *Wolf v. Heathers*, 4 Harr. (Del.) 325.

43. **ILL.**—*Springer v. Law*, 185 Ill. 542, 57 N. E. 435, 76 Am. St. Rep. 57; *Princeton Loan & Trust Co. v. Munsen*, 60 Ill. 371; *Crumpton v. Baldwin*, 42 Ill. 165. **KAN.**—*Keene Five-Cent Savings Bank v. Marsh*, 31 Kan. 771, 3 Pac. 511. **W. VA.**—*Atkinson v. Washington & Jefferson College*, 54 W. Va. 32, 46 S. E. 253.

44. **ILL.**—*Maass v. Hess*, 140 Ill. 576, 29 N. E. 887. **MICH.**—See *Dexter v. Cranston*, 41 Mich. 448, 2 N. W. 674. **NEB.**—*Taylor v. Coots*, 32 Neb. 30, 48 N. W. 964, 29 Am. St. Rep. 426.

[a] **Proof of publication is not necessary to the validity of a decree of confirmation.** *Yerger v. Ferguson*, 55 Miss. 190.

[b] **Sufficient Certificate.**—The certificate of publication by an agent of a corporation publisher is sufficient where it is shown by the minutes of the board of directors that the agent was authorized to make certificates of publication. *Pentzel v. Squire*, 161 Ill. 346, 43 N. E. 1064, 52 Am. St. Rep. 373.

45. *Frazier v. Steenrod*, 7 Iowa 339, 71 Am. Dec. 447, by affidavit with a copy of the advertisement.

46. *Johnson v. Colby*, 52 Neb. 327, 72 N. W. 313; *Taylor v. Coots*, 32 Neb. 30, 48 N. W. 964, 29 Am. St. Rep. 426; *Miller v. Lefever*, 10 Neb. 77, 4 N. W. 929.

47. See cases and notes following, and generally the title "Judgments."

[a] **An allegation in the report of sale that the sale was advertised "according to law," followed by a con-**

firmation of the sale is prima facie proof of publication of the notice required by the statute. *Cooper v. Sunderland*, 3 Iowa 114, 66 Am. Dec. 52. See *Robbins v. Boulware*, 190 Mo. 33, 88 S. W. 674, 109 Am. St. Rep. 746.

[b] **Effect of Recital in Record.** Where the statute prescribes notice, but not personal service, a recital in the record that the court was satisfied that the notice required by law had been given, is sufficient to show jurisdiction of the court until contradicted. *Little v. Sinnett*, 7 Iowa 324; *Cooper v. Sunderland*, 3 Iowa 114, 66 Am. Dec. 52.

[c] **Collateral Attack.**—A record recital that proper notice was given cannot be impeached in a collateral proceeding in another court. *Sargeant v. State Bank*, 12 How. 371, 13 L. ed. 1028. As to collateral attack, see *infra*, XIX, and the title "Judgments."

48. **ILL.**—*Reynolds v. Wilson*, 15 Ill. 394, 60 Am. Dec. 753. **KY.**—*Clark v. Bell*, 4 Dana 15; *Williams v. Woodruff*, 1 Duv. 257; *Fink v. Herrick*, 28 Ky. L. Rep. 763, 90 S. W. 268; *Terry v. Swinford*, 19 Ky. L. Rep. 712, 41 S. W. 553; *Harris v. Gunnell*, 10 Ky. L. Rep. 419, 9 S. W. 376. **MD.**—*Glenn v. Wooten*, 3 Md. Ch. 514. **MINN.**—*Hartley v. Croze*, 38 Minn. 325, 37 N. W. 449. **S. C.**—*Baily v. Baily*, 9 Rich. Eq. 392.

See 12 STANDARD PROC. 827.

49. **ME.**—*Tracy v. Roberts*, 88 Me. 310, 34 Atl. 68, 51 Am. St. Rep. 394. **MD.**—*Bolgiano v. Cooke*, 19 Md. 375. **MINN.**—*McCord v. Sullivan*, 85 Minn. 344, 88 N. W. 989, 89 Am. St. Rep. 561. **WIS.**—*Blodgett v. Hitt*, 29 Wis. 169.

50. **CAL.**—*Hellman v. Merz*, 112 Cal.

firmation.<sup>51</sup> Defects in the notice which do not deter or mislead bidders or depreciate the value of the property or prevent it from bringing a fair price, do not make it necessary to order a re-advertisement, and are not ground for setting aside the sale.<sup>52</sup> Thus a mistake in the date which misleads no one will not invalidate the proceedings.<sup>53</sup>

661, 44 Pac. 1079; *In re O'Sullivan's Estate*, 84 Cal. 444, 24 Pac. 281. See also *Halleck v. Moss*, 17 Cal. 339. **Kan.** *Wheatley v. Terry*, 6 Kan. 427. **La.** *Curley's Succession*, 18 La. Ann. 728. **N. J.**—*Tappan v. Dayton*, 51 N. J. Eq. 260, 28 Atl. 1.

51. **Ala.**—*Doe ex dem. Hudgens v. Jackson*, 51 Ala. 514. **Ill.**—*Moffitt v. Moffitt*, 69 Ill. 641. **Mo.**—*Robbins v. Boulware*, 190 Mo. 33, 88 S. W. 674, 109 Am. St. Rep. 746. **S. C.**—*Ex parte Alexander*, 35 S. C. 409, 14 S. E. 854, *distinguishing Baily v. Baily*, 9 Rich. Eq. 392.

As to effect of confirmation, see *infra*, XI, O.

As to collateral attack on the sale, see *infra*, XIX.

52. **Ga.**—*Wylly v. Gazan*, 69 Ga. 506. **Ill.**—*Field v. Brokaw*, 59 Ill. App. 442, where defendant's name was given as Cornelia instead of Cornelius R. Field. **La.**—*Wadsworth's Succession*, 2 La. Ann. 966. **Minn.**—*Richardson v. Farwell*, 49 Minn. 210, 51 N. W. 915. **Mo.**—*Noland v. Bank of Lee's Summit*, 129 Mo. 57, 31 S. W. 341; *Matney v. Graham*, 50 Mo. 559. **Neb.**—*Pierce v. Reed*, 3 Neb. (Unof.) 874, 93 N. W. 154; *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281, 58 N. W. 695. **N. Y.**—*Kingsland v. Fuller*, 157 N. Y. 507, 52 N. E. 562. **Ohio.**—*Kotch, etc. Co. v. Sieplein*, 4 Ohio Dec. 88. **R. I.** *Horton v. Bassett*, 16 R. I. 419, 16 Atl. 715, where plaintiff's name was given as Bartlett instead of Bassett.

[a] **Misdescription.**—Where the advertisement described the property as "lot 3 in block 4, and it was described in the petition to sell as "lot 3, block 3," the error was held to be such as could not be cured without a new advertisement. *Stoffel v. Reiners*, 3 Mo. App. 33.

[b] Where the property is so described that one disposed to bid can easily identify it, the transposition of the numbers of the streets is immaterial where the estate was an impossible one as described by the numbers.

*New England Hospital v. Sohler*, 115 Mass. 50.

[c] **If matters not called for by the statute** but calculated to mislead the public and prevent bidding, are stated in the notice, the sale will be void, but if inserted by mistake and corrected before it could be presumed to influence persons desiring to bid, the mistake will not vitiate the proceedings. *Hubbell v. Sibley*, 5 Lans. 51, *affirmed*, 50 N. Y. 468.

53. **N. Y.**—*Mowry v. Sanborn*, 68 N. Y. 153, where the notice was dated 1858 instead of 1868. **W. Va.**—*Long v. Perine*, 44 W. Va. 243, 28 S. E. 701, where the date was stated to be 1996 instead of 1896. **Wis.**—*Jensen v. Weinlander*, 25 Wis. 477, where the date given was 1761 instead of 1861.

[a] **Mistake of One Year.**—Where by mistake in the advertisement the sale is advertised to be made in one year and was meant to be made and actually was made in the succeeding year, a sale thereunder is invalid. *Fenner v. Tucker*, 6 R. I. 551.

[b] **Mistake as to Day.**—Where the advertisement fixed the date of sale for Oct. 12, and it was recited it was to be made on county court day, which was Oct. 10, and the sale took place on Oct. 10, on proof that the owner was misled and the property sold for a very low price, the sale should be set aside. *Hendrix v. Nesbitt*, 96 Ky. 652, 29 S. W. 627.

[c] **Wrong Name of Day.**—Where the notice fixed the day of sale as Friday, Aug. 9, the sale is valid even though August 9 fell on Saturday. *First State Bank v. Day*, 188 Mich. 228, 154 N. W. 101.

[d] **Effect of Correction in Last Publication.**—Where the advertisement gave the day of the month correctly but named the wrong day of the week, and the mistake was corrected in the published notice on the day before the sale, it was held that no one could have been misled. *Chandler v. Cook*,

A contradiction between the advertised and posted notice as to a matter not required by law to be stated is not ground for equitable relief.<sup>54</sup>

G. **OBJECTIONS AND WAIVER.**—Objections to the notice and publication must be promptly made.<sup>55</sup> The debtor by his conduct may waive any defect in the advertisement.<sup>56</sup>

**VIII. ENJOINING AND STAYING SALE.**<sup>57</sup>—A judicial sale which is about to be made may, in a proper case, be enjoined<sup>58</sup> or stayed.<sup>59</sup> A purchaser who has failed to comply with his bid cannot enjoin a subsequent sale of the property.<sup>60</sup>

**IX. THE SALE.**—A. **TIME AND PLACE.**—1. **Time.**—The time of sale is sometimes fixed by statute,<sup>61</sup> or in the absence thereof, by

2 McArthur (D. C.) 176. *Contra*, Wellman v. Lawrence, 15 Mass. 326.

54. Watt v. McGalliard, 67 Ill. 513.

[a] Where there was no requirement that the notice should state that the sale would be with or without redemption, and two forms of notices were given, one by posted notices stating the sale would be subject to redemption and one by publication in a newspaper that it would be without redemption, and the land was decreed to be sold and was sold subject to redemption, the fact of the publication in the newspaper did not furnish grounds for equitable relief. Watt v. McGalliard, 67 Ill. 513.

55. McBride v. Gwynn, 33 Fed. 402.

56. Howard v. Schmidt, 29 La. Ann. 129.

[a] By appointing an appraiser the debtor cures any defect in the advertisement of a judicial sale. Howard v. Schmidt, 29 La. Ann. 129.

57. As to enjoining execution sale, see the title "Judgments and Decrees, Enforcement of."

58. People v. Gilmer, 10 Ill. 242.

[a] **Form of Writ.**—Where an injunction is sought to restrain a sale on the ground that the full amount of the mortgage note is not due, the writ should be so worded as to prevent the collection of the amount disputed and allow the sale to be made to satisfy the undisputed debt, or suspend the executory proceedings until the injunction suit is tried. Crowley Bk. & Tr. Co. v. Hurd, 137 La. 787, 69 So. 175.

[b] Cotenants who were parties to a partition suit cannot enjoin a sale of the property in the absence of fraud

or undue advantage. Morrison v. Morrison, 105 Ala. 637, 17 So. 109.

59. See Brown v. Lawson, 86 Va. 284, 9 S. E. 1014.

As to stay of proceedings generally, see the title "Supersedeas and Stay of Proceedings."

[a] The pendency of an action of unlawful detainer, which appears to be a mere contrivance to secure delay is not ground for staying a sale. Brown v. Lawson, 86 Va. 284, 9 S. E. 1014.

[b] **Notice to Officer Necessary To Bind Him.**—(1) The person conducting the sale is not bound by an order staying the sale of which he had no notice. Monell v. Lawrence, 12 Johns. (N. Y.) 521, 529; Freehold Permanent Bldg. Society v. Choate, 3 Ch. Chamb. (U. C.) 440. (2) Where an order staying the sale three weeks had been granted on the day of sale, but notice thereof did not reach the master until after the sale, but before the purchase money had been paid, the court refused to set aside the sale. Freehold Permanent Bldg. Society v. Choate, 3 Ch. Chamb. (U. C.) 440.

60. Boyer v. Cannon, 46 La. Ann. 767, 15 So. 86.

[a] Where a resale has been ordered because of failure to pay the purchase money, the purchaser cannot enjoin the resale on the ground that he has in fact paid, his proper remedy being an objection to the report, and a motion or petition for confirmation of the original sale. Haralson v. George's Exr., 56 Ala. 295; Morrow v. McGregor, 49 Ark. 67, 4 S. W. 49.

61. See generally the statutes.

the decree in the discretion of the court.<sup>62</sup> In so far as the officer directed to sell is not limited by the law or decree, he is vested with a reasonable discretion in regard to the time when the sale should be made.<sup>63</sup> The sale must take place at the time designated in the notice,<sup>64</sup> but it may be made after return day of the writ directing the sale.<sup>65</sup>

2. **Place.**—If not restricted by statute, the court may prescribe the place of sale.<sup>66</sup> The officer must sell the property at the place

62. *Macfarlane v. Macfarlane*, 50 Fla. 570, 39 So. 995.

[a] The court should fix the time of a decretal sale and not leave it to the commissioner. The time thereof should be fixed by at least some general designation, such as the first day of some county or circuit court. *Perry v. Seitz*, 2 Duv. (Ky.) 122.

[b] The clerk has discretion in fixing the day on which a decree will be executed, and this discretion can only be controlled in a clear case of its abuse. *Myers v. James*, 4 Lea (Tenn.) 370.

[c] **Sale Before Time Fixed in Decree.**—Where a decree directed a sale at the expiration of a year from the date of the master's report, a sale a year from the date of the decree was allowed where there was unavoidable delay in obtaining the report and in the meantime the defendant had abandoned the premises and it was going to waste, as the decree was equivalent in effect to a judgment at law. *Porte v. Irwin*, 8 Ont. Prac. (Can.) 40.

[d] **Objection to Time Fixed.**—A party objecting to the time fixed should apply with all convenient speed for a change of time or he will be held to have waived the objection. *Cohen v. Wagner*, 6 Gill (Md.) 236. See *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732.

63. *Southern California Lumb. Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115 (referring to former practice); *Head v. Clark*, 88 Ky. 362, 11 S. W. 203.

[a] The time of day when he will sell is ordinarily left to the officer. *Head v. Clark*, 88 Ky. 362, 11 S. W. 203.

64. **Colo.**—*Brown v. Belles*, 17 Colo. App. 529, 16 Pac. 275. **Kan.**—*Wheatley v. Terry*, 6 Kan. 427. **Tex.**—*Trousdale v. Trousdale's Exr.*, 35 Tex. 756.

[a] A sale (1) made on another day than that stated in the notice, and different from the time stated in the report may be set aside if done fraudulently. *McConnel v. Gibson*, 12 Ill. 127. (2) A sale made after the time designated in the notice is void. *Brown v. Belles*, 17 Colo. App. 529, 69 Pac. 275.

[b] Where the sheriff sold a few minutes before the time advertised, and at a grossly inadequate price the sale may be set aside on motion of defendant. *Pickett v. Pickett*, 31 Kan. 727, 3 Pac. 549.

[c] **Sale During Hour Advertised.** Where the advertisement of the sale stated the property would be sold at eleven o'clock, a sale made between 11:30 o'clock and noon was valid because it is eleven o'clock until it is twelve. *McGovern v. Union Mut. Life Ins. Co.*, 109 Ill. 151.

65. *Southern Cal. Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115; *Norton v. Reardon*, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459.

As to execution sale after return day, see the title "Judgments and Decrees, Enforcement of."

66. *Sessions v. Peay*, 23 Ark. 39; *Ladd v. Craig*, 94 Miss. 659, 47 So. 777.

[a] Where the court (1) directs a sale to be had at a place other than that provided in the statute, the sale is not void. The decree may be erroneous but it is binding unless reversed on appeal. *Godchaux v. Morris*, 121 Fed. 482, 57 C. C. A. 434. But see *Horne v. Rodgers*, 113 Ga. 224, 38 S. E. 768, holding (2) that an order granting leave to sell "on the premises" is invalid where the statute requires the sale to be made at the court house door.

prescribed by law or in the decree and named in the notice,<sup>67</sup> or the sale will be void.<sup>68</sup> If compliance with the law in this respect is impossible the officer should so report to the court.<sup>69</sup> The court with the consent of all the parties may change the place of sale.<sup>70</sup>

It is generally required that the sale be made in the county where the land is situated.<sup>71</sup> And where tracts of land decreed to be sold lie in different counties, in the absence of contrary statute,<sup>72</sup> each tract must be sold in the county in which it is situated.<sup>73</sup> In some states it is required that the sale take place at the court house,<sup>74</sup> or at the court house door,<sup>75</sup> but in others there is no such requirement.<sup>76</sup>

67. **U. S.**—See *Blossom v. Milwaukee*, etc. R. Co., 3 Wall. 196, 208, 18 L. ed. 43. **Ky.**—*Bethel v. Bethel*, 6 Bush 65, 99 Am. Dec. 655. **Tex.**—*Brown v. Christie*, 27 Tex. 73, 84 Am. Dec. 607; *Peters v. Caton*, 6 Tex. 554. **Va.** *Talley v. Starke's Admr.*, 6 Gratt. (47 Va.) 339.

[a] **Substantial Compliance.**—Where a sale advertised to be on the premises is held within eighty yards of the house in full view thereof and within fifteen or twenty yards of the premises, the sale is valid. *Ferguson v. Franklins*, 6 Munf. (20 Va.) 305.

68. *Whitney v. Bailey*, 88 Minn. 247, 92 N. W. 974; *Grace v. Garnett*, 38 Tex. 156; *Peters v. Caton*, 6 Tex. 554.

69. *Talley v. Starke's Admx.*, 6 Gratt. (47 Va.) 339.

70. *The San Jose Indiano*, 2 Gall. 311, 21 Fed. Cas. No. 12,323.

71. See generally the statutes.

[a] **Unless good cause be shown to induce the court to direct otherwise**, the court should order the sale to be made on the premises or at the courthouse of the county in which the land is situated. *Sessions v. Peay*, 23 Ark. 39.

[b] **Where a county had been divided into two districts, a sheriff cannot sell land in one district for taxes at the courthouse of the other district.** *Cramer v. Sides*, 87 Miss. 241, 39 So. 693.

72. See generally the statutes.

[a] **A statute providing that in case lands are situated in different counties, suit may be brought in any one by implication authorizes a sale in the county where the proceeding is launched.** *Morris v. Wayne Circ. Judge*, 130 Mich. 336, 89 N. W. 963.

73. *Holmes v. Taylor*, 48 Ind. 169.

74. *Gager v. Henry*, 5 Sawy. 237, 9 Fed. Cas. No. 5,172; *Horne v. Rodgers*, 113 Ga. 224, 38 S. E. 768.

[a] **A sale (1) at the courthouse door is a sale at the courthouse within the statute.** *Smith v. Burnes*, 8 Kan. 197. (2) **A sale advertised to take place at the "south door of the courthouse" is "at the courthouse,"** although it is not the door of general access to the courthouse. *Peck v. Starks*, 64 Neb. 341, 89 N. W. 1040.

[b] **Where the courthouse had been destroyed by fire, and a place rented and designated as the courthouse, a sale made at the latter place is not void.** *Thayer v. Hartman*, 78 Miss. 590, 29 So. 396.

[c] **Where Church Is Used as Courthouse.**—It is a sufficient compliance where the sale was made at a near by church used as a courthouse, the latter being occupied by troops of soldiers. *Kane v. McCown*, 55 Mo. 181.

[d] **Where the decree is silent, it is the duty of the officer to make the sale at the courthouse.** *Hooper v. Young*, 58 Ala. 585; *Matheson's Heirs v. Hearin*, 29 Ala. 210.

75. See generally the statutes.

[a] **A sale is substantially at the courthouse door where the officer standing in front of the outer door of the courthouse announced to the persons attending the sale that while crying said sale, he would stand inside the door, on account of inclemency of the weather; whereupon he went into the courthouse about fifty feet from the door on the same floor in full view and hearing of the persons at the door.** *Patterson v. Reynolds*, 19 Ind. 148.

76. *Sessions v. Peay*, 23 Ark. 39; *Cressler v. Tri-State L. & T. Co.*, 182 Ind. 572, 107 N. E. 68. But see *Holmes v. Taylor*, 48 Ind. 169.

Where the statute directs a sale at the court house or such place as the court may direct, the sale should be made at the court house in the absence of a designation in the decree,<sup>77</sup> but a sale at another place will be upheld when confirmed by the court.<sup>78</sup>

### 3. Adjournment or Postponement. — a. Generally. — By the Court.

The court may postpone a sale<sup>79</sup> upon an ex parte application,<sup>80</sup> and in a proper case, mandamus will lie to compel it to do so.<sup>81</sup>

**By the Officer.** — The officer directed to make a sale is vested with a reasonable discretion to adjourn a sale to another time and place when the circumstances demand it,<sup>82</sup> but he cannot arbitrarily do so.<sup>83</sup> Nor can he delegate his power to another.<sup>84</sup> A master need not post-

77. **Kan.**—Thompson v. Burge, 60 Kan. 549, 555, 57 Pac. 110, 72 Am. St. Rep. 369. **Ky.**—Revill's Heirs v. Claxon's Heirs, 12 Bush 558. **Miss.** Ladd v. Craig, 94 Miss. 659, 47 So. 777. **Tex.**—Peters v. Caton, 6 Tex. 554.

78. **Kan.**—Thompson v. Burge, 60 Kan. 549, 555, 57 Pac. 110, 72 Am. St. Rep. 369. **Ky.**—Revill's Heirs v. Claxon's Heirs, 12 Bush 558. **Miss.** Ladd v. Craig, 94 Miss. 659, 47 So. 777. See also Tate v. Bush, 62 Miss. 145. **Tex.**—Peters v. Caton, 6 Tex. 554.

As to effect of confirmation, see *infra*, XI, O.

79. **Mass.**—Old Colony Trust Co. v. Great White Spirit Co., 181 Mass. 413, 63 N. E. 945. **Mich.**—Roberts v. Kalamazoo Judge, 122 Mich. 560, 81 N. W. 355. **Mont.**—State v. Dist. Court, 34 Mont. 345, 86 Pac. 268. **Tex.**—Butler v. Stephens, 77 Tex. 599, 14 S. W. 202.

[a] A motion for the postponement of the sale made on the day of sale, when the facts on which it was based had been on file in the court for a month, may be summarily dismissed. *Cressler v. Tri-State L. & T. Co.*, 132 Ind. 572, 107 N. E. 68.

80. *Old Colony Trust Co. v. Great White Spirit Co.*, 181 Mass. 413, 63 N. E. 945.

81. *Roberts v. Kalamazoo Judge*, 122 Mich. 560, 81 N. W. 355.

82. **U. S.**—Burbank v. Semmes, 99 U. S. 138, 25 L. ed. 315; Blossom v. Milwaukee, etc. R. Co., 3 Wall. 196, 18 L. ed. 43; Richards v. Holmes, 18 How. 143, 15 L. ed. 304; Kearney v. Taylor, 15 How. 494, 14 L. ed. 787; Gager v. Henry, 5 Sawy. 237, 9 Fed. Cas. No. 5,172. **Ill.**—Gilbert v. Watts-De Golyer

Co., 169 Ill. 129, 48 N. E. 430, 61 Am. St. Rep. 154. **Ky.**—Head v. Clark, 88 Ky. 362, 11 S. W. 203. **Md.**—Compare, *Harrison v. Harrison*, 1 Md. Ch. 331. **Miss.**—Mitchell v. Harris, 43 Miss. 314. **Mo.**—Noland v. Barrett, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572; Wolff v. Ward, 104 Mo. 127, 16 S. W. 161. **N. J.**—Bethlehem Iron Co. v. P. & S. S. Ry. Co., 49 N. J. Eq. 356, 23 Atl. 1077. **N. Y.**—Kelly v. Israel, 11 Paige 147; Collier v. Whipple, 13 Wend. 224; Moir v. Flood, 66 App. Div. 544, 73 N. Y. Supp. 364; Angel v. Clark, 21 App. Div. 339, 47 N. Y. Supp. 731. **Wis.**—Pier v. Storm, 37 Wis. 247.

[a] **Adjourned Sale.**—A sale regularly adjourned so as to give notice to all persons present of the time and place to which it is made, is, when made, in effect the sale, of which previous public notice was given. *Richards v. Holmes*, 18 How. (U. S.) 143, 15 L. ed. 304. As to notice of adjourned sale, see section following.

[b] **Adjournment to Another Room.** Where so many prospective bidders were present that the auditor's office was unable to accommodate them the sale was properly adjourned to the courtroom upstairs. *Whitney v. Bailey*, 88 Minn. 247, 92 N. W. 974.

[c] **Adjournment Is Not a Judicial Act.**—*White v. Zust*, 28 N. J. Eq. 107.

[d] **On appeal** a receiver's discretion refusing to adjourn a sale will not be disturbed, unless there has been an abuse thereof. *Fleming v. Fleming Hotel Co.*, 70 N. J. Eq. 509, 61 Atl. 739.

83. *Gilbert v. Watts-De Golyer Co.*, 169 Ill. 129, 48 N. E. 430, 61 Am. St. Rep. 154.

84. **Ill.**—Thornton v. Boyden, 31 Ill. 200. **Ia.**—Wolf v. Van Metre, 27 Iowa

pone a sale at the request of a mere stranger,<sup>85</sup> or if no reason therefor is given.<sup>86</sup> The day to which an adjournment is made should be specified at the time of adjournment.<sup>87</sup>

**Grounds.**—The officer may adjourn an advertised sale to a different time and place in order to obtain a fair price for the property.<sup>88</sup> Thus he may adjourn the sale where it is necessary to prevent a great sacrifice of the property,<sup>89</sup> or if a reasonably advantageous price cannot be had,<sup>90</sup> if there is a lack of bidders,<sup>91</sup> or if the day fixed for the sale falls on a legal holiday.<sup>92</sup> So also a sale may be adjourned in a proper case to permit the debtor to redeem.<sup>93</sup>

**b. Notice of Adjourned Sale.**—Although in the absence of a statute requiring it, a notice of an adjournment of sale is not necessary,<sup>94</sup> statutes generally require such notice,<sup>95</sup> which must be the same as was

348. **Mo.**—*Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401. **N. J.**—But see *Hicks v. Willis*, 41 N. J. Eq. 515, 7 Atl. 507.

85. *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732.

86. *Connick v. Hill*, 127 Cal. 162, 59 Pac. 832.

87. *La Farge v. Van Wagenen*, 14 How. Pr. (N. Y.) 54.

[a] **Variance in Date as Fixed and as Published.**—There is no statute or rule of court requiring the naming of the future day, and if a day is fixed the sale must be made on that day. If there is a variance between the day announced at the adjournment and that published in the newspaper the sale will be irregular. *La Farge v. Van Wagenen*, 14 How. Pr. (N. Y.) 54; *Miller v. Hull*, 4 Denio (N. Y.) 104.

88. *Head v. Clark*, 88 Ky. 362, 11 S. W. 203.

[a] **In the absence of a direction in the decree** the officer may adjourn the sale to another hour in order to obtain a fair price, or determine which property shall be sold first, or owing to sham bidding or lack of bidders refuse to sell altogether at the time fixed in the notice. *Head v. Clark*, 88 Ky. 362, 11 S. W. 203.

89. **U. S.**—*Blossom v. Milwaukee*, etc. R. Co., 3 Wall. 209, 18 L. ed. 43. **Ill.**—*Thornton v. Boyden*, 31 Ill. 200. **Mich.**—*Beaubien v. Poupard*, Harr. Ch. 206. **Mo.**—*Noland v. Barrett*, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572. **N. Y.**—*Collier v. Whipple*, 13

Wend. 224. **S. C.**—*Miller v. Law*, 10 Rich. Eq. 320, 73 Am. Dec. 92.

90. **U. S.**—*Richards v. Holmes*, 18 How. 143, 15 L. ed. 304; *Collier v. Stanbrough*, 6 How. 14, 12 L. ed. 324. **Ill.**—*Thornton v. Boyden*, 31 Ill. 200. **Ky.**—*Head v. Clark*, 88 Ky. 362, 11 S. W. 203. **Mich.**—*Beaubien v. Poupard*, Harr. Ch. 206.

91. **U. S.**—*Richards v. Holmes*, 18 How. 143, 15 L. ed. 304. **Ill.**—*Cohen v. Menard*, 136 Ill. 130, 24 N. E. 604. **Ky.**—*Head v. Clark*, 88 Ky. 362, 11 S. W. 203. **Mass.**—*Norris v. Howe*, 15 Mass. 175. **Miss.**—*Mitchell v. Harris*, 43 Miss. 314.

92. *White v. Zust*, 28 N. J. Eq. 107.

93. *Blossom v. Milwaukee, etc. R. Co.*, 3 Wall. (U. S.) 196, 18 L. ed. 43.

[a] **Where the decree ordered a sale** unless the mortgagors should previously pay the mortgage debt, a few short adjournments to enable the mortgagors to make arrangements to pay are for sufficient cause. If before the day to which the sale stands adjourned the amount of the decree is paid the sale may be discontinued altogether. *Blossom v. Milwaukee, etc. R. Co.*, 3 Wall. (U. S.) 196, 18 L. ed. 43.

94. *Coxe v. Halsted*, 2 N. J. Eq. 311. *Compare, Richards v. Holmes*, 18 How. (U. S.) 143, 15 L. ed. 304.

95. **Ill.**—*Griffin v. Marine Co. of Chicago*, 52 Ill. 130; *Thornton v. Boyden*, 31 Ill. 200. **La.**—*Montgomery v. Barrow*, 19 La. Ann. 169; *Humphreys v. Browne*, 19 La. Ann. 158. **Md.**—*Glenn v. Wootten*, 3 Md. Ch. 514. **Neb.**—*Fraaman v. Fraaman*, 64 Neb. 472, 90 N. W.

required for the original sale, unless the statute prescribes other notice.<sup>95½</sup>

**B. WHO MAY SELL. — 1. In General.** — The person who makes the sale must have received, from the court decreeing it, authority to offer the property for sale, to receive bids for it and to sell it.<sup>96</sup> The sale must be made by the person designated in the decree of sale or under the immediate direction and supervision.<sup>97</sup>

**2. Who May Be Designated.** — The court in the order<sup>98</sup> of sale may appoint or designate any competent person as its agent in making

245, 97 Am. St. Rep. 650. **Can.**—See *Thompson v. Milliken*, 15 Grant Ch. 197, holding that where a sale is put off a note of such postponement at the foot of the old advertisement will suffice without incurring the expense of a fresh advertisement.

[a] **In New Jersey**, an adjournment for any period not exceeding a week need not be advertised in the newspapers. *Hewitt v. Montclair R. Co.*, 25 N. J. Eq. 392.

[b] **Adjournment from week to week** for nearly three years without further advertisement is unwarranted, and where the owner had been misled thereby and was unaware of the sale the sale might be set aside upon equitable terms. *Chamberlain v. Larned*, 32 N. J. Eq. 295.

95½. *Griffin v. Chicago Marine Co.*, 52 Ill. 130; *Thornton v. Boyden*, 31 Ill. 200; *Hewitt v. Montclair Ry. Co.*, 25 N. J. Eq. 392.

[a] **Date.**—Where the notice of adjournment is published at the foot of the original notice of sale, the fact that it bears no date will not vitiate it. *Pier v. Storm*, 37 Wis. 247.

[b] **Description of Property.**—In advertising an adjourned sale the notice need not describe the lands to be sold. *Avon-by-the-Sea Land & Imp. Co. v. Finn*, 56 N. J. Eq. 808, 41 Atl. 360.

[c] **Adding Notice of Postponement to Notice of Sale.**—Where the statute does not direct any form of adjournment, unless it is from day to day, it is sufficient where on the day before the date appointed for the sale, a notice of postponement for a week at the same hour and place was added to the notice of sale, and the notice of sale and postponement appeared in each issue of the paper up to and including

the day of sale. *In re Harris*, Petitioner, 14 R. I. 637.

96. *Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co.*, 165 Fed. 162, 91 C. C. A. 196.

**As to necessity of order or decree of sale generally**, see *supra*, IV, A.

**As to process to officer**, see *supra*, V.

97. *Blossom v. Milwaukee, etc. R. Co.*, 3 Wall. (U. S.) 196, 205, 18 L. ed. 43.

[a] **Assigning Reason in Order.** Sometimes the statutes provide that the court in appointing certain persons as masters to sell must assign its reason therefor in the order of appointment. A recitation in the record, "good cause existing therefor," without assigning the reason, is a mere error which is amendable and it does not invalidate or affect the decree of sale. *Quinton v. Neville*, 154 Fed. 432, 83 C. C. A. 252.

[b] **Sale by Agent of Guardian.** Where a conservator's sale of real estate was made in the absence of the guardian by her agent, and the sale was fair and for a good price, and she adopted the act of her agent, and the court approved the sale, such sale cannot be attacked in a collateral proceeding, or even in a direct proceeding, especially where no exceptions were made to the manner of conducting the sale. *Wing v. Dodge*, 80 Ill. 564.

98. **Neb.**—*Omaha L. & T. Co. v. Bertrand*, 51 Neb. 508, 70 N. W. 1120; *American Inv. Co. v. Nye*, 40 Neb. 720, 59 N. W. 355, 42 Am. St. Rep. 692. **N. C.**—*McNeill v. Morrison*, 63 N. C. 508. **Ohio.**—*Mayer v. Wick*, 15 Ohio St. 548; *Wick v. Mayer*, 2 Ohio Dec. 579. **S. C.**—*Adams v. Kleckley*, 1 S. C. 142; *Meetze v. Padgett*, 1 S. C. 127.

the sale, but it should not appoint a nonresident,<sup>99</sup> a person under disability,<sup>1</sup> a party to the action,<sup>2</sup> one having an interest in the judgment to satisfy which the suit is brought,<sup>3</sup> or any of its own officers or others whose duties may be incompatible with their proper attention to their duties as agent of the court to make the sale.<sup>4</sup>

The court may direct a sale to be made by a master,<sup>5</sup> a special master or auctioneer,<sup>6</sup> a commissioner,<sup>7</sup> a marshal or sheriff,<sup>8</sup> or his

[a] **A woman** may be appointed. *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257.

[b] **Under a statute providing that attached property shall be sold "by the sheriff"** on order of the court having control of property, the court may direct the sheriff of the county where the court is held to sell land in another county. *Smith v. Commonwealth L. & L. Co.*, 172 Ky. 607, 189 S. W. 912.

99. *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257.

1. *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257.

2. *Smith v. Harrigan*, 27 Abb. N. C. 322, 15 N. Y. Supp. 852, 40 N. Y. St. 292.

3. *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257; *Etter v. Scott*, 90 Va. 762, 19 S. E. 776. But see *Teel v. Yancey*, 23 Gratt. (64 Va.) 691, 697 (holding it to be no objection to a sale that one of the commissioners was one of the plaintiffs to the suit in his own right); *Elworthy v. Billing*, 10 L. J. Ch. (N. S.) 176, 10 Sim. 98, 59 Eng. Reprint 549.

4. *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257.

5. **U. S.**—*Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732; *Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co.*, 165 Fed. 162, 91 C. C. A. 196. **Fla.**—*Mann v. Jennings*, 25 Fla. 730, 6 So. 771. **Ga.**—*Hall v. Taylor*, 133 Ga. 606, 66 S. E. 478. **N. Y.**—*Heyer v. Deaves*, 2 Johns. Ch. 154. **S. C.**—*Ex parte O'Bannon*, 65 S. C. 487, 43 S. E. 958.

[a] **The fact that a master was styled a commissioner** can make no difference, when the authority and duties prescribed in the appointment are appropriate to the function given. *Mann v. Jennings*, 25 Fla. 730, 6 So. 771.

[b] **Nomination by Plaintiff.**—The

master should be selected by the court, but the objection that he was nominated by complainant's counsel cannot be urged against the purchaser. *Knickerbocker Trust Co. v. Carteret Steel Co.*, 81 N. J. Eq. 130, 86 Atl. 55.

6. *Blossom v. Milwaukee, etc. R. Co.*, 3 Wall. (U. S.) 196, 18 L. ed. 43; *The Monte Allegre*, 9 Wheat. (U. S.) 616, 6 L. ed. 174; *Magann v. Segal*, 92 Fed. 252, 34 C. C. A. 323; *Threadgill v. Colcord*, 16 Okla. 447, 85 Pac. 703.

7. *Robertson v. McClintock*, 86 Ark. 255, 110 S. W. 1052; *Hall v. Taylor*, 133 Ga. 606, 66 S. E. 428.

[a] **Special Commissioner.**—*Bowen v. Evans*, 1 Lea (Tenn.) 107; *Williams v. Bowman*, 3 Head (Tenn.) 678; *Martin v. Kester*, 49 W. Va. 647, 39 S. E. 599.

[b] **Master Commissioner.**—*Scott v. Graves*, 153 Ky. 221, 154 S. W. 1084; *Northwestern Mut. Life Ins. Co. v. Mulvihill*, 53 Neb. 538, 74 N. W. 78; *American Inv. Co. v. Nye*, 40 Neb. 720, 59 N. W. 355, 42 Am. St. Rep. 692; *State v. Holliday*, 35 Neb. 327, 53 N. W. 142.

[c] **Special Master Commissioner.**—*Jones v. Miller*, 2 Neb. (Unof.) 582, 92 N. W. 201 (a special master commissioner may be appointed to enforce the decree after the sheriff had made two abortive attempts to do so, and the appointment may be made without notice); *Mayer v. Wick*, 15 Ohio St. 548; *Wick v. Mayer*, 2 Ohio Dec. 579.

8. **U. S.**—*Nalle v. Young*, 160 U. S. 624, 6 Sup. Ct. 420, 40 L. ed. 560; *Blossom v. Milwaukee, etc. R. Co.*, 3 Wall. 196, 18 L. ed. 43; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 640, 17 L. ed. 886; *Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co.*, 165 Fed. 162, 91 C. C. A. 196. **Ind.**—*Smith v. Sparks*, 162 Ind. 270, 70 N. E. 253. **Minn.**—*Clossen v. Whitney*, 39 Minn. 50, 38

deputy,<sup>9</sup> a referee,<sup>10</sup> or receiver,<sup>11</sup> a trustee,<sup>12</sup> a guardian,<sup>13</sup> an executor or administrator,<sup>14</sup> or by the clerk of court.<sup>15</sup>

No notice of the appointment of a master to sell is necessary.<sup>16</sup> If the person appointed to sell is unacceptable objection should be made to the court when the decree is rendered.<sup>17</sup> The order appointing a master to sell can be attacked only in a direct proceeding to set aside the order of appointment.<sup>18</sup>

**3. Right To Delegate Authority.**—The person appointed to sell cannot delegate his authority,<sup>19</sup> but if he be an officer having a deputy, the latter may make a sale under an order of sale directed to the former.<sup>20</sup> A sheriff cannot appoint a special deputy to make the sale, however.<sup>21</sup>

**4. Right To Employ Auctioneer.**—The person directed to make the sale may employ an auctioneer to conduct the sale if it be made

N. W. 759. **Mo.**—Hamer v. Cook, 118 Mo. 476, 24 S. W. 180. **Neb.**—State v. Holliday, 35 Neb. 327, 53 N. W. 142. **N. Y.**—Strauss v. Bendheim, 162 N. Y. 469, 56 N. E. 1007, reversing 44 App. Div. 82, 60 N. Y. Supp. 398. **Ohio.**—Craig's Admx. v. Fox, 16 Ohio 563. **S. C.**—Adams v. Kleekley, 1 S. C. 142. **Tex.**—Buse v. Bartlett, 1 Tex. Civ. App. 335, 21 S. W. 52.

[a] **Sheriff of Another County.**—But sheriff of one county cannot execute an alias order directed to sheriff of another county. Terry v. Cutler, 4 Tex. Civ. App. 570, 23 S. W. 539.

9. Hotchkiss v. Cutting, 14 Minn. 537; Tatum v. Holliday, 59 Mo. 422.

10. Sproule v. Davies, 171 N. Y. 277, 63 N. E. 1106; Strauss v. Bendheim, 162 N. Y. 469, 56 N. E. 1007, reversing 44 App. Div. 82, 60 N. Y. Supp. 398.

[a] **A referee appointed to sell is an administrative and not a judicial officer.** Sproule v. Davies, 171 N. Y. 277, 63 N. E. 1106.

11. *Ex parte* O'Bannon, 65 S. C. 487, 43 S. E. 958.

12. Gibson's Case, 1 Bland (Md.) 138, 17 Am. Dec. 257.

13. Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co., 165 Fed. 162, 91 C. C. A. 196.

14. Matter of Georgi, 21 Misc. 419, 47 N. Y. Supp. 1061.

[a] **An insolvent administrator may sell provided he gives the bond required by statute.** Matter of Georgi, 21 Misc. 419, 47 N. Y. Supp. 1061.

15. McCrady v. Jones, 36 S. C. 136, 15 S. E. 430; Adams v. Kleekley, 1 S. C. 142.

16. Seaman v. Northwestern Mut. Life Ins. Co., 86 Fed. 493, 30 C. C. A. 212.

17. Seaman v. Northwestern Mut. Life Ins. Co., 86 Fed. 493, 30 C. C. A. 212.

18. Seaman v. Northwestern Mut. Life Ins. Co., 86 Fed. 493, 30 C. C. A. 212; Elgutter v. Northwestern Mut. L. Ins. Co., 86 Fed. 500, 30 C. C. A. 218.

[a] **A collateral attack because of ineligibility of the appointee cannot be made.** Seaman v. Northwestern Mut. Life Ins. Co., 86 Fed. 493, 30 C. C. A. 212; Elgutter v. Northwestern Mut. L. Ins. Co., 86 Fed. 500, 30 C. C. A. 218.

19. **Ill.**—Kellogg v. Wilson, 89 Ill. 357; Sebastian v. Johnson, 72 Ill. 282, 22 Am. Rep. 144. **Mo.**—Graham v. King, 50 Mo. 22, 11 Am. Rep. 401. **Neb.**—Levara v. McNeny, 5 Neb. (Unof.) 318, 98 N. W. 679; Myers v. McGavock, 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627, is not in conflict with this rule, because while the sale was not actually made by the guardian it does not appear not to have been made under his personal supervision and in his presence. **N. J.**—Hicks v. Willis, 41 N. J. Eq. 516, 7 Atl. 507. **N. Y.**—Heyer v. Deaves, 2 Johns. Ch. 154. **W. Va.**—Connell v. Wilhelm, 36 W. Va. 598, 15 S. E. 245.

20. Chambers v. Jones, 72 Ill. 275; Heyer v. Deaves, 2 Johns. Ch. (N. Y.) 154.

21. Meyer v. Patterson, 28 N. J. Eq. 239.

in his presence.<sup>22</sup> And it has been held to be no objection to a sale which is fairly conducted, that the person entitled to the proceeds employs the auctioneer.<sup>23</sup>

**5. Where Term of Office Expires.**—Inasmuch as the duties of a master or commissioner expire with his term of office, sales ordered but not made by him before that time must be made by his successor.<sup>24</sup>

**6. Where Person Appointed Dies.**—Where the person appointed to make the sale dies, the court may make a new appointment.<sup>25</sup>

**7. Removal.**—Before removing a person appointed to make a sale on account of unusual delay in executing the decree, the court will ordinarily award a rule requiring the person appointed to account for the delay.<sup>26</sup>

**8. Bond and Oath.**—In the absence of a statute, or a requirement in the decree, the officer selling need not give a bond,<sup>27</sup> or take an oath of office,<sup>28</sup> especially where he is an officer who has taken an oath of office and filed a general bond.<sup>29</sup> But as this matter rests in the court's discretion, the court may require it and it is undoubtedly better practice to do so.<sup>30</sup> Statutes sometimes require bond and oath

22. **U. S.**—*Williamson v. Berry*, 8 How. 495, 12 L. ed. 1170; *Blossom v. Milwaukee R. Co.*, 3 Wall. 196, 18 L. ed. 43; *The Monte Allegre*, 9 Wheat. 616, 6 L. ed. 174. **Ill.**—*Chambers v. Jones*, 72 Ill. 275; *Sebastian v. Johnson*, 72 Ill. 282, 22 Am. Rep. 144. **Ky.** *Noland v. Noland's Admr.*, 12 Bush 426. **Md.**—*Gibson's Case*, 1 Bland 138, 17 Am. Dec. 257. **Miss.**—*Swan v. Smith*, 58 Miss. 875. **Neb.**—*Levara v. McNeny*, 5 Neb. (Unof.) 318, 98 N. W. 679; *Myers v. McGavock*, 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627. **Tenn.**—*Goodlett v. Campbell*, 1 Tenn. Ch. 200. **W. Va.**—*Bock v. Bock*, 24 W. Va. 586.

23. *Speer v. Skinner*, 35 Ill. 282, in a mortgage sale or a receiver's sale.

24. *Keith v. Gray*, Rich. Eq. Cas. (S. C.) 227; *Hunt v. Elliott*, 1 Bailey Eq. (S. C.) 90; *Yost v. Porter*, 80 Va. 855.

[a] The office of a master or commissioner does not, like a sheriff's levy, vest the property in him for sale. He is merely the agent of the court to execute a decree of sale and he must act within the power conferred on him. *Keith v. Gray*, Rich. Eq. Cas. (S. C.) 227.

25. *Covas v. Bertoulin*, 45 La. Ann. 160, 11 So. 874.

26. *Connell v. Wilhelm*, 36 W. Va. 598, 15 S. E. 245.

27. *Elgutter v. Northwestern Mut. Life Ins. Co.*, 86 Fed. 500, 30 C. C. A. 218; *Seaman v. Northwestern Mut. Life Ins. Co.*, 86 Fed. 493, 30 C. C. A. 212; *Morton v. Carroll*, 68 Miss. 699, 9 So. 896.

As to bond of personal representative, see 6 STANDARD PROC. 569.

As to guardian's bond, see 12 STANDARD PROC. 825.

28. *Elgutter v. Northwestern Mut. Life Ins. Co.*, 86 Fed. 500, 30 C. C. A. 218; *Mayer v. Wick*, 15 Ohio St. 548.

As to oath of administrator, see 6 STANDARD PROC. 568.

29. *Elgutter v. Northwestern Mut. Life Ins. Co.*, 86 Fed. 500, 30 C. C. A. 218; *Swofford v. Garmon*, 51 Miss. 348.

[a] A master specially appointed for the sole purpose of selling, in the absence of the person who would naturally make the sale (a receiver) need neither give a bond nor take an oath. *Threadgill v. Colcord*, 16 Okla. 447, 85 Pac. 703.

30. *George v. Keniston*, 57 Neb. 313, 77 N. W. 772; *Northwestern Mut. Life Ins. Co. v. Mulvihill*, 53 Neb. 538, 74 N. W. 78; *Omaha Loan & Trust Co. v. Bertrand*, 51 Neb. 508, 70 N. W. 1120; *Mayer v. Wick*, 15 Ohio St. 548.

before a sale can be made,<sup>31</sup> and this requirement cannot be waived by the plaintiff;<sup>32</sup> but a bond may be waived if all the parties interested in requiring it entered into a consent decree to that effect.<sup>33</sup> In some jurisdictions, a failure to give the required bond renders the sale erroneous and voidable,<sup>34</sup> but in others the sale is considered to be wholly void.<sup>35</sup>

31. See generally the statutes and the following: **Ky.**—*Phelps v. Jones*, 91 Ky. 244, 15 S. W. 668. **Mass.**—*Williams v. Reed*, 5 Pick. 480. **Miss.**—*Sharpley v. Plant*, 79 Miss. 175, 28 So. 799, 89 Am. St. Rep. 588; *State v. Cox*, 62 Miss. 786; *Yerger v. Ferguson*, 55 Miss. 190. **W. Va.**—*Parker v. Valentine*, 27 W. Va. 677; *Neeley v. Ruleys*, 26 W. Va. 686. See *McClaskey v. O'Brien*, 16 W. Va. 791, not referring to statute.

[a] **Resales** are included in statute. *Tompkins v. Deyerle*, 102 Va. 219, 46 S. E. 300.

[b] **Time of Taking Oath.**—The special oath required of guardians, executors or administrators must be taken before the selection of the time and place of sale. **U. S.**—*Gager v. Henry*, 5 Sawy. 237, 9 Fed. Cas. No. 5,172. **Ia.**—*Thornton v. Mulquinne*, 12 Iowa 549, 79 Am. Dec. 548; *Cooper v. Sunderland*, 3 Iowa 114, 66 Am. Dec. 52. **Me.**—*Campbell v. Knights*, 26 Me. 224, 45 Am. Dec. 107. **Mass.**—*Parker v. Nichols*, 7 Pick. 111. **Mich.**—*Ryder v. Flanders*, 30 Mich. 336. **Neb.**—*Bachelor v. Korb*, 58 Neb. 122, 78 N. W. 485, 76 Am. St. Rep. 70. **Ore.**—*Fuller v. Hager*, 47 Ore. 242, 83 Pac. 782, 114 Am. St. Rep. 916. **Wis.**—*Wilkinson v. Filby*, 24 Wis. 441; *Blackman v. Baumann*, 22 Wis. 611.

[c] **Bond With Other Commissioner as Surety.**—Where two commissioners are appointed to sell and required to execute a bond, each cannot execute a separate bond with the other as his sole surety. *Tyler v. Toms*, 75 Va. 116.

**Effect of failure of guardian to take oath**, see 12 STANDARD PROC. 827.

32. *Neeley v. Ruleys*, 26 W. Va. 686.

33. *Neeley v. Ruleys*, 26 W. Va. 686.

34. **Ala.**—*Wyman v. Campbell*, 6 Port. 219, 31 Am. Dec. 677. **Ind.**—*Davidson v. Bates*, 111 Ind. 391, 12 N. E. 687, after running of statute of

limitations. **Ia.**—*Hamiel v. Donnelly*, 75 Iowa 93, 39 N. W. 210; *Bunce v. Bunce*, 59 Iowa 533, 13 N. W. 705. **Mass.**—*Perkins v. Fairfield*, 11 Mass. 227. **Ohio.**—*Arrowsmith v. Harmoning*, 42 Ohio St. 254 (approved, *Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. ed. 630); *Mauarr v. Parrish*, 26 Ohio St. 636. See, however, *Carpenter v. Sloane*, 20 Ohio 327. **Pa.**—*Dixey's Exrs. v. Laning*, 49 Pa. 143.

[a] **Defective Bond.**—Where the bond had been duly approved by the court, the fact that it was defective cannot invalidate the sale. *Gibbs v. Cunningham*, 1 Md. Ch. 44.

[b] **The court may confirm a sale** though the trustee may have omitted to give the bond required by the decree. *Speed v. Smith*, 4 Md. Ch. 299. See *Tyson v. Mickle*, 2 Gill (Md.) 376; *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257.

[c] **Sale by One Commissioner Giving Bond.**—Where the decree directs a sale by three commissioners and provides that those giving bond may sell alone, a sale by the commissioner who alone gave bond is valid. The fact that he joined his co-commissioner with him in the advertisement and report does not invalidate the proceedings. *Strayer v. Long's Exr.*, 89 Va. 471, 16 S. E. 357.

35. **U. S.**—*Bright v. Boyd*, 1 Story 478, 4 Fed. Cas. No. 1,875. **Ky.**—*Barnett v. Bull*, 81 Ky. 127; *Isert v. Davis*, 17 Ky. L. Rep. 686, 32 S. W. 294; *Kelly v. Muir*, 17 Ky. L. Rep. 167, 30 S. W. 653. **Me.**—*Snow v. Russell*, 93 Me. 362, 45 Atl. 305, 74 Am. St. Rep. 350. **Minn.**—*Babcock v. Cobb*, 11 Minn. 347. **Miss.**—*Sharpley v. Plant*, 79 Miss. 175, 28 So. 799, 89 Am. St. Rep. 588; *Heth v. Wilson*, 55 Miss. 587; *Vanderburg v. Williamson*, 52 Miss. 233. **Wis.**—*Weid v. Johnson Mfg. Co.*, 84 Wis. 537, 54 N. W. 335; *Wilkinson v. Filby*, 24 Wis. 441. See also *McKinney v. Jones*, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381.

The amount of the bond is within the discretion of the court,<sup>36</sup> but must be sufficient to cover the probable amount of purchase money.<sup>37</sup> The bond must be approved in writing by the court<sup>38</sup> whose duty it is to determine its sufficiency.<sup>39</sup>

**C. MANNER OF SALE. — 1. In General.** — In making the sale, the officer whose duty it is to sell, must follow any directions in the decree or order authorizing the sale,<sup>40</sup> and in the statute regulating it.<sup>41</sup> In addition thereto the officer must sell in pursuance to the advertisement,<sup>42</sup> and for any departure therefrom the sale will be set aside.<sup>43</sup> In so far as he is not restricted by the decree or general law, he has a reasonable discretion as to the manner of conducting the sale,<sup>44</sup> and it is his duty to offer the property in such a manner

**On Sales of Infant's Property.**—See 12 STANDARD PROC. 825.

**On sale by executor or administrator,** see 6 STANDARD PROC. 569.

36. *Dawes v. Thomas*, 4 Gill (Md.) 333.

37. *Southwestern Virginia Mineral Co. v. Chase*, 95 Va. 50, 27 S. E. 826.

[a] Where the bond is double the estimated value of the property it is sufficient. *Greer v. Ford*, 31 Tex. Civ. App. 389, 72 S. W. 73.

38. *Austin v. Austin*, 50 Me. 74, 79 Am. Dec. 597.

[a] Approval of a bond in a lesser amount than that required by the order of sale will not invalidate the sale. *In re Winona Bridge R. Co.*, 51 Minn. 97, 52 N. W. 1079.

39. *Bolgiano v. Cooke*, 19 Md. 375.

40. **U. S.**—*Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. ed. 608; *Williamson v. Berry*, 8 How. 495, 12 L. ed. 1170. **Ala.**—*Aderholt v. Henry*, 82 Ala. 541, 3 So. 114. **Ark.**—*Phelps v. Jackson*, 31 Ark. 272. **Ill.**—*Quick v. Collins*, 197 Ill. 391, 64 N. E. 288; *Wilson v. Ford*, 190 Ill. 614, 60 N. E. 876; *Gould v. Garrison*, 48 Ill. 258; *Sowards v. Pritchett*, 37 Ill. 517; *Reynolds v. Wilson*, 15 Ill. 394, 60 Am. Dec. 753; *Jacobus v. Smith*, 14 Ill. 359. **Ind.**—*Smith v. Sparks*, 162 Ind. 270, 70 N. E. 253. **Ky.**—*Noel v. Harper*, 170 Ky. 657, 186 S. W. 503; *Williams v. Woodruff*, 1 Duv. 257. **La.**—*In re Sheets Lumber Co.*, 52 La. Ann. 1337, 27 So. 809. **Md.**—*Hopper v. Hopper*, 79 Md. 400, 29 Atl. 611. **Mont.**—*Broadwater v. Richards*, 4 Mont. 80, 2 Pac. 546. **N. J.**—*Collins v. Kiederling* (N. J. Eq.), 97 Atl. 948. **Tex.**—*Wipff v.*

*Heder*, 6 Tex. Civ. App. 685, 26 S. W. 118. **Va.**—See *Strayer v. Long's Exr.*, 89 Va. 471, 16 S. E. 357. **Wis.**—*Babcock v. Perry*, 8 Wis. 277.

See 12 STANDARD PROC. 828.

[a] A sale of other property than that directed to be sold is void. *Giesecke v. Hoffman*, 15 Tex. Civ. App. 361, 40 S. W. 1034.

[b] A second judgment of sale without formal pleadings is a nullity and confers no authority on the officer. A sale partly in accordance with the first judgment and partly in accordance with the second is therefore void. *Bethel v. Bethel*, 6 Bush (Ky.) 65, 99 Am. Dec. 655.

41. *Tappan v. Dayton*, 51 N. J. Eq. 260, 28 Atl. 1; *Kopmeier v. O'Neil*, 47 Wis. 593, 3 N. W. 365. See 12 STANDARD PROC. 828.

42. *Jarboe v. Colvin*, 4 Bush (Ky.) 70; *Hahn v. Pindell*, 1 Bush (Ky.) 538, 540.

[a] An advertisement of a sale in gross is no notice of a sale in parcels, and vice versa. *Hahn v. Pindell*, 1 Bush (Ky.) 538, 540.

[b] Where property is advertised to be sold for cash it is no variance for the commissioner to announce at the sale that payment will be received in United States treasury notes. Cash means ready money as distinguished from credit. *Meng v. Houser*, 13 Rich. Eq. (S. C.) 210.

43. *Jarboe v. Colvin*, 4 Bush (Ky.) 70.

44. **U. S.**—*Blossom v. Milwaukee, etc. R. Co.*, 3 Wall. 196, 208, 18 L. ed. 43. **Ky.**—*Head v. Clark*, 88 Ky. 362, 11 S. W. 203. **Mo.**—*Hand v. Motter*, 73 Mo. 457.

as to bring its fair market value.<sup>45</sup> Although the officer may and perhaps usually does act on the advice of the creditor's attorney, unreasonable directions of the latter are not obligatory and should not be followed.<sup>46</sup>

**2. Whether Public or Private.**—When the statute does not provide whether the sale shall be public or private, the manner of making it rests in the discretion of the court,<sup>47</sup> or, in the absence of any designation by the court, in the discretion of the officer,<sup>48</sup> and may be made either publicly or privately,<sup>49</sup> but generally in the absence of a contrary direction the sale should be public.<sup>50</sup> It has been held, however, that even where the statute directs a sale to be made at public auction the court may direct otherwise.<sup>51</sup> The officer directed to make the sale should comply with the decree of sale when it directs either a public<sup>52</sup> or private<sup>53</sup> sale, but a departure therefrom is gen-

45. *Thomas v. Fewster*, 95 Md. 446, 52 Atl. 750; *Hopper v. Hopper*, 79 Md. 400, 29 Atl. 611; *Delaplaine v. Lawrence*, 3 N. Y. 301.

46. *Blossom v. Milwaukee, etc. R. Co.*, 3 Wall. (U. S.) 196, 209, 18 L. ed. 43.

47. Md.—*Glenn v. Clapp*, 11 Gill & J. 1. Mo.—*Hand v. Motter*, 73 Mo. 457. Ohio.—See *Dresbach v. Stein*, 41 Ohio St. 70. Pa.—*In re Smith's Estate*, 188 Pa. 222, 41 Atl. 542. Va.—*Cox v. Price*, 22 S. E. 512.

See 13 STANDARD PROC. 577; 12 STANDARD PROC. 830.

[a] Especially when a public sale has been attempted and failed to bring a purchaser at a satisfactory price, and a delay involves serious depreciation in the value of the property. *Benet v. Ford*, 113 Va. 442, 74 S. E. 394.

[b] **Direction to Receive Private Bids.**—A direction in a decree for the sale of real estate for a commissioner to receive private offers and report them to the court to be acted upon in vacation, is within the discretion of the trial court, in order to obtain the best price for the land. *Conrad's Admr. v. Fuller*, 98 Va. 16, 34 S. E. 893.

[c] **Where No Bids at Public Sale Are Anticipated.**—Where the land consists of fractional parts of lots, and in such proportions and relations to the other interests of other owners in the same lot that the part owners are the only persons interested in bidding and no competition can be hoped for, a private sale may take the place of a public sale if the decree so directs.

*Palmer v. Garland's Com.*, 81 Va. 444.

48. *Hand v. Motter*, 73 Mo. 457.

As to confirmation of sale, see *infra*, XI.

As to vacation and setting aside of sales, see *infra*, XII.

49. *Hess v. Rader*, 26 Gratt. (67 Va.) 746; *Klapneck v. Keltz*, 50 W. Va. 331, 40 S. E. 570.

As to sale of infant's property, see 12 STANDARD PROC. 829.

As to sale of property of insane persons, see 13 STANDARD PROC. 577.

50. *Harris v. Parker*, 41 Ala. 604; *Fambro v. Gantt*, 12 Ala. 298; *Leuders v. Thomas*, 35 Fla. 518, 17 So. 633, 48 Am. St. Rep. 255.

51. *Harris v. Parker*, 41 Ala. 604 (reviewing Alabama authorities); *Klapneck v. Keltz*, 50 W. Va. 331, 40 S. E. 570. *Contra*, *Luttrell v. Wells*, 97 Ky. 84, 16 Ky. L. Rep. 812, 30 S. W. 10.

Confirmation as curing defects, see *infra*, XI, O.

52. Cal.—*Schlicker v. Hemenway*, 110 Cal. 579, 42 Pac. 1063, 52 Am. St. Rep. 116. Md.—*So. Baltimore Brick & Tile Co. v. Kirby*, 89 Md. 52, 42 Atl. 913; *Kelso v. Jessop*, 59 Md. 114; *Latrobe v. Herbert*, 3 Md. Ch. 375, 394. W. Va.—*Hutson v. Sadler*, 31 W. Va. 358, 6 S. E. 920.

53. *Mallard v. Dejan*, 45 La. Ann. 1270, 14 So. 238.

[a] The court should be fully informed as to the probable value of the property, when it departs from the general rule of selling at public auction. *Bound v. South Carolina Ry. Co.*, 46 Fed. 315.

erally held to be an irregularity which may be cured by a confirmation of the sale.<sup>54</sup>

**3. Order of Selling.**—Any directions in the decree as to the order in which property shall be sold must be followed,<sup>55</sup> but in the absence of such directions the order of sale is within the discretion of the officer making it.<sup>56</sup> The parties may apply to the court for instructions to the officer,<sup>57</sup> and where part of defendant's property has been sold, the court will doubtless compel a resort to the unsold portions first.<sup>58</sup> After the sale has been made and confirmed, however, no objections to the order of sale can be made.<sup>59</sup>

**4. Personalty Must Be in View.**—While it is the policy of the law to require that personal property about to be sold should be within the view of the bidders,<sup>60</sup> the court may dispense with this requirement.<sup>61</sup>

**5. Sale En Masse or in Parcels.**—Whether property shall be sold en masse or in parcels is sometimes regulated by statutory or constitutional provisions.<sup>62</sup> In the absence thereof, it is discretionary with the court,<sup>63</sup> or with the officer, if the court does not otherwise di-

54. Md.—Speed v. Smith, 4 Md. Ch. 299. Mo.—Blickensderffer v. Hanna, 231 Mo. 93, 132 S. W. 678. W. Va.—Klapneck v. Keltz, 50 W. Va. 331, 40 S. E. 570.

As to effect of confirmation, see *infra*, XI, O.

[a] **When Sale Made Otherwise Will Be Confirmed.**—(1) If a trustee directed to sell by decree at a public sale, sells at private sale, the sale will be confirmed, if satisfactory reasons are given for so doing, and no objection is made. *Anderson v. Foulke*, 2 Har. & G. (Md.) 346; *Andrews v. Scotten*, 2 Bland (Md.) 629, 643. (2) "Where no objection is made" means such objections as are sufficient to outweigh the reasons given by the trustee for deviating from the terms of the decree. *Cunningham v. Schley*, 6 Gill (Md.) 207.

[b] **Sale Privately After Attempted Public Sale.**—Where a trustee did not sell at private sale until failure made at public sale, and even after such failure kept the property advertised by offering it at private sale, and procured a better price at private sale than he had been offered at public, the court will not consider his conduct a substantial deviation from the decree but only one done from necessity. *Cunningham v. Schley*, 6 Gill (Md.) 207.

55. *Smith v. Sparks*, 162 Ind. 270, 70 N. E. 253.

56. *King v. Platt*, 37 N. Y. 155, 3 Abb. Pr. 434, 35 How. Pr. 23.

57. *King v. Platt*, 37 N. Y. 155, 3 Abb. Pr. 434, 35 How. Pr. 23, *citing Collier v. Whipple*, 13 Wend. (N. Y.) 224, 229.

58. *Watt v. McGalliard*, 67 Ill. 513.

59. *Watt v. McGalliard*, 67 Ill. 513; *McGavock v. Bell*, 3 Coldw. (Tenn.) 512.

60. *Morrow v. McGregor*, 49 Ark. 67, 4 S. W. 49; *Boylan v. Kelly*, 36 N. J. Eq. 331.

61. *Morrow v. McGregor*, 49 Ark. 67, 4 S. W. 49.

[a] **Rule as to Execution Sales Not Applicable.**—The rule that a sale on execution by a sheriff of personal property not present at the time is void does not apply to a sale made by a sheriff in the execution of a decree or order of sale. *Craig's Admx. v. Fox*, 16 Ohio 563. As to execution sales, see the title "Judgments and Decrees, Enforcement of."

62. See generally the statutes and constitutions, and *Bansemmer v. Mace*, 18 Ind. 27, 81 Am. Dec. 344.

As to direction in decree, see IV, D, 9.

63. U. S.—*In re Haywood Wagon Co.*, 219 Fed. 655, 135 C. C. A. 391; *Quinton v. Neville*, 154 Fed. 432, 83

rect,<sup>64</sup> whether a sale shall be en masse or in parcels as the best interests of the parties may require. As a general rule where the land offered for sale is susceptible of division, it must be sold in parcels,<sup>65</sup>

C. C. A. 252; *Farmers L. & T. Co. v. Cape Fear & Y. V. Ry. Co.*, 82 Fed. 344; *Johns v. Slack*, 2 Hughes 467, 13 Fed. Cas. No. 7,363. **Ark.**—Southwestern Ark. & I. T. R. Co. v. Hays, 63 Ark. 355, 38 S. W. 665. **Ill.**—McMullen v. Gable, 47 Ill. 67. **Ind.**—See *Knarr v. Conaway*, 42 Ind. 260. **Kan.**—Geuda Springs T. & W. Co. v. Lombard, 57 Kan. 625, 47 Pac. 532. **Ky.**—Wigginton v. Nehan, 25 Ky. L. Rep. 617, 76 S. W. 196. See *O'Kane v. Vinnege*, 108 Ky. 34, 55 S. W. 711; *Mays v. Carman*, 23 Ky. L. Rep. 2216, 66 S. W. 1019. **La.**—McCall's Succession, 28 La. Ann. 713. **Mich.**—Macomb v. Prentis, 57 Mich. 225, 23 N. W. 788. **Neb.**—Kane v. Jonasen, 55 Neb. 757, 76 N. W. 441. **N. Y.**—Am. Ins. Co. v. Oakley, 9 Paige 259. **N. C.**—Montague v. Raleigh Sav. Bank, 118 N. C. 283, 24 S. E. 6. **Tenn.**—Young v. Cardwell, 6 Lea 168. **Tex.**—Lomax v. Comstock, 50 Tex. Civ. App. 340, 110 S. W. 762. **Va.**—Gilbert v. Washington City, etc. R. Co., 33 Gratt. (74 Va.) 586; *Long v. Weller's Exr.*, 29 Gratt. (70 Va.) 347.

As to sale of infant's property, see 12 STANDARD PROC. 828.

As to sale of property of insane persons, see 13 STANDARD PROC. 577.

[a] **Where Decree Is Not Followed.** Where the register conducting the sale sells only part of the property, or if he sells in different lots than provided in the decree because a better price is obtainable, and no injury results to either party, the court will ordinarily confirm and complete the sale. But when there are conflicting equities, the register acts in violation of the decree, goes beyond his province and invades the province of the court if he undertakes to determine that a portion and what portion of the property shall be first sold, unless by consent of the parties. The court cannot sanction such a course. *Aderholt v. Henry*, 82 Ala. 541, 3 So. 114.

64. **Ga.**—Palmour v. Roper, 119 Ga. 10, 45 S. E. 790. **Ind.**—Wright v. Yetts, 30 Ind. 185. **Md.**—Thomas v. Fewster, 95 Md. 446, 52 Atl. 750; *Hughes v. Riggs*, 84 Md. 502, 36 Atl. 269. **Mo.**

*Culbertson v. Edwards*, 243 Mo. 433, 148 S. W. 112; *Tatum v. Holliday*, 59 Mo. 422. **Neb.**—Pierce v. Reed, 3 Neb. (Unof.) 874, 93 N. W. 154; *Mallory v. Patterson*, 63 Neb. 429, 88 N. W. 686; *Kane v. Jonasen*, 55 Neb. 757, 76 N. W. 441. **N. J.**—Avon-by-the-Sea Land & Imp. Co. v. Finn, 56 N. J. Eq. 808, 41 Atl. 360; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159; *Johnson v. Garrett*, 16 N. J. Eq. 31; *Kelly v. Neshanic Min. Co.*, 7 N. J. Eq. 579. **N. Y.**—Delaplaine v. Lawrence, 3 N. Y. 301; *Whitbeck v. Rowe*, 25 How. Pr. 403. See *Am. Ins. Co. v. Oakley*, 9 Paige 259. **W. Va.**—Rose & Co. v. Brown, 17 W. Va. 649.

[a] If the court directs a sale en gross, the sheriff must follow the direction. *Babcock v. Perry*, 8 Wis. 277. Compliance with order generally, see *supra* IX, C, 1.

[b] Although the order of sale describes the property as one parcel, the officer may sell in subdivisions. *Delaplaine v. Lawrence*, 3 N. Y. 301.

[c] It is the officer's duty to offer the property in such parcels as is calculated to bring the greatest aggregate amount. *Delaplaine v. Lawrence*, 3 N. Y. 301.

As to notice, see generally, VII, C, 4.

65. **Ark.**—Belcher v. Harr, 94 Ark. 221, 126 S. W. 714; *Chatfield v. Iowa & Arkansas Land Co.*, 88 Ark. 395, 114 S. W. 473; *Harris v. Brady*, 87 Ark. 428, 112 S. W. 974; *La Cotts v. Quertermous*, 83 Ark. 174, 103 S. W. 182, tax sales. **Cal.**—See *Houghton v. Kern Valley Bank*, 157 Cal. 289, 107 Pac. 113. **Colo.**—Hughes v. Webster, 52 Colo. 475, 122 Pac. 789; *Page v. Gillett*, 47 Colo. 289, 107 Pac. 290 (tax sales). **Ga.**—Stark v. Cummings, 127 Ga. 107, 56 S. E. 130; *Palmour v. Roper*, 119 Ga. 10, 45 S. E. 790. **Ill.**—Osmond v. Evans, 269 Ill. 278, 110 N. E. 16; *Bowen v. Bowen*, 265 Ill. 638, 107 N. E. 129; *Henderson v. Harness*, 184 Ill. 520, 56 N. E. 786; *McMullen v. Gable*, 47 Ill. 67; *Dates v. Winstanley*, 53 Ill. App. 623. **Ind.**—Smith v. Sparks, 162 Ind. 270, 70 N. E. 253; *Brake v. Brownlee*, 91 Ind. 359. **Ia.**—White v. Watts,

and if several tracts of land are to be sold, each must be offered separately.<sup>66</sup> If, however, the amount bid when the property is offered en masse is greater than the aggregate of the bids on each tract separately, a sale en masse may be made.<sup>67</sup> And if one tract will not sell separately another may be added,<sup>68</sup> and a third tract may be added if no bid can be had for the two tracts. In this manner the whole may be sold en masse upon a reasonable bid.<sup>69</sup> Where realty and per-

18 Iowa 74. **Kan.**—Geuda Springs T. & W. Co. v. Lombard, 57 Kan. 625, 47 Pac. 532. **Ky.**—Kentucky Union Co. v. Comm., 128 Ky. 610, 108 S. W. 931, 110 S. W. 398; Vanmeter v. Vanmeter's Assignee, 88 Ky. 448, 11 S. W. 80, 289; Burns v. Ray, 18 B. Mon. 392; Buckley's Assignee v. Stevenson, 30 Ky. L. Rep. 952, 99 S. W. 961; Mays v. Carman, 23 Ky. L. Rep. 2216, 66 S. W. 1019. **La.**—Borde v. Erskine, 33 La. Ann. 873. See McCull's Succession, 28 La. Ann. 713; Duckworth v. Vaughan, 27 La. Ann. 599; Walker v. Kimbrough, 27 La. Ann. 558; Truxillo's Succession, 24 La. Ann. 453; Bowie v. Lott, 24 La. Ann. 214. **Md.**—Thomas v. Tewster, 95 Md. 446, 52 Atl. 750; Carroll v. Hutton, 88 Md. 676, 41 Atl. 1081; Johnson v. Hambleton, 52 Md. 378. **Mich.**—Griswold v. Fuller, 32 Mich. 268. **Minn.**—Hull v. King, 38 Minn. 349, 37 N. W. 792. **Miss.**—McCluskey v. Trussell, 90 Miss. 544, 44 So. 69; Stevenson v. Reed, 90 Miss. 341, 43 So. 433 (under constitutional provision); Swofford v. Garmon, 51 Miss. 348. **Mo.**—Culbertson v. Edwards, 243 Mo. 433, 148 S. W. 112; Tatum v. Holliday, 59 Mo. 422. **Neb.** See Mallory v. Patterson, 63 Neb. 429, 88 N. W. 686; Craig v. Stevenson, 15 Neb. 362, 18 N. W. 510. **N. J.**—Ryan v. Wilson, 64 N. J. Eq. 797, 52 Atl. 993; Avon-by-the-Sea Land & I. Co. v. Finn, 56 N. J. Eq. 808, 41 Atl. 360; Morris v. Inglis, 46 N. J. Eq. 306, 19 Atl. 16; Burnett v. Eaton, 29 N. J. Eq. 466; National Bank of Metropolis v. Sprague, 20 N. J. Eq. 159. **N. Y.**—DeLaplaine v. Laurence, 3 N. Y. 301; American Ins. Co. v. Oakley, 9 Paige 259; Jackson *ex dem.* Bear v. Irwin, 10 Wend. 441; Woods v. Morrell, 1 Johns. Ch. 103, 505. **Okla.**—Meadors v. Johnson, 27 Okla. 544, 112 Pac. 1121; Keller v. Hawk, 19 Okla. 407, 91 Pac. 778; Eldridge v. Robertson, 19 Okla. 165, 92 Pac. 156; Lowenstein v. Sexton, 18 Okla. 322, 90 Pac. 410. **Pa.**—Connell v. Hughes, 1 Phila. 225, 8 Leg. Int. 130;

Tate v. Carberry, 1 Phila. 133. **Tex.** Cook v. Brown, 45 Tex. 73; Fisk v. Varnell, 39 Tex. 73; Allen v. Courtney, 24 Tex. Civ. App. 86, 58 S. W. 200. **Vt.**—See Brush v. Watson, 81 Vt. 43, 69 Atl. 141. **W. Va.**—Younger v. Meadows, 63 W. Va. 275, 59 S. E. 1087; Hurxthal's Exrx. v. Hurxthal's Heirs, 45 W. Va. 584, 32 S. E. 237; Crammer v. McSwords, 26 W. Va. 412.

[a] **Sale to Two Persons.**—Where a commissioner was authorized to sell in two separate parcels, but the land was sold as a whole, the two purchasers being allowed to divide the land between themselves, such act will not invalidate the sale. *Rodgers v. Rodgers'* Admr., 17 Ky. L. Rep. 358, 31 S. W. 139.

66. **Cal.**—Anglo-Californian Bank v. Cerf, 142 Cal. 303, 75 Pac. 902. **Ill.** Henderson v. Harness, 184 Ill. 520, 56 N. E. 786; Clark v. Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; Cohen v. Menard, 136 Ill. 130, 24 N. E. 604. **Kan.**—Geuda Springs T. & W. Co. v. Lombard, 57 Kan. 625, 47 Pac. 532. **N. J.**—Hasbrouck Heights Co. v. Lodi, 66 N. J. L. 102, 48 Atl. 517.

**Direction in decree**, see *supra*, IV, D, 9.

67. **U. S.**—Union Trust Co. v. Illinois R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963; *In re* Haywood Wagon Co., 219 Fed. 655, 135 C. C. A. 391; Godechaux v. Morris, 121 Fed. 482, 57 C. C. A. 434. **Ill.**—Osmond v. Evans, 269 Ill. 278, 110 N. E. 16; Ward v. Ward, 174 Ill. 432, 51 N. E. 806; Van Valkenburg v. Schoels, 66 Ill. 103. **Ky.** Van Meter v. Van Meter's Assn., 88 Ky. 448, 11 S. W. 80, 289; Terry v. Swinford, 19 Ky. L. Rep. 712, 41 S. W. 553.

**Contents of notice**, see *supra*, VII, C, 4.

68. Henderson v. Harness, 184 Ill. 520, 56 N. E. 786; Cohen v. Menard, 136 Ill. 130, 24 N. E. 604.

69. **U. S.**—Slater v. Maxwell, 6 Wall. 268, 18 L. ed. 796. **Cal.**—Bechtel v.

sonality are decreed to be sold the court should direct the commissioner to offer them both separately and together, and sell in the way in which they would bring the larger sum.<sup>70</sup> A sale en masse where it should have been in parcels, is a mere irregularity which does not render the sale void or subject to collateral attack,<sup>71</sup> but merely renders it voidable.<sup>72</sup>

**Waiver.**—The right to have the land sold in parcels may be waived.<sup>73</sup>

**D. TERMS AND CONDITIONS OF SALE.**—Where the statute prescribes the terms of sale, the decree of sale must fix the terms<sup>74</sup> in accordance

Wier, 152 Cal. 443, 93 Pac. 75, 15 L. R. A. (N. S.) 549; *Anglo-Californian Bank v. Cerf*, 142 Cal. 303, 75 Pac. 902; *Connick v. Hill*, 127 Cal. 162, 59 Pac. 832; *Marston v. White*, 91 Cal. 37, 27 Pac. 588. **Ill.**—*Henderson v. Harness*, 184 Ill. 520, 56 N. E. 786; *Cohen v. Menard*, 136 Ill. 130, 24 N. E. 604.

**70.** *Hurxthal's Exrx. v. Hurxthal's Heirs*, 45 W. Va. 584, 32 S. E. 237.

[a] **A sheriff may use his discretion** in selling the real estate and personally together, and confirmation will not be refused because he sold a hotel and its equipment together in the absence of a showing that the price realized was less than would have been obtained by separate sales. *Worth v. Newlin* (N. J.), 36 Atl. 30.

**71. U. S.**—*Goerz v. Barstow*, 148 Fed. 563, 78 C. C. A. 248, *reversing* *Barstow v. Beckett*, 122 Fed. 140. **Cal.** *Marston v. White*, 91 Cal. 37, 27 Pac. 588. **Ill.**—*Palmer v. Riddle*, 180 Ill. 461, 54 N. E. 227; *Osgood v. Blackmore*, 59 Ill. 261. **Ky.**—*West v. McDonald*, 113 S. W. 872. **Mich.**—*Brown v. Hannah*, 152 Mich. 33, 115 N. W. 980; *Osmann v. Traphagen*, 23 Mich. 80, especially where the sale has been confirmed and the order of confirmation never disturbed. **N. J.**—*Guarantee T. & S. D. Co. v. Jenkins*, 40 N. J. Eq. 451, 2 Atl. 13.

As to collateral attack, see *infra*, XIX.

**72. Cal.**—*Marston v. White*, 91 Cal. 37, 27 Pac. 588. **Minn.**—*Willard v. Finnegan*, 42 Minn. 476, 44 N. W. 985, 8 L. R. A. 50. **Mo.**—*Culbertson v. Edwards*, 243 Mo. 433, 148 S. W. 112; *Shelton v. Franklin*, 224 Mo. 342, 363, 123 S. W. 1084, 135 Am. St. Rep. 537. **N. Y.**—*Griffith v. Hadley*, 10 Bosw. 587. **N. D.**—*Power v. Larabee*, 3 N. D. 502, 57 N. W. 789, 44 Am. St. Rep. 577.

**S. D.**—*Thompson v. Browne*, 10 S. D. 344, 73 N. W. 194.

[a] **The sale may be set aside** on timely application. *Marston v. White*, 91 Cal. 37, 27 Pac. 588; *Palmer v. Riddle*, 180 Ill. 461, 54 N. E. 227; *Osgood v. Blackmore*, 59 Ill. 261.

[b] **Objection Too Late.**—The objection that the land was not sold in separate parcels cannot be taken after the time for redemption has expired. *Raymond v. Holborn*, 23 Wis. 57, 99 Am. Dec. 105.

**73.** See the following cases: **Ark.** *Frazier v. State*, 56 Ark. 242, 19 S. W. 838. **Ill.**—*Clark v. Glos*, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223. **Miss.**—*Bradley v. Villere*, 66 Miss. 399, 6 So. 208. **Ohio.**—*Hartshorne v. Reeder*, 3 Ohio Dec. (Reprint) 109. **S. D.** *Thompson v. Browne*, 10 S. D. 344, 73 N. W. 194.

[a] **Agreement between parties** that the property shall be sold as a whole is valid and enforceable. *Humboldt Savings Bank v. McCleverty*, 161 Cal. 258, 119 Pac. 82.

[b] **A stipulation in a mortgage** that a sale must be made as a whole may be waived. *Blood v. Munn*, 155 Cal. 228, 100 Pac. 694.

[c] **If creditors stand by without objection** when a sale is made, they cannot later object that a sale should have been made en grosse. *In re Sheets Lumber Co.*, 52 La. Ann. 1337, 27 So. 809.

**74.** *Walker v. McLoud*, 204 U. S. 302, 27 Sup. Ct. 293, 51 L. ed. 495; *Underwood's Admr. v. Cartwright*, 20 Ky. L. Rep. 809, 47 S. W. 580.

[a] **Where statute directs sales to be on credit**, the court cannot authorize a sale for cash. **Ark.**—*Williams v. Ewing*, 31 Ark. 229, 236. **Ky.**—*Luttrell v. Wells*, 97 Ky. 84, 30 S. W. 10. **Miss.**

therewith, and it is error to name any other terms.<sup>75</sup> Some statutes, however, apply only where the decree is silent in this regard.<sup>76</sup> In the absence of statutory direction, the terms of the sale are in the discretion of the court,<sup>77</sup> and this discretion will not be disturbed on appeal except for abuse thereof.<sup>78</sup> Where the terms are stated in the decree, the officer must follow the decree,<sup>79</sup> although if no injury results from a departure, the defect may be cured by a confirmation of the sale.<sup>80</sup> Where the statute and decree are silent, the officer must sell for cash,<sup>81</sup> unless all the creditors consent to a sale on credit,<sup>82</sup>

Knox v. Bank of U. S., 26 Miss. 655;  
Dean v. De Lezardi, 24 Miss. 424.

[b] In Louisiana, statute requires a sale "for cash, if the creditors require it." Code Pr., art. 990. It is optional with them whether the sale shall be so made. Therefore the court may direct the land to be sold on credit without requiring it to be first offered for cash. Wright v. Cummings, 19 La. Ann. 353.

75. Ark.—See Johnson v. Campbell, 52 Ark. 316, 12 S. W. 578; Fry v. Street, 37 Ark. 39; Williams v. Ewing, 31 Ark. 229. Ky.—McKensie v. Salyer, 19 Ky. L. Rep. 1414, 43 S. W. 450. Miss.—Morse v. Clayton, 13 Smed. & M. 373.

[a] A direction for a shorter credit than that provided by statute is erroneous. McKensie v. Salyer, 19 Ky. L. Rep. 1414, 43 S. W. 450.

76. Moffitt v. Moffitt, 69 Ill. 641; Reynolds v. Wilson, 15 Ill. 394, 60 Am. Dec. 753.

77. U. S.—Ballentyne v. Smith, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. ed. 803; Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732; In re Haywood Wagon Co., 219 Fed. 655, 135 C. C. A. 391. Nev.—See Dazet v. Landry, 21 Nev. 291, 30 Pac. 1064. N. Y.—Walrath v. Abbott, 75 Hun 445, 25 N. Y. Supp. 529, 59 N. Y. St. 641. Va.—Yost v. Porter, 80 Va. 855; Pairo v. Bethell, 75 Va. 825, 833.

[a] In directing the sale of real property of value, however, the court should in the absence of peculiar circumstances, direct a sale on a reasonable credit. Pairo v. Bethell, 75 Va. 825, 833; Brien v. Pittman, 12 Leigh (39 Va.) 379.

78. Keith v. Gray, Rich Eq. Cas. (S. C.) 227.

Confirmation as curing defects, see *infra*, XI, O.

[a] This discretion must be exer-

cised where circumstances show it ought to be, and the failure to exercise it may be reviewed by an appellate court. Tennent's Heirs v. Pattons, 6 Leigh (33 Va.) 196.

79. U. S.—Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. ed. 608; Williamson v. Berry, 8 How. 495, 544, 12 L. ed. 1170. Ark.—Phelps v. Jackson, 31 Ark. 272. Ill.—Gould v. Garrison, 48 Ill. 258; Reynolds v. Wilson, 15 Ill. 394, 60 Am. Dec. 753. Kan. Wheatley v. Tutt, 4 Kan. 195. Ky. Cofer v. Miller, 7 Bush 545; Bethel v. Bethel, 6 Bush 65, 99 Am. Dec. 655; Musgrave v. Parrish, 11 Ky. L. Rep. 573, 12 S. W. 709. Miss.—Alsobrook v. Eggleston, 69 Miss. 833, 13 So. 850. Neb.—Hooper v. Castetter, 45 Neb. 67, 63 N. W. 135; Nebraska Loan & Trust Co. v. Hamer, 40 Neb. 281, 58 N. W. 695. Tex.—Hamilton v. Pleasants, 31 Tex. 638, 98 Am. Dec. 551. See Chase v. First Nat. Bank, 1 Tex. Civ. App. 595, 20 S. W. 1027.

[a] Master (1) has no authority to change the terms of sale. Kaufmann v. Pittsburg, 248 Pa. 41, 93 Atl. 779; Jacob's Appeal, 23 Pa. 477. (2) The insertion of other terms of sale on his own motion by the officer selling is unauthorized. Mullins v. Franz, 162 App. Div. 316, 147 N. Y. Supp. 418.

80. Johnson v. Campbell, 52 Ark. 316, 12 S. W. 578, where the officer sold on a three months' credit instead of four as the decree directed.

81. Ala.—Weakley v. Gurley's Admr., 60 Ala. 399. Conn.—Foster v. Thomas, 21 Conn. 285. Ill.—Reynolds v. Wilson, 15 Ill. 394, 60 Am. Dec. 753. Ia.—Richards v. Adamson's Estate, 43 Iowa 248. N. Y.—Maples v. Howe, 3 Barb. Ch. 611. Wis.—Sauer v. Steinbauer, 14 Wis. 70.

82. Maples v. Howe, 3 Barb. Ch. (N. Y.) 611; Sauer v. Steinbauer, 14 Wis. 70.

or the court so orders on the application of the party.<sup>83</sup>

**E. AMOUNT OF PROPERTY TO BE SOLD.**—No more property should be sold than is necessary to satisfy the purpose of the sale,<sup>84</sup> and a sale is not vitiated by a failure to sell all the property described in the decree or order of sale.<sup>85</sup>

**F. AMOUNT FOR WHICH PROPERTY SHALL BE SOLD.**—In some states the officer cannot sell the property for less than a certain proportion of the appraised value,<sup>86</sup> but it is his duty, nevertheless, to realize as much more as possible.<sup>87</sup>

**G. WITHDRAWAL OF PROPERTY FROM SALE.**—The officer selling may withdraw the property offered for sale even after bids have been received and cried, and the bidder whose bid was the highest cannot compel a conveyance unless the property has been knocked off to him.<sup>88</sup>

**H. MANDAMUS TO OFFICER.**—The sheriff or other court officer in making a judicial sale acts under the direction of the court, and his acts will not be controlled by mandamus from a superior court unless the orders of the court under which he proceeds are void.<sup>89</sup>

83. *Sedgwick v. Fish*, 1 Hopk. Ch. (N. Y.) 594.

84. *Thomas v. Fewster*, 95 Md. 446, 52 Atl. 750; *Johnson v. Hambleton*, 52 Md. 378; *Boteler v. Brookes*, 7 Gill & J. (Md.) 143.

85. *Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109.

86. **Ky.**—*Gravitt v. Mountz*, 27 Ky. L. Rep. 945, 87 S. W. 304. **Neb.**—*Fredrick v. Gehling*, 92 Neb. 204, 137 N. W. 998, when purchaser pays two-thirds of the appraised value of defendant's interest the sale will not be set aside for inadequacy of price, in the absence of fraud or mistake. **Ohio.** *Wiles v. Baylor*, 1 Ohio 509, as required in the case of a sale under an execution.

[a] A sale for less than two-thirds of the appraised value is void. *Ellenbogen v. Griffey*, 55 Ark. 268, 18 S. W. 126.

[b] The statute has no application to sales made by assignees for the benefit of creditors. *Peele v. Ohio & Indiana Oil Co.*, 158 Ind. 374, 63 N. E. 763.

[c] The statute regulating sales under powers of sale contained in mortgages and deeds of trust which provides for appraisement of the property and a sale of not less than two-thirds of the appraised value, does not apply to a sale made under a decree of court. *Southwestern Ark. & I. T. R. Co. v.*

*Hays*, 63 Ark. 355, 38 S. W. 665; *Martin v. Ward*, 60 Ark. 510, 30 S. W. 1041.

[d] **Deductions for prior liens** (1) may be made. *Medland v. Van Ellen*, 75 Neb. 794, 106 N. W. 1022; *American Investment Co. v. McGregor*, 48 Neb. 779, 67 N. W. 785; *Rosenfield v. Chada*, 10 Neb. 421, 6 N. W. 630; *Sessions v. Irwin*, 8 Neb. 5. But see (2) *contra*, *Ellenbogen v. Griffey*, 55 Ark. 268, 18 S. W. 126.

87. *Mansfield v. Wallace*, 217 Ill. 610, 75 N. E. 682.

88. **U. S.**—See *Blossom v. Milwaukee, etc. Ry. Co.*, 3 Wall. 196, 18 L. ed. 43. **Ga.**—*Tillman v. Dunman*, 114 Ga. 406, 40 S. E. 244, 88 Am. St. Rep. 28, 57 L. R. A. 784. **S. C.**—*Miller v. Law*, 10 Rich. Eq. 320, 73 Am. Dec. 92.

But see *McAlpine v. Young*, 2 Ch. Chamb. (U. C.) 85. See *O'Connor v. Woodward*, 6 Ont. Pr. (Can.) 223.

[a] The highest bidder at a sale, having acquired no rights to compel a conveyance is a stranger to the transaction, and cannot inquire into the motives which prompted the withdrawal. *Tillman v. Dunman*, 114 Ga. 406, 40 S. E. 244, 88 Am. St. Rep. 28, 57 L. R. A. 784.

89. *State ex rel. Lynch v. Hoover*, 43 Okla. 299, 142 Pac. 1110, where the sheriff duly advertised the sale but prior to the sale returned the order of

I. WHO MAY PURCHASE.—1. In General.—The general rule is that all persons may purchase at a judicial sale except those interdicted by law.<sup>90</sup> One who by reason of any statutory disability is incompetent to purchase at a private sale is incompetent to purchase at a judicial sale.<sup>91</sup> And those who have duties to perform which are inconsistent with the character of purchaser,<sup>92</sup> cannot be purchasers, either directly or indirectly, unless they obtain previous leave of court.<sup>93</sup> He will not be permitted to purchase as agent for another,<sup>94</sup> or, through an agent, for himself.<sup>95</sup> The rule is violated if the officer selling the property becomes interested in the property after the sale and before confirmation.<sup>96</sup>

A purchase by one not authorized to become a purchaser is generally held to be voidable only,<sup>97</sup> but some statutes declare such pur-

sale to the clerk and refused to execute the same.

90. *Smith v. Krause & M. Lumber Co.*, 125 La. 703, 51 So. 693.

91. *Louisville & N. R. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. ed. 849.

92. *Mo.*—*Tuggles v. Callison*, 143 Mo. 527, 45 S. W. 291. *N. Y.*—See *Torrey v. Orleans*, 9 Paige 649. *S. C.* *McCelvey v. Thomson*, 7 S. C. 185. *Utah.*—*Hamilton v. Dooly*, 15 Utah 280, 49 Pac. 769. *Eng.*—*Guest v. Smythe*, 18 Wkly. Rep. 742, L. R. 5 ch. 551, 39 L. J. Ch. 536, 22 L. T. N. S. 563.

93. As to necessity for leave of court, see *infra*, IX, I, 3.

94. *N. Y.*—*Terwilliger v. Brown*, 44 N. Y. 237. *Va.*—*Brock v. Rice*, 27 Gratt. (68 Va.) 812. *W. Va.*—*Hilleary v. Thompson*, 11 W. Va. 113.

[a] See however, *Scott v. Mann*, 36 Tex. 157, holding that while an agent to sell cannot purchase at his own sale, there is nothing to prevent him from bidding it off for a third party.

95. *Terwilliger v. Brown*, 44 N. Y. 237.

96. *Terwilliger v. Brown*, 44 N. Y. 237.

97. *Ark.*—*Hindman v. O'Connor*, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490. *Cal.*—*Coffey v. Greenfield*, 62 Cal. 602, 609; *Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec. 146. *Del.*—*Willey v. Tindal*, 5 Del. Ch. 194; *Downs v. Rickards*, 4 Del. Ch. 416. *Ga.*—*Lowery v. Idelson*, 117 Ga. 778, 45 S. E. 51; *Moore v. Carey*, 116 Ga. 28, 42 S. E. 258; *Wallace v. Jones*, 93 Ga. 419, 21 S. E. 89; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399. *Ill.*—*Mancinelli v.*

*De Bartolo*, 268 Ill. 198, 108 N. E. 1015; *McConnel v. Gibson*, 12 Ill. 128; *Roberts v. Weimer*, 130 Ill. App. 297, *affirmed*, 227 Ill. 138, 81 N. E. 40. *Ind.* *Lane v. Taylor*, 40 Ind. 495. *Ky.*—*Harris v. Hopkins*, 166 Ky. 147, 179 S. W. 14; *Sears v. Collie*, 148 Ky. 444, 146 S. W. 1117; *Johnson v. Poff*, 109 Ky. 396, 59 S. W. 325. *La.*—See *Gary v. Landry*, 122 La. 29, 47 So. 124. *Md.* *Eichelberger v. Hawthorne*, 33 Md. 588; *Mason v. Martin*, 4 Md. 124. *Mass.* *Walker v. Walker*, 101 Mass. 169; *Wyman v. Hooper*, 2 Gray 141; *Robbins v. Bates*, 4 Cush. 104; *Blood v. Hayman*, 13 Met. 231. *Mich.*—*Otis v. Kennedy*, 107 Mich. 312, 65 N. W. 219. See *Louden v. Martindale*, 109 Mich. 235, 67 N. W. 133; *Winter v. Truax*, 87 Mich. 324, 49 N. W. 604, 24 Am. St. Rep. 160. *Minn.*—*Brown v. Fischer*, 77 Minn. 1, 79 N. W. 494; *White v. Iselin*, 26 Minn. 487, 5 N. W. 359. *Miss.* *Brandau v. Greer*, 95 Miss. 100, 48 So. 519; *Temples v. Cain*, 60 Miss. 478. *Mo.* See *Bunel v. Nester*, 203 Mo. 429, 101 S. W. 69. *Neb.*—*Kazebeer v. Nune-maker*, 82 Neb. 732, 118 N. W. 646; *Veeder v. McKinley-Lanning L. & T. Co.*, 61 Neb. 892, 86 N. W. 982; *Olson v. Lamb*, 56 Neb. 104, 115, 76 N. W. 423, 71 Am. St. Rep. 670; *Reno v. Hale*, 28 Neb. 646, 44 N. W. 996. *N. J.* *Smith v. Drake*, 23 N. J. Eq. 302; *Huston v. Cassidy*, 13 N. J. Eq. 228; *Obert v. Obert*, 10 N. J. Eq. 98. *N. Y.*—*Terwilliger v. Brown*, 44 N. Y. 237; *Jackson ex dem. Gillespy v. Woolsey*, 11 Johns. 446; *Dugan v. Denyse*, 13 App. Div. 214, 43 N. Y. Supp. 308. *N. C.* *Shérrod v. Vass*, 128 N. C. 49, 38 S. E. 133; *Shute v. Austin*, 120 N. C. 440, 27 S. E. 90; *Highsmith v. Whitehurst*, 120

chases to be void.<sup>98</sup> It is immaterial whether he pays all the property is worth,<sup>99</sup> or whether the sale is advantageous to the debtor,<sup>1</sup> and equity will set the sale aside as a matter of course on the application of the debtor,<sup>2</sup> but not at the instance of the officer.<sup>3</sup>

2. **Illustrations.**—The parties to the suit,<sup>4</sup> and persons interested in the proceeds of a sale,<sup>5</sup> may become purchasers if the sale is not

N. C. 123, 26 S. E. 917; *Froneberger v. Lewis*, 70 N. C. 456. **Ohio.**—*Terrill v. Auchauer*, 14 Ohio St. 80. See *Armstrong v. Huston's Heirs*, 8 Ohio 552. See *Marsh v. Marsh*, 5 Ohio Dec. (Reprint) 290. **Utah.**—*Hamilton v. Dooly*, 15 Utah 280, 49 Pac. 769. **Va.**—*Howery v. Helms*, 20 Gratt. (61 Va.) 1. **Wash.**—*Miller v. Winslow*, 70 Wash. 401, 126 Pac. 906. **W. Va.**—*Walker v. Ruffner*, 32 W. Va. 297, 9 S. E. 215; *Winans v. Winans*, 22 W. Va. 678; *Newcomb v. Brooks*, 16 W. Va. 32; *Ayers v. Blair*, 26 W. Va. 558. **Wis.** *Gibson v. Gibson*, 102 Wis. 501, 78 N. W. 917. Compare, *McCrubb v. Bray*, 36 Wis. 333.

**Designation of officer in decree**, see *supra*, IV, D, 2.

[a] **Waiver.**—A cestui que trust may acquiesce in and confirm a sale by acts which will preclude him from having the sale set aside. *Mulford v. Minch*, 11 N. J. Eq. 16, 64 Am. Dec. 472.

98. See generally the statutes and **Kan.**—*Frazier v. Jeakins*, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575; *Webb v. Branner*, 59 Kan. 190, 52 Pac. 429. **N. Y.**—*Terwilliger v. Brown*, 44 N. Y. 237; *Forbes v. Halsey*, 26 N. Y. 53; *O'Donoghue v. Boies*, 92 Hun 3, 37 N. Y. Supp. 961. **Okla.**—*Burton v. Comp-ton*, 150 Pac. 1080. **Tenn.**—*Collins v. Smith*, 1 Head 251. **Wis.**—*McCrubb v. Bray*, 36 Wis. 333.

[a] **The guardian intended by §1679 Code Civ. Proc.**, (1) to whom a sale cannot be made, is a guardian ad litem in the action in which the sale is had, and a sale to a guardian in socage is not void but only voidable. *O'Brien v. Reformed Church*, 10 App. Div. 605, 42 N. Y. Supp. 356. (2) This rule applies also to a purchase by a testamentary guardian. *Munsell v. Munsell*, 33 Misc. 185, 68 N. Y. Supp. 329.

[b] **When the title has not passed to a bona fide purchaser without notice**, before the sale is impeached, a purchase under this statute is void.

*Houlihan v. Fogarty*, 162 Mich. 492, 127 N. W. 793; *Otis v. Kennedy*, 107 Mich. 312, 65 N. W. 219. See *Taylor v. Brown*, 55 Mich. 482, 21 N. W. 901.

99. *Terwilliger v. Brown*, 44 N. Y. 237.

1. *Terwilliger v. Brown*, 44 N. Y. 237.

2. *Terwilliger v. Brown*, 44 N. Y. 237.

As to setting aside sales, see *infra*, XII.

3. *Benson v. Benson*, 97 Mo. App. 460, 71 S. W. 360; *Richardson v. Jones*, 3 Gill & J. (Md.) 163, 22 Am. Dec. 293.

4. **U. S.**—*Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732; *Allen v. Gillette*, 127 U. S. 589, 8 Sup. Ct. 1331, 32 L. ed. 271; *Smith v. Black*, 115 U. S. 308, 6 Sup. Ct. 50, 29 L. ed. 398; *Richards v. Holmes*, 18 How. 143, 15 L. ed. 304. **Ky.**—See *Clark's Heirs v. Farrow*, 10 B. Mon. 446, 52 Am. Dec. 552; *Benningfield v. Reed*, 8 B. Mon. 102. **Md.** *Murdock's Case*, 2 Bland 461, 20 Am. Dec. 381.

[a] **A mortgagee may buy at his own foreclosure sale.** **Ia.**—*Koek v. Burgess*, 158 N. W. 534. **N. J.**—*Avon-by-the-Sea Land & Imp. Co. v. Finn*, 56 N. J. Eq. 808, 41 Atl. 360. **N. Y.** *Sedgwick v. Fish*, Hopk. Ch. 594. **Wis.** *Maxwell v. Newton*, 65 Wis. 261, 27 N. W. 31.

5. *McMillan v. Harris*, 110 Ga. 72, 35 S. E. 334, 48 L. R. A. 345.

[a] **Widow who is not administratrix may purchase at an administrator's sale.** *Sheahan v. Madigan* (Ill.), 114 N. E. 135.

[b] **A stockholder** (1) of a railroad corporation owning a majority stock may purchase the property at a judicial sale if there be no fraud. *Rothchild v. Memphis & C. R. Co.*, 113 Fed. 476, 51 C. C. A. 310. (2) A stockholder who is a party may bid at a sale of the assets of the corporation, and no leave

under their control.<sup>6</sup> The rule forbidding those from purchasing whose interest will clash with their duties prevents a purchase at his own sale either directly or indirectly by the commissioner,<sup>7</sup> the auctioneer<sup>8</sup> or crier,<sup>9</sup> or one acting in a fiduciary capacity.<sup>10</sup> The same rule forbids a purchase by the judge who ordered the sale.<sup>11</sup>

An executor or administrator cannot buy at his own sale, directly<sup>12</sup>

of court is necessary. *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732.

[c] The cashier of the mortgagee bank may purchase in his individual right. *House v. Clarke* (Mo.), 187 S. W. 57.

[d] A cestui que trust may purchase where a note is secured by a trust deed to a third party. *Freeman's Appeal*, 74 Conn. 247, 50 Atl. 748.

6. *McMillan v. Harris*, 110 Ga. 72, 35 S. E. 334, 48 L. R. A. 345.

7. **U. S.**—*Michoud v. Girod*, 4 How. 503, 11 L. ed. 1076; *Wormley v. Wormley*, 8 Wheat. 421, 5 L. ed. 651. **Ala.** *Saltmarsh v. Beene*, 4 Port. 283, 30 Am. Dec. 525. **Ill.**—*Kruse v. Steffens*, 47 Ill. 112; *McConnel v. Gibson*, 12 Ill. 128; *Thorp v. McCullum*, 6 Ill. 614. **Mass.** *See Walker v. Walker*, 101 Mass. 169. **Mich.**—*Clute v. Barron*, 2 Mich. 192. **N. Y.**—*Davoue v. Fanning*, 2 Johns. Ch. 252. **S. C.**—*McCelvey v. Thompson*, 7 S. C. 185. **Va.**—*Howery v. Helms*, 20 Gratt. (61 Va.) 1. But see *Hurt v. Jones*, 75 Va. 341, upholding a purchase by a commissioner at a resale. **Wash.**—*Miller v. Winslow*, 70 Wash. 401, 126 Pac. 906. **W. Va.**—*Ayers v. Blair*, 26 W. Va. 558; *Winans v. Winans*, 22 W. Va. 678. **Eng.**—*Guest v. Smythe*, 39 L. J. Ch. 536, 22 L. T. N. S. 563, 18 Wkly. Rep. 742, L. R. 5 Ch. 551. **Can.**—*See Patterson v. Stanton*, 4 Grant Ch. (U. C.) 100; *Crawford v. Boyd*, 6 Ont. Pr. 278.

8. **U. S.**—*See Veazie v. Williams*, 3 Story 611, 28 Fed. Cas. No. 16,907. **N. Y.**—*Terwilliger v. Brown*, 44 N. Y. 237. **Va.**—*Brock v. Rice*, 27 Gratt. (68 Va.) 812. **W. Va.**—*Hilleary v. Thompson*, 11 W. Va. 113.

9. *Brock v. Rice*, 27 Gratt. (68 Va.) 812; *Crook v. Williams*, 20 Pa. 342.

[a] But see *Swires v. Brotherline*, 41 Pa. 135, 80 Am. Dec. 601, holding an auctioneer may bid, and when fairly done this tends to enhance the price, and is no ground for treating the sale as fraudulent, especially if he have

no interest in the property and no responsibility except as mere auctioneer.

10. **Ark.**—*Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497. **Ill.**—*Mariner v. Ingraham*, 230 Ill. 130, 82 N. E. 577; *Miles v. Wheeler*, 43 Ill. 123; *Lockwood v. Mills*, 39 Ill. 602; *McConnel v. Gibson*, 12 Ill. 128. **Ky.**—*Price's Admr. v. Thompson*, 84 Ky. 219, 1 S. W. 408. **Md.**—*Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311, a director in a corporation. **N. Y.**—*Forbes v. Halsey*, 26 N. Y. 53; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192. **Ohio.** *Armstrong v. Huston's Heirs*, 8 Ohio 552. **Utah.**—*Hamilton v. Dooly*, 15 Utah 280, 49 Pac. 769. **W. Va.**—*Newcomb v. Brooks*, 16 W. Va. 32.

As to purchases by guardians, see 12 STANDARD PROC. 832.

11. **Ark.**—*Livingston v. Cochran*, 33 Ark. 294. **Cal.**—*Tracy v. Colby*, 55 Cal. 67. **Ill.**—*Hoskinson v. Jaquess*, 54 Ill. App. 59. **Mich.**—*See Woods v. Morroe*, 17 Mich. 238; *Walton v. Torrey*, Harr. Ch. 259. **Miss.**—*Forbes Piano Co. v. Hennington*, 98 Miss. 51, 53 So. 777, Ann. Cas. 1913A, 1216.

[a] **Where Confirmed by Another Judge.**—But where the judge ordering the sale had no interest or any thought of purchasing it at the time he made the order, a sale to him is not void and the decree of sale will not be reversed where the sale was confirmed by a special judge. *Thompson v. Buffalo Land & Coal Co.* (W. Va.), 88 S. E. 1040.

[b] **Judge's wife cannot be purchaser.** *Hoskinson v. Jaquess*, 54 Ill. App. 59.

12. **Ark.**—*See Griffith v. Maxfield*, 63 Ark. 548, 39 S. W. 852. **Ill.**—*Mariner v. Ingraham*, 230 Ill. 130, 82 N. E. 577; *Miller v. Rich*, 204 Ill. 444, 68 N. E. 488; *Elting v. First Nat. Bank*, 173 Ill. 368, 50 N. E. 1095. **La.**—*Willis v. Berry*, 104 La. 114, 28 So. 888. **Md.** *Scott v. Burch's Admx.*, 6 Har. & J. 67; *Conway v. Green's Admr.*, 1 Har.

or indirectly,<sup>13</sup> unless the court in its discretion,<sup>14</sup> the statute,<sup>15</sup> or the

& J. 151. **Mass.**—*Blood v. Hayman*, 13 Met. 231; *Jennison v. Hapgood*, 7 Pick. 1, 19 Am. Dec. 258. **Mich.** *Dwight v. Blackmar*, 2 Mich. 330, 57 Am. Dec. 130, whether the sale be public or private. **Miss.**—*Pearson v. Moreland*, 7 Smed. & M. 609, 45 Am. Dec. 319. **Neb.**—*Veeder v. McKinley-Lanning L. & T. Co.*, 61 Neb. 892, 86 N. W. 982. **N. J.**—*Burnett v. Eaton*, 29 N. J. Eq. 466; *Culver v. Culver*, 11 N. J. Eq. 215; *Scott v. Gamble*, 9 N. J. Eq. 218, either at public or private sale. **N. Y.**—*Terwilliger v. Brown*, 44 N. Y. 237. **N. C.**—*Shute v. Austin*, 120 N. C. 440, 27 S. E. 90; *Highsmith v. Whitehurst*, 120 N. C. 123, 26 S. E. 917; *Froneberger v. Lewis*, 70 N. C. 456. **Ohio.**—*Barrington v. Alexander*, 6 Ohio St. 189. **Tenn.**—*Collins v. Smith*, 1 Head 251. **Tex.**—*Crescent Ins. Co. v. Camp*, 71 Tex. 503, 9 S. W. 473; *Hamblin v. Warnecke*, 31 Tex. 91; *Wipff v. Heder*, 6 Tex. Civ. App. 685, 26 S. W. 118. See *McCulloch v. Renn*, 28 Tex. 793; *Erskine v. De la Baum*, 3 Tex. 406, 421, 49 Am. Dec. 751. **Va.**—*Davies v. Hughes*, 86 Va. 909, 11 S. E. 488. **Wash.** *Stewart v. Baldwin*, 86 Wash. 63, 149 Pac. 662, in the absence of a statute authorizing him. **W. Va.**—*Walker v. Ruffner*, 32 W. Va. 297, 9 S. E. 215.

See 6 STANDARD PROC. 575.

[a] **Purchase Voidable.**—An executor or administrator may purchase at his own sale subject to the power of disaffirmance in the heirs or creditors. The other bidders have no right to object. *Rigg v. Schweitzer*, 170 Pa. 549, 33 Atl. 116; *Pennock's Appeal*, 14 Pa. 446, 53 Am. Dec. 561. See *In re Estate of Hallman*, 13 Phila. (Pa.) 562; *Chronister v. Bushey*, 7 Watts & S. (Pa.) 152.

[b] **Rule in Alabama.**—(1) When he has an interest in the property, an executor or administrator may purchase property under his own sale if the sale is made in the ordinary mode and there is no unfairness. *Cottingham v. Moore*, 128 Ala. 209, 30 So. 784; *Penny v. Jackson*, 85 Ala. 67, 4 So. 720; *Brannan v. Oliver*, 2 Stew. 47, 19 Am. Dec. 39. (2) An executor who is a judgment creditor of his testator has such an interest as entitles him to purchase. *Cottingham v. Moore*, 128 Ala. 209, 30 So. 784.

[c] **An administrator who has no power to sell realty** may purchase at the sale as the sale is not his. The sale is made by the court, but owing to his connection in bringing the sale about, the court will look narrowly into his conduct. *Cooley v. Cooley's Heirs* (Tenn. Ch.), 37 S. W. 1028.

13. **Cal.**—*Boyd v. Blankmen*, 29 Cal. 20, 87 Am. Dec. 146. **Ga.**—*Lowery v. Idleson*, 117 Ga. 778, 45 S. E. 51, purchase by husband of administratrix. **Ill.**—*Elting v. First Nat. Bank*, 173 Ill. 368, 50 N. E. 1095; *Miles v. Wheeler*, 43 Ill. 123. **Kan.**—*Frazier v. Jenkins*, 10 Kan. App. 558, 63 Pac. 459. **La.** See *Trahan v. Simon*, 51 La. Ann. 809, 25 So. 374. **Miss.**—*Pearson v. Moreland*, 7 Smed. & M. 609, 45 Am. Dec. 319. **Mo.**—*Hull v. Voorhis*, 45 Mo. 555. **Neb.**—*Veeder v. McKinley-Lanning L. & T. Co.*, 61 Neb. 892, 86 N. W. 982. **N. J.**—*Culver v. Culver*, 11 N. J. Eq. 215. **N. C.**—See *McNeill v. Fuller*, 121 N. C. 209, 28 S. E. 299; *Shute v. Austin*, 120 N. C. 440, 27 S. E. 90; *Highsmith v. Whitehurst*, 120 N. C. 123, 26 S. E. 917. **Tex.**—*Crescent Ins. Co. v. Camp*, 71 Tex. 503, 9 S. W. 473; *Fisher v. Wood*, 65 Tex. 199; *Hamblin v. Warnecke*, 31 Tex. 91; *Wipff v. Heder*, 6 Tex. Civ. App. 685, 26 S. W. 118. **Wash.** *Stewart v. Baldwin*, 86 Wash. 63, 149 Pac. 662.

[a] **An administrator cannot sell to his wife**, even though she be one of the heirs to the estate. *Chastain v. Pender* (Okla.), 152 Pac. 833.

[b] **Sale to son of administrator** is not in itself enough to make the sale void. Such relationship is only a circumstance to be considered in connection with other facts in determining whether the sale was collusive and fraudulent. *Fairburn Banking Co. v. Summerlin*, 144 Ga. 31, 85 S. E. 1007; *Cain v. McGeenty*, 41 Minn. 194, 42 N. W. 933.

14. **As to necessity for leave of court**, see *infra*, IX, I, 3.

15. *Linman v. Riggins*, 40 La. Ann. 761, 5 So. 49, 8 Am. St. Rep. 549; *Biedenstein v. Schoenlau* (Mo.), 178 S. W. 54; *Baldwin v. Dalton*, 168 Mo. 20, 67 S. W. 599; *Price v. Springfield R. E. Assn.*, 161 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595. See, however, *Hull v. Voorhis*, 45 Mo. 555.

will,<sup>16</sup> allows him to do so. An executor who resigned after obtaining the order of sale may purchase where it appears that he has not prevented competition and the price paid was fair.<sup>17</sup>

A trustee cannot, as a general rule, become a purchaser at his own sale<sup>18</sup> unless the court gives its permission before the sale.<sup>19</sup> But he may purchase at a sale in which he has no part.<sup>20</sup>

**Attorney.**—An attorney cannot purchase his client's land at a sale where such purchase would be injurious or disadvantageous to the client,<sup>21</sup> but some authorities allow a purchase by him<sup>22</sup> on condition

[a] In Louisiana, under R. C. C. 1146, an executor or administrator may purchase "when he is the surviving partner in community, etc." *Linman v. Riggins*, 40 La. Ann. 761, 5 So. 49, 8 Am. St. Rep. 549.

16. *Union Trust Co. v. Morgans*, 140 Mich. 134, 139, 103 N. W. 568.

17. *Woodward v. Curtis*, 19 Ohio Cir. Ct. 15, 10 Ohio Cir. Dec. 400.

18. **U. S.**—*Allen v. Gillette*, 127 U. S. 589, 8 Sup. Ct. 1331, 32 L. ed. 271; *In re Hawley*, 117 Fed. 364. See *Buchler v. Black*, 226 Fed. 703, 141 C. C. A. 459. **Del.**—*Van Dyke v. Johns*, 1 Del. Ch. 93, 12 Am. Dec. 76. **Ill.**—*Roberts v. Fleming*, 53 Ill. 196. **Ky.**—*Price's Admr. v. Thompson*, 84 Ky. 219, 1 S. W. 408. **Md.**—*Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311; *Mason v. Martin*, 4 Md. 124; *Richardson v. Jones*, 3 Gill & J. 163, 22 Am. Dec. 293. **Miss.**—*Scott v. Freeland*, 7 Smed. & M. 409, 45 Am. Dec. 310. **N. J.**—*Voorhees v. Bailey*, 59 N. J. Eq. 292, 44 Atl. 657; *In re Patterson's Exrs.* (N. J. Eq.), 20 Atl. 486; *Scott v. Gamble*, 9 N. J. Eq. 218. **N. Y.**—*Davoue v. Fanning*, 2 Johns. Ch. 252. **N. C.**—*Sherrod v. Vass*, 128 N. C. 49, 38 S. E. 133; *Shew v. Call*, 119 N. C. 450, 26 S. E. 33, 56 Am. St. Rep. 678. **Utah.**—*Hamilton v. Dooly*, 15 Utah 280, 49 Pac. 769.

See generally the titles "Mortgages;" "Trusts and Trustees."

[a] That the sale was at public auction, and bona fide for a fair price, is immaterial. *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252.

[b] **Limitations on Rule.**—"According to the general course of the cases in England, where the trustee remains in possession of the land which he has purchased of the cestui que trust, and the sale is questioned and disapproved by the court, the sale is declared void; but where the trustee

has parted with the land at an advanced price, he is made to account for the difference in value." *Van Dyke v. Johns*, 1 Del. Ch. 93, 12 Am. Dec. 76, reviewing *Morse v. Royal*, 12 Ves. Jr. 355, 33 Eng. Reprint 134; *Campbell v. Walker*, 5 Ves. Jr. 678, 31 Eng. Reprint 801; *Whelpdale v. Cookson*, 1 Ves. Sr. 9, 27 Eng. Reprint 856, where a majority of the creditors agreed to allow it.

19. As to necessity for leave of court, see *infra*, IX, I, 3.

20. *Starkweather v. Jenner*, 216 U. S. 524, 30 Sup. Ct. 382, 54 L. ed. 602, 17 Ann. Cas. 1167; *Allen v. Gillette*, 127 U. S. 589, 8 Sup. Ct. 1331, 32 L. ed. 271; *Buchler v. Black*, 226 Fed. 703, 141 C. C. A. 459; *Goodgame v. Rushing*, 35 Tex. 722; *Scott v. Mann*, 33 Tex. 725; *Howard v. Davis*, 6 Tex. 174.

21. **Ga.**—*Crayton v. Spullock*, 87 Ga. 326, 13 S. E. 561. **Ia.**—*Harper v. Perry*, 28 Iowa 57. **Kan.**—*Cunningham v. Jones*, 37 Kan. 477, 15 Pac. 572, 1 Am. St. Rep. 257. **Mo.**—*Burke v. Daly*, 14 Mo. App. 542. **Neb.**—*Olson v. Lamb*, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670. **Pa.**—*Elliott v. Tyler*, 3 Sad. 584, 6 Atl. 917. **Wis.**—*Ellis v. Allen*, 99 Wis. 598, 74 N. W. 537, 75 N. W. 949.

[a] An attorney who is conducting a judicial sale cannot purchase at such sale. *McCelvey v. Thomson*, 7 S. C. 185; *Roger v. Whitham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. Rep. 1105, 21 Ann. Cas. 272.

22. **U. S.**—*Pacific Railroad v. Ketchum*, 101 U. S. 289, 25 L. ed. 932. See *Schroeder v. Young*, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. ed. 721. **Ill.**—*Mansfield v. Wallace*, 217 Ill. 610, 75 N. E. 682; *Herr v. Payson*, 157 Ill. 244, 41 N. E. 732; *Hess v. Voss*, 52 Ill. 472. **Ky.**—See *Busey v. Hardin*, 2 B. Mon. 407. **Mo.**—*Grayson v. Weddle*, 63 Mo.

that he act in strict fairness.<sup>23</sup> Where an attorney purchases his client's property, he is presumed to make such purchase as the trustee of his client.<sup>24</sup>

**Appraisers.**—Some statutes prohibit a purchase by an appraiser.<sup>25</sup> but otherwise he may purchase, and the sale will be upheld in the absence of evidence that he contemplated its purchase at the time of the appraisal.<sup>26</sup>

**A tenant in common may purchase.**<sup>27</sup>

523. **S. C.**—*Le Conte v. Irwin*, 19 S. C. 554. **Tex.**—*Douglass v. Blount*, 95 Tex. 369, 67 S. W. 484, 58 L. R. A. 699. See *McLaury v. Miller*, 64 Tex. 381. **W. Va.** See *Newcomb v. Brooks*, 16 W. Va. 32.

[a] **A purchase by the proctor** of libellant in an admiralty sale is permitted, and if at an inadequate price should cause vigilant scrutiny into anything which might affect the fairness or unfairness of the sale. *The Ruby*, 38 Fed. 622.

[b] **In England** a solicitor may purchase whenever his client may. *Guest v. Smythe*, 18 Wkly. Rep. 742, L. R. 5 Ch. 551, 39 L. J. Ch. 536, 22 L. T. N. S. 563.

[c] **Third persons whose rights are not affected** cannot object to a purchase by the attorney. *Hayes v. Waggener* (Kan.), 161 Pac. 584.

[d] **The attorney of the officer selling the property** may purchase it where his client could. *Baldwin v. Dalton*, 168 Mo. 20, 67 S. W. 599.

23. *Mansfield v. Wallace*, 217 Ill. 610, 75 N. E. 682; *Busey v. Hardin*, 2 B. Mon. (Ky.) 407.

24. **Ga.**—*Holmes v. Holmes*, 106 Ga. 858, 33 S. E. 216. **Ill.**—*Moore v. Bracken*, 27 Ill. 23. **Ia.**—*Reickhoff v. Brecht*, 51 Iowa 633, 2 N. W. 522. **Mo.**—*Ward v. Brown*, 87 Mo. 468. **N. Y.**—*Johnstone v. O'Connor*, 21 App. Div. 77, 47 N. Y. Supp. 425, *affirmed*, 162 N. Y. 639, 57 N. E. 1113; *Case v. Carroll*, 35 N. Y. 385. **Wis.**—*In re Taylor Orphan Asylum*, 36 Wis. 534.

25. *Reno v. Hale*, 28 Neb. 646, 44 N. W. 996; *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614; *Terrill v. Auchauer*, 14 Ohio St. 80.

[a] **Sale Void.**—*Reno v. Hale*, 28 Neb. 646, 44 N. W. 996; *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614.

[b] **Sale Voidable.**—*Terrill v. Auchauer*, 14 Ohio St. 80, holding the purpose of a statute declaring such sale to be fraudulent and void will be ac-

complished by holding the sale voidable only.

26. *Ison v. Kinnaird*, 13 Ky. L. Rep. 569, 17 S. W. 633; *Barlow v. McClintock*, 10 Ky. L. Rep. 894, 11 S. W. 29.

[a] **Appraiser's brother** may purchase. *Mastin v. Zweigart*, 24 Ky. L. Rep. 1920, 72 S. W. 750.

27. **U. S.**—*Starkweather v. Jenner*, 216 U. S. 524, 30 Sup. Ct. 382, 54 L. ed. 602, 17 Ann. Cas. 1167. **Colo.** *Hodgson v. Fowler*, 24 Colo. 278, 50 Pac. 1034, *reversing* 7 Colo. App. 378, 43 Pac. 462. **Ill.**—*Montague v. Selb*, 106 Ill. 49; *Smith v. Osborne*, 86 Ill. 606. **Ind.**—*Jennings v. Moon*, 135 Ind. 168, 34 N. E. 996; *McPheeters v. Wright*, 124 Ind. 560, 24 N. E. 734, 9 L. R. A. 176; *Ladd v. Kuhn*, 27 Ind. App. 535, 61 N. E. 747. **Ia.**—*Moy v. Moy*, 89 Iowa 511, 56 N. W. 668. **Mass.** See *Barnes v. Boardman*, 152 Mass. 391, 25 N. E. 623, 9 L. R. A. 571. **Mich.** *Ream v. Robinson*, 128 Mich. 92, 87 N. W. 115; *Reed v. Reed*, 122 Mich. 77, 80 N. W. 996, 80 Am. St. Rep. 541. **Minn.**—*Holterhoff v. Mead*, 36 Minn. 42, 29 N. W. 675; *Oliver v. Hedderly*, 32 Minn. 455, 21 N. W. 478. **Miss.** *Beaman v. Beaman*, 90 Miss. 762, 44 So. 987; *Walker v. Williams*, 84 Miss. 392, 36 So. 450; *Wyatt v. Wyatt*, 81 Miss. 219, 32 So. 317. **Mo.**—*Hinters v. Hinters*, 114 Mo. 26, 21 S. W. 456; *Dillinger v. Kelley*, 84 Mo. 561. **Pa.**—*McGranighan v. McGranighan*, 185 Pa. 340, 39 Atl. 951; *Duff v. Wilson*, 72 Pa. 442; *Gibson v. Winslow*, 46 Pa. 380, 84 Am. Dec. 552. **Tenn.**—*Davis v. Solari*, 132 Tenn. 225, 177 S. W. 939. **W. Va.**—*Reed v. Bachman*, 61 W. Va. 452, 57 S. E. 769, 123 Am. St. Rep. 996.

[a] **The rule which prohibits a tenant in common** from purchasing for his own benefit an outstanding encumbrance has no application to a purchase by him of the interest of his cotenant at a judicial sale. *Westergreen*

**3. Leave of Court.**—Whenever the person conducting the sale<sup>28</sup> desires to bid and purchase, he must first obtain leave of court therefor or secure the appointment of another to make the sale.<sup>29</sup>

The proper method of obtaining such leave is by bill,<sup>30</sup> or petition.<sup>31</sup>

**J. SECURITY FROM PURCHASER.**—The court may require a purchaser to execute a bond as security for the purchase price where the sale is on credit,<sup>32</sup> and if the officer does not take security when re-

*v. Beer*, 25 Cal. App. 775, 145 Pac. 543; *Burr v. Mueller*, 65 Ill. 258.

[b] **One partner may purchase land** sold on foreclosure for his own individual benefit when he has acted fairly. *Evans v. Carter* (Tex. Civ. App.), 176 S. W. 749.

**28. U. S.**—*Allen v. Gillette*, 127 U. S. 589, 8 Sup. Ct. 1331, 32 L. ed. 271. **Kan.**—*Frazier v. Jeakins*, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575. **N. J.** *Roderer v. Fox*, 84 N. J. Eq. 359, 94 Atl. 393; *Kirkpatrick v. Coming*, 48 N. J. Eq. 302, 24 Atl. 441. **Pa.**—*McPherran's Estate*, 212 Pa. 425, 61 Atl. 954; *Armor v. Cochrane*, 66 Pa. 308. **Utah.**—*Hamilton v. Dooly*, 15 Utah 280, 49 Pac. 769. **Eng.**—*Guest v. Smythe*, 18 Wkly. Rep. 742, L. R. 5 Ch. 551, 39 L. J. Ch. 536, 22 L. T. N. S. 563. **Can.**—*Pruden v. Squarebriggs*, 2 Terr. L. R. 200.

[a] **A receiver or trustee authorized by the court to bid and buy** at the sale of trust property may bid and buy for another as well as for himself. *Kirkpatrick v. Corning*, 48 N. J. Eq. 302, 24 Atl. 441.

[b] **After he has obtained leave of court**, the officer stands upon the same footing as any other person if he becomes the purchaser. *Larrabee v. Larrabee*, 24 Ky. L. Rep. 1423, 71 S. W. 645.

[c] **In England, the plaintiff, must obtain leave of court before he can bid and purchase.** *Elworthy v. Billing*, 10 L. J. Ch. (N. S.) 176, 10 Sim. 98, 59 Eng. Reprint 549; *Guest v. Smythe*, 18 Wkly. Rep. 742, L. R. 5 Ch. 551, 39 L. J. Ch. 536, 22 L. T. N. S. 563.

**29. Armor v. Cochrane**, 66 Pa. 308.

**30. In re Patterson's Exrs.** (N. J. Eq.), 20 Atl. 486.

[a] **Parties.**—All persons interested must be made parties. *In re Patterson's Exrs.* (N. J. Eq.), 20 Atl. 486.

[b] **Contents of Application.**—(1) In his application for leave to bid the

trustee must state his reasons therefor. *Hamilton v. Dooly*, 15 Utah 280, 49 Pac. 769. (2) Where no previous effort has been made to effect a sale the bill must show, what, in the judgment of the applicant, the land will probably bring at public sale in case he is not permitted to bid, what said land is reasonably worth, or the reasonable market value, and what he is willing to pay. *In re Patterson's Exrs.* (N. J. Eq.), 20 Atl. 486.

**31. Lewis' Estate**, 1 Chest. Co. Rep. (Pa.) 313.

[a] **In New Jersey, petition is not the proper manner of obtaining leave of court.** *In re Patterson's Exrs.* (N. J. Eq.), 20 Atl. 486.

[b] **Approved form of petition and affidavit by an administrator asking permission to bid is found in Lewis' Estate**, 1 Chester Co. Rep. (Pa.) 313, wherein the petitioner under oath alleged the issuance of the order of sale, description of the property, the necessity for the sale, and the price she would pay, concluding with a prayer authorizing her to bid. To this petition was annexed an affidavit of two disinterested persons showing their knowledge of the property to be sold and that the price offered by the administratrix was a fair, full, and adequate price, and more than would probably be obtained from any other bidder, and that it would be to the advantage of the sale for the court to be permitted to bid. To this was annexed the consent of the heirs and the guardian of the minors, and also praying leave for her to bid, with affidavit of truth annexed.

**32. U. S.**—*Quinton v. Neville*, 154 Fed. 432, 83 C. C. A. 252, this is to prevent bye bidding, as well as bids from irresponsible parties. **Ga.**—See *Crosby v. Lovett*, 143 Ga. 483, 85 S. E. 317. **Ky.**—*Preston v. Breckinridge*, 86 Ky. 619, 6 S. W. 641; *Brassfield v. Burgess*, 10 Ky. L. Rep. 660, 10 S. W.

quired, the court may refuse to confirm the sale until security is given,<sup>33</sup> or it may set aside the sale.<sup>34</sup> The officer may in his discretion require a bond or a deposit.<sup>35</sup>

**K. BIDDING.—1. In General.**—The general rules as to bidding at auction sales are applicable to judicial sales.<sup>36</sup>

**2. Nature and Incidents of Bid.**—A bid is a mere proposal or offer to buy,<sup>37</sup> and must be accepted by the court to make the sale effective.<sup>38</sup> The acceptance makes the bidder a party to the proceeding,<sup>39</sup> gives him the right to be heard on an application to have the sale set aside,<sup>40</sup> and entitles him to such relief in equity as may appear fair.<sup>41</sup>

**3. Who May Bid.**—The right to bid necessarily involves the right to become the purchaser should there be no higher bidder,<sup>42</sup> and is therefore governed by the rules hereinbefore discussed.<sup>43</sup> An association may be formed to bid.<sup>44</sup> While ordinarily a crier or

122. **S. C.**—*Young v. Teague*, Bailey Eq. 13. **Vt.**—See *Duncan v. Fish*, 1 Aik. 231.

[a] **The decretal order may leave it discretionary** with the commissioner to take security or not. His advertising that security would be required did not deprive him of the right of dispensing with it. *Thompson v. Wagner*, 3 De-saus. (S. C.) 94.

[b] **Where a creditor becomes the purchaser** he need not give a bond for that part of the purchase price which is due himself. *Davidson v. Dishman*, 22 Ky. L. Rep. 94, 59 S. W. 326.

[c] **Approval by One of Two Trustees.**—Where a sale is ordered to be made by two trustees the court may require the security to be given by the purchaser to be approved by only one of them. *Hopper v. Williams*, 75 Md. 191, 23 Atl. 352, wherein the two trustees were unable to agree upon the security.

[d] **The length of time allowed the purchaser to perfect his bond** is in the discretion of the officer. *Hughes v. Swope*, 88 Ky. 254, 1 S. W. 394; *Carter v. Carter*, 23 Ky. L. Rep. 1963, 66 S. W. 624.

33. *Reamer v. Judah*, 13 Bush (Ky.) 206.

34. *Terry v. Swinford*, 19 Ky. L. Rep. 712, 41 S. W. 553.

35. *Vaughn v. Newman*, 221 Ill. 576, 77 N. E. 1106, 112 Am. St. Rep. 203, where a deposit was required of the bidder because on a previous sale he had failed to make good his bid.

36. *Blossom v. Milwaukee*, etc. R. Co., 3 Wall. (U. S.) 196, 18 L. ed. 43.

37. **U. S.**—*Blossom v. Milwaukee*, etc. R. Co., 3 Wall. 196, 18 L. ed. 43; *Williamson v. Berry*, 8 How. 495, 12 L. ed. 1170; *The Sue*, 137 Fed. 133. **Neb.**—*George v. Pracheil*, 92 Neb. 81, 137 N. W. 880; *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281, 58 N. W. 695. **Eng.**—*Payne v. Cave*, 3 T. R. 148, 100 Eng. Reprint 502.

38. See cases in preceding note, and *infra*, XI.

39. *Davis v. Mercantile Trust Co.*, 152 U. S. 590, 14 Sup. Ct. 693, 38 L. ed. 563; *Kneeland v. American L. & T. Co.*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. ed. 379; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 Sup. Ct. 736, 34 L. ed. 97; *Stuart v. Gay*, 127 U. S. 518, 8 Sup. Ct. 1279, 32 L. ed. 191.

**Enforcing bid**, see *infra*, XVI.

40. *Davis v. Mercantile Trust Co.*, 152 U. S. 590, 14 Sup. Ct. 693, 38 L. ed. 563.

**As to decree**, see IV.

41. *Blossom v. Milwaukee*, etc. R. Co., 1 Wall. (U. S.) 655, 17 L. ed. 673.

42. *Estate of Dundas*, 17 Phila. (Pa.) 491.

**As to advertisement**, see *supra*, VII.

43. **As to who may purchase at a judicial sale**, see *supra*, IX, I.

**As to setting aside sale** see *infra*, XII.

44. **U. S.**—*Kearney v. Taylor*, 15 How. 494, 14 L. ed. 787. **N. C.**—*Goode v. Hawkins*, 17 N. C. 393. **Pa.**—See

auctioneer making a sale cannot bid for himself,<sup>45</sup> he may be the agent of an absent purchaser to make a definite bid if he discloses that fact.<sup>46</sup> One authorized to purchase may employ another to bid for him.<sup>47</sup>

**4. How Made.**—A bid may be made in words uttered aloud or spoken privately to the person conducting the sale, by writing, by a wink or nod, or in any mode by which the bidder signifies his willingness to give a particular price.<sup>48</sup> And it may be conditional,<sup>49</sup> but the officer conducting the sale need not entertain any bids coupled with conditions not in conformity with the terms of sale.<sup>50</sup>

**5. Puffing and Stifling.**—The employment of a puffer to enhance bidding is such a fraud as will vitiate the sale.<sup>51</sup> Combinations or

*Smull v. Jones*, 6 Watts & S. 122, where the association fixed a price beyond which they would not go.

[a] Associations formed to bid at a judicial sale, may be advantageous to a sale. "It is true that in every association formed to bid at the sale, and who appoint one of their number to bid in behalf of the company, there is an agreement, express or implied, that no other member will participate in the bidding; and hence, in one sense, it may be said to have the effect to prevent competition. But it by no means necessarily follows that if the association had not been formed, and each member left to bid on his own account, that the competition at the sale would be as strong and efficient as it would be by reason of the joint bid for the benefit and upon the responsibility of all." *Kearney v. Taylor*, 15 How. (U. S.) 494, 14 L. ed. 787.

[b] Where joint owners are too poor to purchase they may agree to share with the purchaser in his bid. *Allen v. Martin*, 61 Miss. 78.

45. As to right of auctioneer to become purchaser, see IX, I. 2.

46. *James v. Kelley*, 107 Ga. 446, 33 S. E. 425, 73 Am. St. Rep. 135. See *Campbell v. Swan*, 48 Barb. (N. Y.) 109.

47. **Fla.**—*Mann v. Jennings*, 25 Fla. 730, 6 So. 771. **Ga.**—*McMillan v. Harris*, 110 Ga. 72, 35 S. E. 334, 48 L. R. A. 345. **Ill.**—*Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580; *Gibbs v. Davies*, 168 Ill. 205, 48 N. E. 120. **N. Y.** *Nat. Fire Ins. Co. v. Loomis*, 11 Paige 431. **Tex.**—*Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101.

48. *Millinger v. Daly*, 56 Pa. 245.

[a] **By Letter.**—(1) A bid may be made by letter. *Wenner v. Thornton*, 98 Ill. 156. (2) A trustee's sale fairly made will not be set aside because of a letter written to the auctioneer on the day of the sale authorizing a higher bid to be made and enclosing the required deposit, when the person is not present and there is nothing to show if he would be able or willing to comply with the terms of the sale. *Thomson v. Ritchie*, 80 Md. 247, 30 Atl. 708.

49. *Gore v. Burdette*, 175 Mo. App. 389, 162 S. W. 321.

50. *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281, 58 N. W. 695.

51. **U. S.**—*Veazie v. Williams*, 8 How. 134, 12 L. ed. 1018. **Ga.**—*McMillan v. Harris*, 110 Ga. 72, 35 S. E. 334, 48 L. R. A. 345. **N. J.**—*National Bank v. Sprague*, 20 N. J. Eq. 159. **N. C.** *Woods v. Hall*, 16 N. C. 411; *Morehead v. Hunt*, 16 N. C. 35. **Pa.**—*Rigg v. Schweitzer*, 170 Pa. 549, 33 Atl. 116; *Staines v. Shore*, 16 Pa. 200, 55 Am. Dec. 492; *Pennock's Appeal*, 14 Pa. 446, 53 Am. Dec. 561; *Schug's Appeal*, 14 W. N. C. 49. **Eng.**—*Thornett v. Haines*, 15 L. J. Exch. 230, 15 Mees. & W. 367; *Howard v. Castle*, 6 T. R. 642, 3 Rev. Rep. 296, 101 Eng. Reprint 748; *Bexwell v. Christie*, 1 Cowp. 395, 98 Eng. Reprint 1150.

[a] A puffer is a person who, (1) without having any intention to purchase, is employed by the vendor, to raise the price by fictitious bids, thereby increasing competition, while he himself is secured from risk by a secret understanding, that he shall not be bound by his bids. *McMillan v. Harris*, 110 Ga. 72, 35 S. E. 334, 48 L. R. A. 345; *Peck v. List*, 23 W. Va. 338,

agreements to prevent competition in bidding are unlawful,<sup>52</sup> but an association may lawfully be formed for the purpose of bidding.<sup>53</sup>

**6. Withdrawal.**—Inasmuch as a bid amounts only to a proposal to buy,<sup>54</sup> it may be withdrawn at any time before it has been accepted,<sup>55</sup> but after acceptance it cannot be withdrawn or changed except under such circumstances as would justify the rescission of other contracts.<sup>56</sup>

**7. Acceptance and Rejection.**—The acceptance and rejection of a bid is largely in the discretion of the court.<sup>57</sup> The person conducting the sale is clothed with some discretion in refusing bids,<sup>58</sup> and may prescribe such terms as will exclude puffers and fraudulent bidders.<sup>59</sup>

48 Am. Rep. 398. (2) But one who bids merely for the purpose of running up the price is not a puffer if he can be compelled by the person conducting the sale to take and pay for the property. It is neither contrary to law nor public policy for persons who will be entitled to the proceeds to engage a third person to run the property up to a specified price, with the understanding that if knocked down to him they will take it off his hands. *McMillan v. Harris*, 110 Ga. 72, 35 S. E. 334, 48 L. R. A. 345.

[b] **Question of Fact.**—Whether the employment by the owner of a bye bidder is bona fide, or for the fraudulent purpose of enhancing the price is a question of fact for the jury. *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101.

52. *Kearney v. Taylor*, 15 How. (U. S.) 494, 14 L. ed. 787.

[a] **Question of fact** whether unlawful intent existed. See the following cases: **U. S.**—*Kearney v. Taylor*, 15 How. 494, 14 L. ed. 787. **Me.**—*Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248. **N. H.**—*Bellows v. Russell*, 20 N. H. 427, 51 Am. Dec. 238. **N. Y.**—*Hopkins v. Ensign*, 122 N. Y. 144, 25 N. E. 306, 9 L. R. A. 731. **Tex.**—*Allen v. Stephanes*, 18 Tex. 658.

53. See *supra*, IX, K, 3.

54. See *supra*, IX, K, 2.

55. **U. S.**—*Blossom v. Milwaukee, etc. R. Co.*, 3 Wall. 196, 18 L. ed. 43. **Ky.**—*Head v. Clark*, 88 Ky. 362, 11 S. W. 203. **Neb.**—*George v. Pracheil*, 92 Neb. 81, 137 N. W. 880; *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281, 58 N. W. 695. **N. J.**—See *Metropolis Nat. Bank v. Sprague*, 20 N. J. Eq. 159.

**Tex.**—*Interstate Nat. Bank v. O'Dwyer*, 15 Tex. Civ. App. 33, 38 S. W. 368. **Eng.** *Payne v. Cave*, 3 T. R. 148, 100 Eng. Reprint 502.

56. *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281, 58 N. W. 695; *Hayward v. Wemple*, 152 App. Div. 195, 136 N. Y. Supp. 625, *affirmed*, 206 N. Y. 692, 99 N. E. 1108; *Continental Ins. Co. v. Reeve*, 135 App. Div. 737, 119 N. Y. Supp. 901, *appeal dismissed*, 198 N. Y. 595, 92 N. E. 1081.

57. *Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. ed. 608; *Milwaukee R. Co. v. Soutter*, 5 Wall. (U. S.) 660, 18 L. ed. 678; *The Sue*, 137 Fed. 133.

[a] The court may order that the bids of some persons be not received, or that they be received only upon condition. *Murdock's Case*, 2 Bland (Md.) 461, 20 Am. Dec. 381.

58. *Gray v. Veirs*, 33 Md. 18.

[a] **On Resale.**—The officer conducting the sale may decline to cry the bid of one who has refused to comply with the terms of a former sale, and who gives no satisfactory assurance of ability to comply with the terms of the second sale. *Hildreth v. Turner*, 89 Va. 858, 17 S. E. 471.

59. *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159.

[a] **Scope of Officer's Authority.** (1) The master may demand an immediate compliance with the terms of sale where he has reason to doubt the good faith of the bidder. *Irby v. Irby*, 11 Lea (Tenn.) 165. (2) He may adopt conditions of sale sufficient to secure compliance by the purchaser with his bid, but he cannot impose any liability upon the purchaser which would not

**8. Striking Off Property.**—Generally the property is struck off to the highest bidder.<sup>60</sup> If after the hammer has fallen and the purchaser is announced, the officer discovers he has made a mistake, he may announce the fact and proceed with the sale, the parties and crowd still being present.<sup>61</sup>

**9. Reference To Examine Title.**—In some states, a reference will be ordered if necessary to enable the purchaser after bidding to examine the title of the property.<sup>62</sup>

**10. Opening Bidding on Upset Bid.**—The old English chancery practice<sup>63</sup> of opening biddings on judicial sales before confirmation upon an offer of a reasonable advance of the amount bid does not obtain<sup>64</sup> in

result by law from his purchase. He cannot by conditions of sale, change the relations of parties interested in the property, nor create any other liability on the part of the purchaser than to complete his contract of purchase. If he does more he exceeds his authority. *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548.

Rejecting bids with conditions attached, see *supra*, IX, K, 4.

**60. Ill.**—*Comstock v. Purple*, 49 Ill. 158. **Kan.**—*Fraser v. Seeley*, 71 Kan. 169, 79 Pac. 1081. **Ky.**—*Morton v. Moore*, 4 Ky. L. Rep. 717. **Tenn.**—*Atkinson v. Murfree*, 1 Tenn. Ch. 51.

[a] **Presumption From Recital.**—A recital in the return that the sale was held at public auction implies that the land was sold to the highest bidder. *Fraser v. Seeley*, 71 Kan. 169, 79 Pac. 1081.

[b] **The highest bidder** is one who makes the highest bid in good faith. *Gray v. Veirs*, 33 Md. 18.

**61.** *Head v. Clark*, 88 Ky. 362, 11 S. W. 203, as where appellee and appellant both bid the same amount but the commissioner hearing only appellant's bid announced him as purchaser.

[a] **Where there is a dispute** and a bid is claimed by two or more persons the auctioneer should put the property up again. *Conover v. Walling*, 15 N. J. Eq. 173.

**62.** *People's Bank v. Bramlett*, 58 S. C. 477, 36 S. E. 912; *Mitchell v. Pinekney*, 13 S. C. 203; *Warren v. Bateman, Flan. & K.* (Eng.) 189. And see *Smith v. Smith*, 97 S. C. 242, 81 S. E. 499, 52 L. R. A. (N. S.) 751; *Virginia-Carolina Chemical Co. v. McLucas*, 87 S. C. 350, 69 S. E. 670; *Fuller v. Missroon*, 35 S. C. 314, 14 S. E. 714.

**63.** *Bourn v. Bourn*, 13 Sim. 189, 60 Eng. Reprint 73; *White v. Wilson*, 14 Ves. Jr. 151, 33 Eng. Reprint 479; *Andrews v. Emerson*, 7 Ves. Jr. 420, 32 Eng. Reprint 170.

[a] **This practice has been abolished** by statute, St. 30 and 31 Vict., ch. 48, §7, and to entitle the parties to open the biddings, it is necessary to show either fraud or such misconduct as borders on fraud. *Delves v. Delves*, L. R. 20 Eq. (Eng.) 77.

**64. U. S.**—*Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. ed. 839; *Byers v. Surget*, 19 How. 303, 15 L. ed. 670; *In re Haywood Wagon Co.*, 219 Fed. 655, 135 C. C. A. 391; *Morrison v. Burnette*, 154 Fed. 617, 83 C. C. A. 391; *Files v. Brown*, 124 Fed. 133, 59 C. C. A. 403. See *Magann v. Segal*, 92 Fed. 252, 34 C. C. A. 323. **Ala.** *Bethea v. Bethea*, 136 Ala. 584, 34 So. 28; *Parker v. Bluffton Car Wheel Co.*, 108 Ala. 140, 18 So. 938; *Glennon v. Mittenight*, 86 Ala. 455, 5 So. 772. **Ark.** *Bank of Pine Bluff v. Levi*, 90 Ark. 166, 118 S. W. 250; *Colonial & U. S. Mortg. Co. v. Sweet*, 65 Ark. 152, 45 S. W. 60, 67 Am. St. Rep. 910; *Penn's Admr. v. Tolleson*, 20 Ark. 652. **Cal.** *Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847. **D. C.**—*Auerbach v. Wolf*, 22 App. Cas. 538. **Ill.**—*Coffey v. Coffey*, 16 Ill. 141; *Ayers v. Baumgarten*, 15 Ill. 444. See *Wilson v. Ford*, 190 Ill. 614, 60 N. E. 876; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580; *Jennings v. Dunphy*, 174 Ill. 86, 50 N. E. 1045. **Ky.**—*Stump v. Martin*, 9 Bush 285; *Forman v. Hunt*, 3 Dana 614; *Columbia Finance & Trust Co. v. Bates*, 24 Ky. L. Rep. 2412, 74 S. W. 248; *Alms & Doepeke Co. v. Gates*, 17 Ky. L. Rep. 908, 32 S. W. 1088. **Md.** See *Kelso v. Jessop*, 59 Md. 114; *Mahoney v. Mackubin*, 52 Md. 357; *Cohen*

the United States, though the rule is otherwise in some states.<sup>65</sup>

**Second Opening.**—After biddings have once been opened and a resale had they will not again be opened,<sup>66</sup> except under extraordinary circumstances.<sup>67</sup>

An application to open biddings may be made on motion<sup>68</sup> or petition,<sup>69</sup> but it cannot be coupled with a condition.<sup>70</sup>

**Security.**—The offer of an advanced bid must be accompanied with the money and securities required by the original decree.<sup>71</sup>

**Notice.**—The purchaser,<sup>72</sup> and the parties to the suit<sup>73</sup> must be given notice of the motion to open biddings.

**Time of Application.**—Generally application must be made before confirmation of the sale,<sup>74</sup> but the court may entertain an application after

*v. Wagner*, 6 Gill 236; *Andrews v. Seaton*, 2 Bland 629. **Mich.**—Page *v. Kress*, 80 Mich. 85, 44 N. W. 1052, 20 Am. St. Rep. 504. **Miss.**—Allen *v. Martin*, 61 Miss. 78; *Mitchell v. Harris*, 43 Miss. 314. See *Wright v. Cantzon*, 31 Miss. 514. **N. J.**—*Krieger v. Scheuer* (N. J. Eq.), 86 Atl. 534; *Cropper v. Brown*, 76 N. J. Eq. 406, 74 Atl. 987, 139 Am. St. Rep. 770; *Fleming v. Fleming Hotel Co.*, 70 N. J. Eq. 509, 61 Atl. 739; *Rogers v. Rogers' Locomotive*, 62 N. J. Eq. 111, 118, 50 Atl. 10; *Bethlehem Iron Co. v. P. & S. R. R. Co.*, 49 N. J. Eq. 356, 23 Atl. 1077; *Morrisse v. Inglis*, 46 N. J. Eq. 306, 19 Atl. 16. **N. M.**—*Las Vegas Ry. & Power Co. v. Trust Co.*, 15 N. M. 634, 110 Pac. 856; *Cattle Co. v. Schofield*, 9 N. M. 136, 49 Pac. 954. **N. Y.**—*Lefevre v. Laraway*, 22 Barb. 167; *Duncan v. Dodd*, 2 Paige 99; *Williamson v. Dale*, 3 Johns. Ch. 290; *Wesson v. Chapman*, 76 Hun 592, 28 N. Y. Supp. 192. **S. C.**—See *Tompkins v. Tompkins*, 39 S. C. 537, 18 S. E. 233; *Baily v. Baily*, 9 Rich. Eq. 392; *Young v. Teague*, *Bailey Eq.* 13. **Wis.**—*Kneeland v. Smith*, 13 Wis. 591; *Adams v. Haskell*, 10 Wis. 123.

65. **N. C.**—See *Marsh v. Nimocks*, 122 N. C. 478, 29 S. E. 840, 65 Am. St. Rep. 715; *Trull v. Rice*, 92 N. C. 572; *Hinson v. Adrian*, 92 N. C. 121; *Vass v. Arrington*, 89 N. C. 10. **Tenn.**—See *Bright v. Bright*, 12 Lea 630; *Mabry v. Churchwell*, 9 Lea 488; *Dupuy v. Gorman*, 9 Lea 144; *Allen v. East*, 4 Baxt. 308; *Glenn v. Glenn*, 7 Heisk. 367; *Houston v. Aycock*, 5 Sneed 406, 73 Am. Dec. 131; *Morton v. Sloan*, 11 Humph. 278; *Atkison v. Murfree*, 3 Tenn. Ch. 51. **Va.**—*Hardy v. Coley*, 114 Va. 570, 77 S. E. 458; *Moore v.*

*Triplett*, 96 Va. 603, 32 S. E. 50; *Ewald v. Crockett*, 85 Va. 299, 7 S. E. 386; *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586, 5 S. E. 676. **W. Va.**—*Gillmor v. Rinehart*, 73 W. Va. 779, 81 S. E. 549.

66. *Geisler v. Mauk* (Tenn.), 48 S. W. 344; *Collins v. Wood*, 88 Tenn. 779, 14 S. W. 221; *Bradford v. Hamilton*, 3 Tenn. Ch. 344; *Click v. Burris*, 6 Heisk. (Tenn.) 539.

67. *Atchison v. Murfree*, 3 Tenn. Ch. 728; *Vaughn v. Smith*, 3 Tenn. Ch. 368; *Mayo v. Harding*, 3 Tenn. Ch. 237; *Click v. Burris*, 6 Heisk. (Tenn.) 539.

68. *Langyher v. Patterson*, 77 Va. 470; *Effinger v. Ralston*, 21 Gratt. (62 Va.) 430.

69. See *Vaughn v. Smith*, 3 Tenn. Ch. 368.

[a] Amount of bid must be stated. *Wright v. Cantzon*, 31 Miss. 514.

70. *Reese v. Copeland*, 6 Lea (Tenn.) 190, citing *Lucas v. Moore*, 2 Lea (Tenn.) 1.

71. *Mabry v. Churchwell*, 9 Lea (Tenn.) 488; *Glenn v. Glenn*, 7 Heisk. (Tenn.) 367; *Mound City Mut. Life Ins. Co. v. Hamilton*, 3 Tenn. Ch. 228; *Atchison v. Murfree*, 3 Tenn. Ch. 728; *Roudabush v. Miller*, 32 Gratt. (73 Va.) 454.

As to collateral attack, see *infra*, XIX.

72. *Langyher v. Patterson*, 77 Va. 470; *Effinger v. Ralston*, 21 Gratt. (62 Va.) 430, 437.

73. *Langyher v. Patterson*, 77 Va. 470; *Effinger v. Ralston*, 21 Gratt. (62 Va.) 430, 437, quoting *Sugden on Vendors*, p. 66.

74. *Coles' Heirs v. Coles' Exr.*, 83 Va. 525, 5 S. E. 673.

confirmation.<sup>75</sup> And an application to open bids a second time may be made both before<sup>76</sup> and after confirmation,<sup>77</sup> but if asked after confirmation, a strieter showing therefor must be made.<sup>78</sup>

**Hearing and Determination.**—Whether the court will reopen bids is addressed to the sound discretion of the court,<sup>79</sup> which should be exercised with due regard to the rights and interests of all concerned, the purchaser as well as the others,<sup>80</sup> and the court may impose terms.<sup>81</sup>

75. *Yost v. Porter*, 80 Va. 855.

76. *Mound City Mut. Life Ins. Co. v. Hamilton*, 3 Tenn. Ch. 228.

77. *Mound City Mut. Life Ins. Co. v. Hamilton*, 3 Tenn. Ch. 228.

78. *Bradford v. Hamilton*, 3 Tenn. Ch. 344; *Mound City Mut. Life Ins. Co. v. Hamilton*, 3 Tenn. Ch. 228.

[a] **No advance price**, however large, will have the effect to open biddings after confirmation. *Houston v. Aycock*, 5 Sneed (Tenn.) 406, 73 Am. Dec. 131.

79. **U. S.**—See *Ballentyne v. Smith*, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. ed. 803; *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. ed. 839. **Ill.**—See *McCallum v. Chicago Title & Trust Co.*, 203 Ill. 142, 67 N. E. 823. **Tenn.**—*Bright v. Bright*, 12 Lea 630; *Mabry v. Ohurchwell*, 9 Lea 488; *Glenn v. Glenn*, 7 Heisk. 367; *Atkison v. Murfree*, 1 Tenn. Ch. 51. **Va.** *Hardy v. Coley*, 114 Va. 570, 77 S. E. 458; *Moore v. Triplett*, 96 Va. 603, 32 S. E. 50; *Ewald v. Crockett*, 85 Va. 299, 7 S. E. 386; *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586, 5 S. E. 676; *Roudabush v. Miller*, 32 Gratt. (73 Va.) 454; *Brock v. Rice*, 27 Gratt. (68 Va.) 812. **W. Va.**—*Kable v. Mitchell*, 9 W. Va. 492.

**As to statement of terms in decree**, see *supra*, IV, D, 10.

[a] **Where it clearly appears that no appreciable advantage** will result to the parties intended to be benefited bids will not be opened. *Bennett v. McKay*, Newfoundland 1874-1884, p. 241.

[b] **What advance is sufficient** (1) to require the opening of bids is largely within the discretion of the court. *Atkison v. Murfree*, 1 Tenn. Ch. 51. (2) In *Childress v. Hurt*, 2 Swan (Tenn.) 487, bidding was reopened on an advance bid of 30%, while in *Johnson v. Quarles*, 4 Coldw. (Tenn.) 615, the court refused on an offer of 20% advance. (3) In *Donaldson v. Young*, 7

*Humph. (Tenn.)* 266, it was said that the court would not open the bidding as a matter of course merely on an offer to advance 50% on the bid.

[c] **The court will not set aside a sale and open the biddings solely because of an advance bid.** *Litton v. Flanary*, 116 Va. 710, 82 S. E. 692; *Howell v. Morien*, 109 Va. 200, 63 S. E. 1073; *Watkins & Bros. v. Jones*, 107 Va. 6, 57 S. E. 608; *Yost v. Porter*, 80 Va. 855; *Roudabush v. Miller*, 32 Gratt. (73 Va.) 454; *Brock v. Rice*, 27 Gratt. (68 Va.) 812.

[d] **Where Application Is Delayed.** The practice of opening biddings is discountenanced, and an order will not be made to open bids after great delay as against an innocent purchaser, unless there has been misconduct on his part. *Crooks v. Crooks*, 2 Ch. Chamb. (Eng.) 29.

[e] **Where Sale Price Was Inadequate.**—An unconfirmed judicial sale, which by the tender of a properly secured upset bid appears to have been at an inadequate price should ordinarily be set aside, and a resale ordered. *Gillmor v. Rinehart*, 73 W. Va. 779, 81 S. E. 549.

80. *Hardy v. Coley*, 114 Va. 570, 77 S. E. 458; *Moore v. Triplett*, 96 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882; *Roudabush v. Miller*, 32 Gratt. (73 Va.) 454; *Brock v. Rice*, 27 Gratt. (68 Va.) 812.

[a] **Usually, one present at a sale and bidding thereat or having had an opportunity cannot put in an upset bid.** *Moore v. Triplett*, 96 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882.

[b] **When the upset price has been offered to gratify ill-will or malice towards the purchaser, a sale which has been fair and for a fair price will not be set aside.** *Roudabush v. Miller*, 32 Gratt. (73 Va.) 454, 465.

81. *Yost v. Porter*, 80 Va. 855; *Efinger v. Ralston*, 21 Gratt. (62 Va.) 430.

Although generally a readvertisement should be ordered,<sup>82</sup> the court may order the opening of biddings without requiring it.<sup>83</sup>

The resale must be made on the basis of the upset bid.<sup>84</sup>

**L. OBJECTIONS.**—Objections should be promptly made,<sup>85</sup> and if not timely will be held to be waived.<sup>86</sup> Objections to the manner of sale must be made before confirmation,<sup>87</sup> and if not made until afterwards will generally be held to come too late<sup>88</sup> unless the party is prevented from interposing them by reason of fraud or other adventitious circumstance.<sup>89</sup>

**X. REPORT OR RETURN.—A. DEFINITION.**—The return is the written statement of the officer of what he has done under the process in his hands.<sup>90</sup>

82. *Dupuy v. Gorman*, 9 Lea (Tenn.) 144, affirming *Click v. Burris*, 6 Heisk. (Tenn.) 539, 545; *Wilson & Co. v. Shields*, 3 Baxt. (Tenn.) 65.

83. *Dupuy v. Gorman*, 9 Lea (Tenn.) 144; *Vaughn v. Smith*, 3 Tenn. Ch. 368.

84. *Marsh v. Nimocks*, 122 N. C. 478, 29 S. E. 840, 65 Am. St. Rep. 715. See *Mason v. Martin*, 64 Miss. 572, 1 So. 756.

[a] **Receiving Bids at Office.**—The chancellor may in his discretion let the biddings remain open in the master's office and receive such bids as may be offered, and confirm the sale when reported by the master. *Dupuy v. Gorman*, 9 Lea (Tenn.) 144.

[b] **Striking-off.**—(1) In default of other bids, the person making the advanced bid should be declared the purchaser. *Marsh v. Nimocks*, 122 N. C. 478, 29 S. E. 840, 65 Am. St. Rep. 715. (2) But if other bids are offered the highest bidder must be declared the purchaser. *Atkison v. Murfree*, 1 Tenn. Ch. 51.

85. **La.**—See *Fried v. Marrero*, 137 La. 778, 69 So. 172. **Md.**—*Cohen v. Wagner*, 6 Gill 236, 251; *Cunningham v. Schley*, 6 Gill 207. **Mich.**—*Goodwin v. Burns*, 21 Mich. 211; *Leonard v. Taylor*, 12 Mich. 398; *Bullard v. Green*, 10 Mich. 268.

**Objection to confirmation**, see *infra*, XI, J.

[a] **At Term to Which Report Is Made.**—Objections should be filed at the term of court to which commissioners conducting the sale make their report. *Oswald v. Johnson*, 140 Ga. 62, 78 S. E. 333.

86. *Hewitt v. Great Western Beet*

*Sugar Co.*, 230 Fed. 394, 399, 144 C. C. A. 536.

[a] **Objection (1) at ratification comes too late** when the party knows of a cloud and fails to notify the officer thereof until after sale (*Cunningham v. Schley*, 6 Gill [Md.] 207); (2) and when a party, knowing the day fixed for sale falls on his Sabbath, fails to sooner object. *Cohen v. Wagner*, 6 Gill (Md.) 236, 251.

[b] **Where a decree directs a sale as a whole**, an objection that the sale was not made in parcels made at confirmation comes too late. *Central Trust Co. v. Sheffield & B. C., I. & R. Co.*, 60 Fed. 9.

87. *Klapneck v. Keltz*, 50 W. Va. 331, 40 S. E. 570; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102.

88. **U. S.**—*Nevada Nickel Syndicate v. Nat. Nickel Co.*, 103 Fed. 391. **Ark.**—*Sawyer v. Hentz*, 74 Ark. 324, 85 S. W. 775; *Nix v. Draughan*, 56 Ark. 240, 19 S. W. 669. **Ky.**—*Youell v. Gaines*, 1 Ky. Op. 163. **Tex.**—*Dilley v. Jasper Lumber Co.* (Tex. Civ. App.), 114 S. W. 878.

[a] **Where Court Still Controls Assets.**—Although the purchaser's exceptions were not filed until after ratification, the court may rescind its order of ratification where the assets are still within its control and an injustice would be done a purchaser by compelling him to take the property. *Gottschalk Co. v. Samuelson*, 128 Md. 541, 97 Atl. 1003; *Connaughton v. Bernard*, 84 Md. 577, 36 Atl. 265.

89. *Brown v. Gilmor's Exrs.*, 8 Md. 322; *Klapneck v. Keltz*, 50 W. Va. 331, 40 S. E. 570; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102.

90. *Davis v. Reaves*, 7 Lea (Tenn.)

B. **NECESSITY FOR.**—A report of the proceedings of the sale must be made to the court,<sup>91</sup> unless the approval of the court is not required as a preliminary to the purchaser's title.<sup>92</sup> It has been held, however, that the title of the purchaser is not dependent upon the fact of a return if the preliminary proceedings are correct.<sup>93</sup> If the officer fails to report, he may be cited to perform his duty in this regard.<sup>94</sup>

C. **DIVERSE REPORTS AND ADDENDA.**—A sale is not invalidated by the fact that one of the officers making the sale declines to join in the report and files a separate report,<sup>95</sup> and where one of the three commissioners who made the sale, makes and signs an addendum to the report, such addendum is no part of the report or of the record.<sup>96</sup>

585; *Hill v. Hinton*, 2 Head (Tenn.) 124.

As to who may bid, see *infra*, IX, K, 3.

91. **U. S.**—*Ballentyne v. Smith*, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. ed. 803; *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732; *Blossom v. Milwaukee, etc. R. Co.*, 3 Wall. 196, 18 L. ed. 43. **Ala.**—*Howison v. Oakley*, 118 Ala. 215, 23 So. 810. **Ark.**—*Nash v. Delinquent Lands*, 111 Ark. 158, 163 S. W. 1147. **Cal.**—*Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847; *Bennallack v. Richards*, 125 Cal. 427, 58 Pac. 65; *Bennallack v. Richards*, 116 Cal. 405, 48 Pac. 622; *In re Durham's Estate*, 49 Cal. 490. **Idaho.**—*State v. Cunningham*, 6 Idaho 113, 53 Pac. 451. **Ill.**—*Moore v. Titman*, 33 Ill. 358; *Ayers v. Baumgarten*, 15 Ill. 444; *Young v. Keogh*, 11 Ill. 642. **Ind.**—*Lawson v. De Bolt*, 78 Ind. 563. **Mich.**—*Butters v. Butters*, 153 Mich. 153, 117 N. W. 203; *Peirson v. Fisk*, 99 Mich. 43, 57 N. W. 1080. **Minn.**—See *Rogers v. Holyoke*, 14 Minn. 220, where it was attempted to restrain a party from moving to set aside a sale because no report had been made. **Neb.**—*Maul v. Hellman*, 39 Neb. 322, 58 N. W. 112. **N. J.**—*Den ex dem. Larason v. Lambert*, 13 N. J. L. 182; *Titman v. Riker*, 43 N. J. Eq. 122, 10 Atl. 397. **N. C.**—*Harrell v. Blythe*, 140 N. C. 415, 53 S. E. 232; *Joyner v. Futrell*, 136 N. C. 301, 48 S. E. 649; *Wood v. Parker*, 63 N. C. 379. **S. C.**—*Young v. Teague*, Bailey Eq. 13. **Tenn.**—*Armstrong v. McClure*, 4 Heisk. 80; *Lasell v. Powell*, 7 Coldw. 277; *Walker v. Walker*, 4 Coldw. 300. **Tex.**—*Dowling v. Duke*, 20 Tex. 181. **Va.**—*Crockett v. Sexton*, 29 Gratt. (70 Va.) 46. **W. Va.**—*McGinnis v. Caldwell*, 71 W. Va. 375,

76 S. E. 834, 43 L. R. A. (N. S.) 630; *Castleman's Admr. v. Castleman*, 67 W. Va. 407, 68 S. E. 34.

See 13 STANDARD PROC. 577; 12 STANDARD PROC. 86.

As to return generally, see the title "Returns."

As to return on execution sale, see the title "Judgments and Decrees, Enforcement of."

[a] **Substantial Compliance.**—Where there is an order stating that the court approved the deed and confirmed the sale, there is a substantial compliance with a requirement that the officer report. *Kulbreth v. Drew Co. Timber Co. (Ark.)*, 188 S. W. 810.

92. *Robert v. Casey*, 25 Mo. 584.

93. *McNitt v. Turner*, 16 Wall. (U. S.) 352, 21 L. ed. 341.

[a] The failure of the officer to make a complete or accurate return will not vitiate the purchaser's title under a sale lawfully made. *Wolfenberger v. Hubbard (Ind.)*, 110 N. E. 198.

[b] **Confirmation Without Return.** If the court, convinced otherwise than by a report, that a sale has been had in the mode directed, approves and ratifies the sale, the absence of a report does not affect the title of the purchaser. *Harrison v. Harrison*, 1 Md. Ch. 331.

94. *Bennallack v. Richards*, 125 Cal. 427, 433, 58 Pac. 65.

[a] The officer may be compelled to file a report. *Smith v. Denson*, 2 Smed. & M. (Miss.) 326. See *Connell v. Wilhelm*, 36 W. Va. 598, 15 S. E. 245.

95. *Hildreth v. Turner*, 89 Va. 858, 17 S. E. 471.

96. *Shirley v. Rice*, 79 Va. 442.

**D. WHEN MADE.**—In some states it is required that the return or report be made at the first term after the sale,<sup>97</sup> but in others the statute does not limit the time within which to report the sale for confirmation.<sup>98</sup>

**E. FORM AND CONTENTS.**—The statutes sometimes provide for what the report or return of the sale must contain.<sup>99</sup> It must affirmatively show that the person making it has complied with the order or decree of sale.<sup>1</sup> It must show that the required notices and advertisements were posted and made.<sup>2</sup> If notices were posted, that fact,<sup>3</sup> and the places where the notices were posted,<sup>4</sup> must be stated, but the notice itself need not be set out.<sup>5</sup> The report must show the name of the purchaser,<sup>6</sup> the terms of the sale,<sup>7</sup> the price received,<sup>8</sup> and how much

97. Ill.—*Moore v. Titman*, 33 Ill. 358. Miss.—*Mitchell v. Harris*, 43 Miss. 314; *Hoel v. Courser*, 26 Miss. 511. Mo.—*Price v. Springfield R. E. Assn.*, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595; *McVey v. McVey*, 51 Mo. 406.

[a] **Statute Is Directory.**—*Custer v. Holler*, 160 Ind. 505, 67 N. E. 228. See *Price v. Springfield R. E. Assn.*, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595.

[b] **Effect on Sale.**—(1) The failure to report at the next term does not render the sale void. *Johnson v. Cooper*, 56 Miss. 608 (*disapproving dictum* on this point in *Learned v. Matthews*, 40 Miss. 210). (2) That a report of the sale was not made for more than a year after the sale is no reason for setting aside the sale when the master might have been compelled by rule to make his report. *Moore v. Titman*, 33 Ill. 358.

98. *Bennallack v. Richards*, 125 Cal. 427, 433, 58 Pac. 65.

99. See generally the statutes.

1. *Quick v. Collins*, 197 Ill. 391, 64 N. E. 288.

[a] **Presumption in Aid of Report.** Where the report states the terms, time and place of the sale were advertised as directed, but does not state when and where the sale was made, it will be presumed, in the absence of a contrary showing, that the sale was made as directed. *Downing v. Thompson's Exr.*, 28 Ky. L. Rep. 1182, 92 S. W. 290.

**Form of referee's report of sale, see** 9 STANDARD PROC. 750.

**As to order or decree of sale, see** *supra*, IV.

2. *Quick v. Collins*, 197 Ill. 391, 64 N. E. 288; *Evans v. Bushnell*, 59 Kan. 160, 52 Pac. 419.

[a] **Cure by Affidavit of Printer.** A return which fails to show that required notice of the sale was duly given is irregular, and not cured by an accompanying affidavit of the printer showing the essential facts omitted from the return. *Evans v. Bushnell*, 59 Kan. 160, 52 Pac. 419.

**As to notice of sale, see** *supra*, VII.

3. *Quick v. Collins*, 197 Ill. 391, 64 N. E. 288.

[a] **If the notices were posted by others,** the report should be accompanied by affidavits proving the posting. *Quick v. Collins*, 197 Ill. 391, 64 N. E. 288.

4. *Quick v. Collins*, 197 Ill. 391, 64 N. E. 288.

5. *Burke v. Weaver*, 71 Ill. 359; *Moore v. Titman*, 33 Ill. 358.

6. Miss.—*Conger v. Robinson*, 4 Smed. & M. 210. N. J.—*Den ex dem. Larason v. Lambert*, 13 N. J. L. 182. Tex.—See *Dodd v. Templeman*, 76 Tex. 57, 13 S. W. 187.

7. *Wipff v. Heder*, 6 Tex. Civ. App. 685, 26 S. W. 118.

8. Ill.—*Reinhardt v. Seaman*, 208 Ill. 448, 69 N. E. 847. Ky.—*Haney v. McClure*, 88 Ky. 146, 10 S. W. 427; *Terry v. Swinford*, 19 Ky. L. Rep. 712, 41 S. W. 553. Miss.—*Conger v. Robinson*, 4 Smed. & M. 210. Tex.—*Taffinder v. Merrell*, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814.

[a] **The omission from the report of sale of the price paid is an irregularity, but does not make the conveyance subject to collateral attack.** *Taffinder v. Merrell*, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814.

or what land was sold,<sup>9</sup> and whether the land was sold in parcels or in gross.<sup>10</sup> It is not necessary, however, to report the various bids to the court.<sup>11</sup>

**Verification.**—Verification of the return is frequently required by statute,<sup>12</sup> but otherwise it is not necessary.<sup>13</sup>

**F. OBJECTIONS AND EXCEPTIONS.**—After the report of the officer is made, the parties may file objections or exceptions thereto,<sup>14</sup> which are in the nature of a special demurrer,<sup>15</sup> for the purpose of preventing confirmation of the sale.<sup>16</sup> An amended report may be excepted to in the same manner as the original report.<sup>17</sup>

**Who May Make.**—Either party to the suit,<sup>18</sup> and the purchaser,<sup>19</sup> may except or object to the report or return of the officer.

**When Made.**—The time within which to interpose exceptions or objections is sometimes limited by statute or rule of court.<sup>20</sup> Generally

[b] Where partnership property is sold and one of the partners becomes the purchaser, the report must show that he paid the amount of his bid, or what partnership debts were paid or to what extent out of the sum bid. *Renfrow v. Pearce*, 68 Ill. 125.

9. *Wipff v. Heder*, 6 Tex. Civ. App. 685, 26 S. W. 118; *Barger v. Buckland*, 28 Gratt. (69 Va.) 850.

[a] **Description of Land.**—(1) Although the description in the commissioner's report may not be as full or accurate as the description in the judgment or petition for sale, it is sufficient if the description is such that the land can be identified with reasonable certainty. *Downing v. Thompson's Exr.*, 28 Ky. L. Rep. 1182, 92 S. W. 290. (2) A report which does not identify the land but refers to the mortgage deed, which is a part of the record, is sufficient. *Sims' Lessee v. Cross*, 10 Yerg. (Tenn.) 460. (3) The same particularity in description is not required in a report of sale which is necessary to a deed. *Gilbert v. Cooksey*, 69 Mo. 42.

10. *Terry v. Swinford*, 19 Ky. L. Rep. 712, 41 S. W. 553.

11. *Comstock v. Purple*, 49 Ill. 158, criticising *Dills v. Jasper*, 33 Ill. 262, as being out of harmony with previous decisions or with the practice of the state.

12. *Dennis v. Winter*, 63 Cal. 16; *Perkins v. Gridley*, 50 Cal. 97; *State v. Cunningham*, 6 Idaho 113, 53 Pac. 451.

[a] **Statute Is Directory.**—(1) *Hur-*

*ley v. Barnard*, 48 Tex. 83. (2) The failure to verify will not invalidate the sale. *Sheldon v. Wright*, 7 Barb. (N. Y.) 39.

13. *Hargus v. Bowen*, 46 Miss. 72.

14. *Kiebel v. Leick*, 216 Ill. 474, 75 N. E. 187; *Van Meter's Exrs. v. Van Meter*, 3 Gratt. (44 Va.) 148.

[a] **Form.**—Under a statute allowing exceptions to a report but prescribing no particular form, a petition for vacation of the sale is a sufficient exception. *Kiebel v. Leick*, 216 Ill. 474, 75 N. E. 187.

[b] **A motion for a resale**, accompanied by a secured advance offer showing the sale to have been made at an inadequate price is of itself an objection to the sale. *Gillmor v. Rinehart*, 73 W. Va. 779, 81 S. E. 549.

**Objections to confirmation**, see *infra*, XI, J.

15. *Myers v. James*, 4 Lea (Tenn.) 370; *Goddard v. Cox*, 1 Lea (Tenn.) 112; *Ridley's Adms. v. Ridley*, 1 Coldw. (Tenn.) 323; *Crislip v. Cain*, 19 W. Va. 438.

16. *Alsobrook v. Eggleston*, 69 Miss. 833, 13 So. 850.

17. *Simmons's Admr.*, 33 Gratt. (74 Va.) 451; *Crockett v. Sexton*, 29 Gratt. (70 Va.) 46.

18. *Blossom v. Milwaukee, etc. R. Co.*, 3 Wall. (U. S.) 196, 18 L. ed. 43.

19. *Blossom v. Milwaukee, etc. R. Co.*, 3 Wall. (U. S.) 196, 18 L. ed. 43.

20. *Pewabic Min. Co. v. Mason*, 145

exceptions or objections to the report must be made in the trial court and cannot be made for the first time on appeal.<sup>21</sup>

**Requisites of Exceptions and Objections.**—The exceptions or objections must specify with reasonable certainty the particular grounds of exception,<sup>22</sup> and the particular part of the report intended to be excepted to.<sup>23</sup> It is not necessary that they be under oath.<sup>24</sup>

**Traverse of Exceptions.**—There need be no written traverse or confession and avoidance of the matter set up in the exceptions to the confirmation of a report of sale.<sup>25</sup>

**G. AMENDMENT AND CORRECTION.**—The commissioner's report of sale may be amended,<sup>26</sup> and, if the commissioner, after having filed his report, discovers any material mistake or omission he may, any time before final action upon it by the court, file an amended, additional or supplemental report by leave of court.<sup>27</sup> If the report is incomplete or insufficient he may be required to make a further report.<sup>28</sup>

**H. FORCE AND EFFECT.**—A report is not conclusive generally,<sup>29</sup>

U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732. See generally the statutes, and *In re* Assignment of Citizens' Stock Bank, 86 Mo. App. 14.

21. *Lasell v. Powell*, 7 Coldw. (Tenn.) 277.

[a] **On Appeal.**—Where a commissioner's report was confirmed without exception in the court below, it is too late to except thereto in the appellate court, unless it is erroneous on its face. *Hildreth v. Turner*, 89 Va. 858, 17 S. E. 471; *Smith v. Henkel*, 81 Va. 524.

[b] **Exceptions to First Report When Second Is Excepted to.**—Where exceptions to a report because of certain irregularities are made and sustained and a second report is made showing a compliance in these matters, it is then too late to raise other irregularities in the first report by taking exceptions to the second. *Nebbett v. Cunningham*, 27 Miss. 292.

22. **Ky.**—*Noel v. Harper*, 186 S. W. 503. **Tenn.**—*Myers v. James*, 4 Lea 370; *Ridley's Admr. v. Ridley*, 1 Coldw. 323. **Va.**—*Simmons v. Simmons*, 33 Gratt. (74 Va.) 451; *Crockett v. Sexton*, 29 Gratt. (70 Va.) 46. **W. Va.** *Crislip v. Cain*, 19 W. Va. 438; *Hartley & Co. v. Roffe*, 12 W. Va. 401.

[a] **Mere conclusions of the pleader**, without averment of facts, will not support allegations of fraud. The facts relied upon must be stated. *Osmond v. Evans*, 269 Ill. 278, 110 N. E. 16.

[b] **In cases involving property**

**rights of infants**, the court will apply the rule liberally and will consider any question fairly raised by an exception, though it be general in its terms and scope. *Noel v. Harper* (Ky.), 186 S. W. 503.

23. *Story v. Livingston*, 13 Pet. (U. S.) 359, 10 L. ed. 200.

24. *Allen v. Martin*, 61 Miss. 78.

25. *Graves' Comm. v. Lyons*, 166 Ky. 446, 179 S. W. 413, the practice being to put upon the party excepting the burden of proof of his allegations without further pleading.

26. *Campbell v. Gawlewicz*, 3 Neb. (Unof.) 321, 91 N. W. 569; *McCleary v. Grantham*, 29 W. Va. 301, 11 S. E. 949.

[a] **Adding Signature.**—A guardian's sale is not invalidated because the guardian did not sign the report. The defect may be supplied by seasonable amendment. *Ellsworth v. Hall*, 48 Mich. 407, 12 N. W. 512.

27. *Crockett v. Sexton*, 29 Gratt. (70 Va.) 46.

28. *Crockett v. Sexton*, 29 Gratt. (70 Va.) 46.

29. *Olipphant v. Burns*, 146 N. Y. 218, 244, 40 N. E. 980.

[a] **Presumptions From Report.**—Where a report has been made stating that the sale was made in pursuance of the order and the notice given as required the presumption is that the duty was properly performed; and the report will be confirmed unless the exceptions to the report are sustained by

but it cannot be attacked in a collateral proceeding by persons having no right to raise the question.<sup>30</sup>

**XI. CONFIRMATION. — A. DEFINITION AND OBJECT.** — A confirmation of a sale by the court is a signification, in some way, of its approval.<sup>31</sup> And where confirmation is required, a sale is not complete, and is subject to the discretion and control of the court, until it is confirmed.<sup>32</sup>

proof. *Childress v. Harrison*, 1 Baxt. (Tenn.) 410.

[b] **As to Recital of Notice.** — Where the report states that the sale was made "after advertising the sale in the manner and for the time required by the said order," it will be taken as true until evidence to the contrary appears. *Laidley v. Jasper*, 49 W. Va. 526, 39 S. E. 169.

[c] **As to Recital of Purchaser.** — A report showing that land had been sold to a designated person is not conclusive as to who was the purchaser. The real person may be shown by parol, even though the decree directed a deed to "the purchaser." *Dodd v. Templeman*, 76 Tex. 57, 13 S. W. 187.

[d] **As to Sale of Land.** — When confirmed, the report is prima facie evidence that the land was sold. *Du Hadaway v. Driver*, 75 Ark. 9, 86 S. W. 807.

[e] **As to Terms of Sale.** — When confirmed, the report is conclusive as to the terms of sale. *Brown v. Wallace*, 2 Bland (Md.) 585.

30. *Gibbs v. Davies*, 168 Ill. 205, 48 N. E. 120; *Hobson v. Ewan*, 62 Ill. 146.

[a] The objection (1) that the land was not conveyed to the bidder by the person making the sale cannot be made by the party whose title was divested. The bidders at the sale are the only ones who can object on this ground. *Gibbs v. Davies*, 168 Ill. 205, 48 N. E. 120. (2) Or the question may be raised between the purchaser and his assignee. *Hobson v. Ewan*, 62 Ill. 146.

31. *Johnson v. Cooper*, 56 Miss. 608. To same effect, *Terry v. Cole's Exr.*, 80 Va. 695.

[a] "The order of confirmation amounts to a judicial ascertainment, and declaration that the commissioner has conducted the sale agreeable to the decree, and that the purchaser, on his

part, has complied also." *Redus v. Hayden*, 43 Miss. 614, 637.

[b] Confirmation is the judicial sanction of the court, and by it the court makes it a sale of its own. *Langyher v. Patterson*, 77 Va. 470.

[c] The confirmation is not the sale, but only the approval of what has already been done. *Wells v. Lenox*, 108 Ark. 366, 159 S. W. 1099; *Robertson v. McClintock*, 86 Ark. 255, 110 S. W. 1052.

[d] The object of confirmation is not so much to determine what particular person is entitled to complete title to the thing bought, as to determine that the sale was made in such a manner and for such price as justifies the court's sanction to the completion of the purchase. *Dodd v. Templeman*, 76 Tex. 57, 13 S. W. 187.

32. Ark. — *Purcell v. Gann*, 113 Ark. 332, 168 S. W. 1102; *Nash v. Delinquent Lands*, 111 Ark. 158, 163 S. W. 1147; *Miller v. Henry*, 105 Ark. 261, 150 S. W. 700, Ann. Cas. 1914D, 754; *Wells v. Rice*, 34 Ark. 346. Cal. — *Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847. Miss. — *Johnson v. Cooper*, 56 Miss. 608; *Swofford v. Garmon*, 51 Miss. 348; *Redus v. Hayden*, 43 Miss. 614; *Henderson v. Herrod*, 23 Miss. 434. Tenn. — *Young v. Thompson*, 2 Coldw. 596. Va. — *Carr v. Carr*, 88 Va. 735, 14 S. E. 368; *Terry v. Cole's Exr.*, 80 Va. 695. W. Va. — *Lowman v. Funkhouser*, 90 S. E. 340; *Castleman's Admr. v. Castleman*, 67 W. Va. 407, 68 S. E. 34.

[a] **Sale Is Valid.** — *Robertson v. McClintock*, 86 Ark. 255, 110 S. W. 1052; *Johnson v. Cooper*, 56 Miss. 608.

[b] **Status of Bids Before Confirmation.** — Until the sale is confirmed the bid of the purchaser is a mere proposition to purchase which may be rejected by the court. Ala. — *Howison v. Oakley*, 118 Ala. 215, 23 So. 810. Va. — *Terry v. Cole's Exr.*, 80 Va. 695. W. Va.

**B. NECESSITY FOR.**—A judicial sale may be either absolute,<sup>33</sup> or subject to subsequent confirmation, by the court.<sup>34</sup> In the absence of statute or requirement in the order or decree of sale it is not necessary that the sale should be confirmed by the court,<sup>35</sup> although it is undoubtedly better practice to have it done.<sup>36</sup> A confirmation is generally and almost universally required, however.<sup>37</sup> Instead of a con-

**Lowman v. Funkhouser**, 90 S. E. 340.  
[c] **The court may change the terms of the sale before confirmation.** **Tebbs v. Lee**, 76 Va. 744.

**33. U. S.**—**Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co.**, 165 Fed. 162, 91 C. C. A. 196. **S. C.**—**Young v. Teague**, Bailey Eq. 13. **Tenn.**—**Crawford v. Woodward**, 1 Tenn. Ch. App. 274.

**34. Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co.**, 165 Fed. 162, 91 C. C. A. 196.

**As to setting aside the sale**, see *infra*, XII.

**35. Cal.**—**Kimple v. Conway**, 75 Cal. 413, 17 Pac. 546. **Ill.**—**Miller v. McMannis**, 104 Ill. 421. **Mo.**—**Roberts v. Casey**, 25 Mo. 584. **N. Y.**—**In the Matter of Denison**, 114 N. Y. 621, 21 N. E. 97. **Ohio.**—**Stall's Lessee v. Macalester**, 9 Ohio 19; **Herbst v. Bates**, 9 Ohio Dec. 444. **Pa.**—**Watt v. Scott**, 3 Watts 79. **Tenn.**—**Queener v. Trew**, 6 Heisk. 59; **Crawford v. Woodward**, 1 Tenn. Ch. App. 274.

[a] **A sale otherwise regular will not be held invalid simply because it was not reported and confirmed where such is not required by statute or decree of sale.** **Miller v. McMannis**, 104 Ill. 421.

[b] **Statute Construed.**—A statute authorizing the administrator "to sell and convey" as the court shall order and direct and requiring him to bring his proceedings to court after the sale is made does not require a confirmation expressed on the record unless some objections are made. Where an objection is made and overruled, the sale is taken to be unobjectionable; and the same conclusion will be drawn where none is made. The requirement of a return is merely to place the matters of record. **Watt v. Scott**, 3 Watts (Pa.) 79.

[c] **Sale of Personalty.**—It seems that in case of a chancery sale of personal property the sale is complete without confirmation. **Killough v. Warren** (Tenn.), 58 S. W. 898; **Williams v.**

**Clark** (Tenn.), 51 S. W. 130; **Saunders v. Stallings**, 5 Heisk. (Tenn.) 65.

[d] **A sale of community property on an order in divorce proceedings need not be confirmed where the statute and decree do not require it.** **Kimple v. Conway**, 75 Cal. 413, 17 Pac. 546.

[e] **Where Decree Is Interlocutory.** Whether or not a sale by a commissioner in equity requires confirmation depends on whether the decree ordering it is final or interlocutory. **Smith v. Coker**, 65 Ga. 461.

**36. Miller v. McMannis**, 104 Ill. 421.

**37. U. S.**—**Pewabic Min. Co. v. Mason**, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732; **Camden v. Mayhew**, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. ed. 608; **Williamson v. Berry**, 8 How. 495, 21 L. ed. 1170; **Gibson v. Lyon**, 115 U. S. 439, 6 Sup. Ct. 129, 29 L. ed. 440; **Layton v. R. I. Hospital Trust Co.**, 205 Fed. 276, 125 C. C. A. 263; **Smith v. Arnold**, 5 Mason 414, 22 Fed. Cas. No. 13,044. **Ala.**—**Wallace v. Hall's Heirs**, 19 Ala. 367; **Bonner v. Greenlee's Heirs**, 6 Ala. 411. **Ark.**—**Nash v. Delinquent Lands**, 111 Ark. 158, 163 S. W. 1147; **Lumpkins v. Johnson**, 61 Ark. 80, 32 S. W. 65; **Alexander v. Hardin**, 54 Ark. 480, 16 S. W. 264; **Apel v. Kelsey**, 47 Ark. 413, 2 S. W. 102. **Cal.**—**Bennalack v. Richards**, 116 Cal. 405, 48 Pac. 622; **In re Jack's Estate**, 115 Cal. 203, 46 Pac. 1057; **Halleck v. Guy**, 9 Cal. 181, 70 Am. Dec. 643. **Fla.**—**Allred v. McGahagan**, 39 Fla. 118, 21 So. 802; **Knox v. Spratt**, 19 Fla. 817. **Ga.**—**Walters v. Hargrove**, 61 Ga. 267. **Haw.**—**Smith v. Pacific Heights Ry. Co.**, 17 Hawaii 96. **Idaho.**—**State v. Cunningham**, 6 Idaho 113, 53 Pac. 451. **Ill.**—**Hart v. Purch**, 130 Ill. 426, 22 N. E. 831, 6 L. R. A. 371; **Miller v. McMannis**, 104 Ill. 421; **Musgrave v. Conover**, 5 Ill. 374; **Ayers v. Baumgarten**, 15 Ill. 444; **Rawlings v. Bailey**, 15 Ill. 178; **Young v. Keogh**, 11 Ill. 642. **Ind.**—**Hammann v. Mink**, 80 Ind. 279; **Maxwell v. Campbell**, 45 Ind. 360. **Ia.**—**Wade v. Car-**

firmation by the court, there may be a confirmation in pais, by the acts of the parties themselves, which is as valid as an approval of the sale by the court.<sup>38</sup>

penyer, 4 Iowa 361. **Ky.**—Campbell v. Johnson, 4 Dana 177; Forman v. Hunt, 3 Dana 614. **Md.**—Schindel v. Keedy, 43 Md. 413; Wagner v. Cohen, 6 Gill 97, 46 Am. Dec. 660. **Mass.**—Eastern B. & Structural Co. v. Worcester Auditorium Co., 216 Mass. 426, 103 N. E. 913. **Mich.**—Hunt v. Stevens, 174 Mich. 501, 140 N. W. 992; Butters v. Butters, 153 Mich. 153, 117 N. W. 203; People *ex rel.* Monroe v. Circuit Judge, 19 Mich. 296. See Jenness v. Smith, 58 Mich. 280, 25 N. W. 191. **Minn.** Myrick v. Coursalle, 32 Minn. 153, 19 N. W. 736. **Miss.**—Campe v. Saucier, 68 Miss. 278, 8 So. 846, 24 Am. St. Rep. 273; Maynard v. Cocke, 18 So. 374; Alsobrook v. Eggleston, 69 Miss. 833, 13 So. 850; Henderson v. Herrod, 23 Miss. 434; Smith v. Denson, 2 Smed. & M. 326. **Mo.**—Desloge v. Tucker, 196 Mo. 587, 94 S. W. 283; Bone v. Tyrrell, 113 Mo. 175, 20 S. W. 796; Valle v. Fleming, 19 Mo. 454, 61 Am. Dec. 566. **Neb.**—Maul v. Hellman, 39 Neb. 322, 58 N. W. 112. **N. J.**—Titman v. Riker, 43 N. J. Eq. 122, 10 Atl. 397. **N. Y.** Ellwood v. Northrup, 106 N. Y. 172, 12 N. E. 590; Stilwell v. Swarthout, 81 N. Y. 109; Battell v. Torrey, 65 N. Y. 294. **N. C.**—Harrell v. Blythe, 140 N. C. 415, 53 S. E. 232; Joyner v. Futrell, 136 N. C. 301, 48 S. E. 649; Vanderbilt v. Brown, 128 N. C. 498, 39 S. E. 36; *In re* Dickerson, 111 N. C. 108, 15 S. E. 1025; Foushee v. Durham, 84 N. C. 56. **Ohio.**—Murphy v. Hardee, 22 Ohio Cir. Ct. 511, 12 Ohio Cir. Dec. 837. See Stall's Lessee v. Macalester, 9 Ohio 19. **Okla.**—Threadgill v. Colcord, 16 Okla. 447, 85 Pac. 703. **Pa.** Brennan's Estate, 220 Pa. 232, 69 Atl. 678; Greenough v. Small, 137 Pa. 132, 20 Atl. 553; Morgan's Appeal, 110 Pa. 271, 4 Atl. 506. **Tenn.**—Wayne v. Fouts, 108 Tenn. 145, 65 S. W. 471; Killough v. Warren, 58 S. W. 898; Hyder v. O'Brien (Tenn. Ch.), 48 S. W. 262; Atkison v. Murfree, 1 Tenn. Ch. 51, 54; Reese v. Copeland, 6 Lea 190; Pearson v. Johnson, 2 Sneed 580; Childress v. Hurt, 2 Swan 487; Morton v. Sloan, 11 Humph. 278. **Tex.** Houston E. & W. T. Ry. Co. v. Keller, 90 Tex. 214, 37 S. W. 1062; Harrison v. Ilgner, 74 Tex. 86, 11 S. W. 1054; Graham v. Hawkins, 38 Tex. 628; Littlefield v. Tinsley, 26 Tex. 353; Neill v. Cody, 26 Tex. 286. **Va.**—Richardson v. Jones, 106 Va. 540, 56 S. E. 243; Alexander v. Howe, 85 Va. 198, 7 S. E. 248; Terry v. Cole's Exr., 80 Va. 695; Daniel v. Leitch, 13 Gratt. (54 Va.) 195. **W. Va.**—Castleman's Admr. v. Castleman, 67 W. Va. 407, 68 S. E. 34; Thompson v. Cox, 42 W. Va. 566, 26 S. E. 189; Childs v. Hurd, 25 W. Va. 530.

[a] A private sale must be approved and confirmed by the court. Dickerson's Heirs v. Talbot's Exrs., 14 B. Mon. (Ky.) 60.

[b] An amended report of sale may be confirmed. Heschel v. Schnecko, 73 Mo. App. 612.

[c] The sale is void unless an order of confirmation is obtained previous to the conveyance to the purchaser. Rea v. McEachron, 13 Wend. (N. Y.) 465, 28 Am. Dec. 471.

[d] The sale must be confirmed before legal title can vest in the purchaser. Ballentyne v. Smith, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. ed. 803; Williamson v. Berry, 8 How. 495, 12 L. ed. 1170; Bank of United States v. Ritchie, 8 Pet. 128, 8 L. ed. 890.

38. Penn v. Heisey, 19 Ill. 295, 68 Am. Dec. 597; Johnson v. Cooper, 56 Miss. 608; Swofford v. Garmon, 51 Miss. 348; Redus v. Hayden, 43 Miss. 614; Henderson v. Herrod, 23 Miss. 434; Tooley v. Gridley, 3 Smed. & M. (Miss.) 493, 41 Am. Dec. 628. See Alsobrook v. Eggleston, 69 Miss. 833, 13 So. 850.

[a] A stranger cannot by acts in pais confirm the sale. Brooks v. Kelly, 63 Miss. 616.

[b] Estoppel. — Where a judicial sale made by a guardian was not reported and never confirmed, and there was no complaint as to the fairness of the sale and the purchase price had been duly applied, the minors will be estopped in equity from proceeding in ejectment to recover the land from an innocent purchaser. Penn v. Heisey, 19 Ill. 295, 68 Am. Dec. 597.

C. PRESUMPTION OF CONFIRMATION. — Ordinarily a confirmation of the sale will not be presumed.<sup>39</sup>

D. JURISDICTION. — The jurisdiction to confirm rests in the court which awarded the decree.<sup>40</sup> Where a cause is transferred from one court to another the latter possesses the same jurisdiction to confirm as the original court.<sup>41</sup>

E. CONFIRMATION IN CHAMBERS. — Some statutes authorize the judge to confirm the sale in chambers.<sup>42</sup>

F. TIME FOR CONFIRMATION. — The court may confirm the sale in vacation,<sup>43</sup> or at a special<sup>44</sup> or adjourned<sup>45</sup> term. The confirmation should precede the execution of the deed,<sup>46</sup> but the fact that it follows it does not render it ineffectual.<sup>47</sup> If a confirmation is made at a term different from that prescribed by law, it is voidable and not void.<sup>48</sup>

G. WHO MAY CONFIRM. — The chancellor may confirm a sale made

[c] Purchaser estopped by taking possession and dealing with property as his own. *Ledyard v. Phillips*, 32 Mich. 13.

39. U. S. — See *Walker v. McLoud*, 204 U. S. 302, 27 Sup. Ct. 293, 51 L. ed. 495. Ark. — *Apel v. Kelsey*, 47 Ark. 413, 2 S. W. 102. Tex. — *Swenson v. Seale* (Tex. Civ. App.), 28 S. W. 143.

[a] If no further steps are taken after the filing of exceptions to a report, the sale, not the exceptions, is presumed to be abandoned. *Alsobrook v. Eggleston*, 69 Miss. 833, 13 So. 850.

[b] After a lapse of fifty years where the records show the sale was reported and the conveyance executed a confirmation may be presumed. *Santana Live-Stock & Land Co. v. Pendleton*, 81 Fed. 784, 26 C. C. A. 608; *Miles v. Dana*, 13 Tex. Civ. App. 240, 36 S. W. 848.

40. *In re Oviatt's Est.*, 3 Pa. Dist. 620; *Samson v. Honrado*, 12 Phil. Isl. 37.

41. *Brown v. Gilmer's Exrs.*, 8 Md. 322.

[a] The order of removal transfers the jurisdiction, and after removal objections to a sale should be filed in the court to which the case is removed. *Brown v. Gilmer's Exrs.*, 8 Md. 322.

42. *Hartsuff v. Huss*, 2 Neb. (Unof.) 145, 95 N. W. 1070; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900, 65 N. W. 1059; *McMurtry v. Tuttle*, 13 Neb. 232, 13 N. W. 213.

As to authority to act in chambers generally, see the title "Judicial Officers."

43. Ill. — *Davies v. Gibbs*, 174 Ill. 272, 51 N. E. 220, partition sale. Mo. — *Murray v. Purdy*, 66 Mo. 606. Neb. — *Armstrong v. Middlestadt*, 22 Neb. 711, 36 N. W. 151.

[a] In Mississippi under the code the court is without power to confirm in vacation where there has been a protest filed to such confirmation. *George v. Wood*, 94 Miss. 268, 49 So. 147, a partition sale.

44. *Harman v. Copenhaver*, 89 Va. 836, 17 S. E. 482.

45. *Price v. Springfield R. E. Assn.*, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595; *Wilkerson v. Allen*, 67 Mo. 502; *Sims v. Gray*, 66 Mo. 613; *McVey v. McVey*, 51 Mo. 406; *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281, 58 N. W. 695.

46. *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462.

47. *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462, it relates to the execution of the deed and sanctions it so that the result is the same as if the deed had been made in pursuance to the confirmation.

48. *Hoel v. Coursey*, 26 Miss. 511; *Murray v. Purdy*, 66 Mo. 606 (criticizing previous Missouri cases); *Highley v. Barron*, 49 Mo. 103. See 12 STANDARD PROC. 837.

[a] Approval at the term following that in which the report is filed is proper, for the law does not require approval at the term when the report is made. *Price v. Springfield R. E. Assn.*, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595.

under a decree rendered by the vice chancellor,<sup>49</sup> but a person acting as special judge, by agreement of parties cannot confirm a sale.<sup>50</sup>

Interest will disqualify a judge from acting.<sup>51</sup>

**H. AT WHOSE INSTANCE.**—Confirmation may be had on the application of any person interested in the sale,<sup>52</sup> including the purchaser,<sup>53</sup> and his assignee,<sup>54</sup> or by the court on its own motion.<sup>55</sup>

**I. MOTION, NOTICE AND DECREE NISI.**—Application for confirmation may be made by motion.<sup>56</sup> Unless required by statute,<sup>57</sup> no notice of application for confirmation is necessary,<sup>58</sup> although better practice requires it.<sup>59</sup> In some jurisdictions a day is fixed to permit the object-

49. *Dunn v. German Security Bank*, 8 Ky. L. Rep. 777, 3 S. W. 425.

50. *Trotter v. Neal*, 50 Ark. 340, 7 S. W. 384, an order by him confirming a sale is void.

51. *Satcher v. Satcher's Admr.*, 41 Ala. 26, 91 Am. Dec. 498; *Wilson v. Wilson*, 36 Ala. 655 (where judge was surety on bond of officers selling); *Heydenfeldt v. Towns*, 27 Ala. 423; *Harrington v. Hayes County*, 81 Neb. 231, 115 N. W. 773, 129 Am. St. Rep. 680, a district judge is disqualified from confirming a judicial sale in an action in which he commenced and prosecuted to judgment as attorney for the plaintiff.

52. **U. S.**—*Coltrane v. Baltimore Bldg. & Loan Assn.*, 126 Fed. 839. **Kan.**—*Galbreath v. Drought*, 29 Kan. 711; *Ferguson v. Tutt*, 8 Kan. 370. **Miss.**—*Redus v. Hayden*, 43 Miss. 614.

[a] **A creditor or the officer** conducting the sale may move for confirmation. *Coltrane v. Baltimore Bldg. & Loan Assn.*, 126 Fed. 839.

53. **U. S.**—*Coltrane v. Baltimore Bldg. & Loan Assn.*, 126 Fed. 839. **Ala.**—*Aderholt v. Henry*, 82 Ala. 541, 3 So. 114; *Haralson v. George's Exr.*, 56 Ala. 295. **Cal.**—*Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847. **Miss.**—*Johnson v. Cooper*, 56 Miss. 608; *Redus v. Hayden*, 43 Miss. 614. **Okla.**—*Payne v. Long-Bell Lumber Co.*, 9 Okla. 683, 60 Pac. 235. **Tenn.**—*Hazlewood v. Christian*, 62 S. W. 39. **Va.**—*Carr v. Carr*, 88 Va. 735, 14 S. E. 368.

54. *Payne v. Long-Bell Lumber Co.*, 9 Okla. 683, 60 Pac. 235.

55. *Galbreath v. Drought*, 29 Kan. 711; *Ferguson v. Tutt*, 8 Kan. 370.

56. *Galbreath v. Drought*, 29 Kan. 711.

[a] **A formal motion and notice** is not required to the confirmation of the sale on the papers and proceedings al-

ready in the case. *Baker v. Hall*, 29 Kan. 617, 630.

57. See generally the statutes.

[a] **When confirmation is had in vacation** (1), statute requires notice (*Armstrong v. Middlestadt*, 22 Neb. 711, 36 N. W. 151; *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144), but (2) unless the party is prejudiced by want of notice, the confirmation will not be set aside. *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144.

58. **Ala.**—*Moore v. Cottingham*, 113 Ala. 148, 20 So. 994, 59 Am. St. Rep. 100; *Ligon v. Ligon*, 84 Ala. 555, 4 So. 405. **Kan.**—*Galbreath v. Drought*, 29 Kan. 711. **Miss.**—*Johnson v. Cooper*, 56 Miss. 608. **Neb.**—*Brusha v. Phipps*, 86 Neb. 822, 126 N. W. 856. **Tex.**—*Davis v. Stewart*, 4 Tex. 223. See 6 STANDARD PROC. 571.

[a] **Notice of Sale as Notice of Confirmation.**—As the statute requires the sale to be reported for confirmation to the first term of court after it is made, the notice of the sale might be construed to be notice to attend court at a particular term to interpose objections against the guardian's actions. But it cannot be held to be notice for any subsequent term unless the records showed a continuance of the application. *Hoel v. Cursery*, 26 Miss. 511, 520.

59. *Williamson v. Berry*, 8 How. (U. S.) 495, 546, 11 L. ed. 1170; *Coltrane v. Baltimore B. & L. Assn.*, 126 Fed. 839. See *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732; *Davis v. Gaines*, 104 U. S. 386, 26 L. ed. 757; *Jackson v. Ludeling*, 21 Wall. (U. S.) 616, 22 L. ed. 492 (under Louisiana Code); *Parker v. Overman*, 18 How. (U. S.) 137, 15 L. ed. 318, under Arkansas statute.

[a] **On Whom Served.**—Where no notice of confirmation is required by

ing party to attend and show cause against the motion.<sup>60</sup>

**J. OBJECTIONS TO CONFIRMATION.**<sup>61</sup>—Any person having an interest in the proceeds of the sale,<sup>62</sup> whether or not he is a party,<sup>63</sup> may object to its confirmation; but one who is not a party and whose interests are not affected cannot object.<sup>64</sup> Thus confirmation may be resisted by a claimant to part of the land sold,<sup>65</sup> by the purchaser,<sup>66</sup> and a mortgagor.<sup>67</sup>

**How Made.**<sup>68</sup>—The objections to confirmation should be made in the form of a petition,<sup>69</sup> or motion;<sup>70</sup> but the court may disapprove a

statute, the service of notice if necessary is sufficient if served upon the attorney of record. *Nevada Nickel Syndicate v. Nat. Nickel Co.*, 103 Fed. 391.

[b] **In a sale of corporation property to enforce liens**, neither the stockholders nor the general creditors need be served with a rule for confirmation, not being necessary parties to the suit. *Godchaux v. Morris*, 121 Fed. 482, 57 C. C. A. 434.

[c] **Where the confirmation is opposed** because more than the necessary amount of property was sold, the purchaser must be notified. *Beaty v. Radenhurst*, 3 Ch. Chamb. (Can.) 344.

60. *Eastern B. & Structural Co. v. Worcester Auditorium Co.*, 216 Mass. 426, 103 N. E. 913; *Henderson v. Herrod*, 23 Miss. 434.

[a] **Decree Nisi.**—Upon the filing of the motion and proof of service of notice a decree nisi is entered to the effect that the sale will be confirmed unless cause be shown to the contrary within a stated time. *Williamson v. Berry*, 8 How. (U. S.) 495, 546, 12 L. ed. 1170; *Coltrane v. Baltimore B. & L. Assn.*, 126 Fed. 839.

61. **As to exceptions to report**, see *supra*, X, F.

62. **Ark.**—*Nash v. Delinquent Lands*, 111 Ark. 158, 163 S. W. 1147. **Ga.** *Oswald v. Johnson*, 140 Ga. 62, 78 S. E. 333, any party in interest. **La.** See *Monition v. Johnson*, 3 La. Ann. 656. **Miss.**—*Henderson v. Herrod*, 23 Miss. 434. **Va.**—*Carr v. Carr*, 88 Va. 735, 14 S. E. 368.

[a] **The party must be one whose interest appears by the records of the court.** The objection must be made by a defendant or a judgment creditor who has a lien on the property sold. *In re Adair* (Del.), 99 Atl. 45.

[b] **Either party may object.** Low-

man *v. Funkhouser* (W. Va.), 90 S. E. 340.

[c] **An heir is not estopped to object to confirmation of an administrator's sale for inadequacy of price**, merely because her claim of title to the property in question caused the low bid. *In re Bazzuro's Estate*, 161 Cal. 71, 118 Pac. 434.

63. *Broadwater v. Richards*, 4 Mont. 80, 2 Pac. 546 (any person interested in the estate may object to a confirmation of the administrator's sale); *Pruden v. Squarebriggs*, 2 Terr. L. R. (Can.) 200.

[a] **A stockholder in an insolvent corporation may, under some circumstances, except to a sale of the property of the corporation made by receivers.** *Southern Baltimore Brick & Tile Co. v. Kirby*, 89 Md. 52, 42 Atl. 913.

64. *Monition v. Johnson*, 3 La. Ann. 656; *Griffith v. Hammond*, 45 Md. 85. See *McCallum v. Chicago T. & T. Co.*, 203 Ill. 142, 67 N. E. 823.

65. *Swafford v. Howard*, 20 Ky. L. Rep. 1793, 50 S. W. 43.

66. **Miss.**—*Conger v. Robinson*, 4 Smed. & M. 210. **Va.**—*Carr v. Carr*, 88 Va. 735, 14 S. E. 368. **W. Va.** *Lowman v. Funkhouser*, 90 S. E. 340.

67. *Richardson v. Owings*, 86 Md. 663, 39 Atl. 100, on the ground of the invalidity of the decree of sale. But see *Rutland Savings Bank v. O'Bryan*, 2 Neb. (Unof.) 519, 89 N. W. 377, where it was held that a mortgagor could not object to confirmation because the order of sale was premature.

68. **As to objections to the return or report of sale**, see *supra*, XI, F.

69. *Conover v. Walling*, 15 N. J. Eq. 173.

70. *Parrat v. Neligh*, 7 Neb. 456.

[a] **The motion must set forth the**

sale on its own motion although no objection has been filed.<sup>71</sup>

K. POSTPONEMENT OF CONFIRMATION.—A petition may be filed asking a postponement of the confirmation.<sup>72</sup>

L. HEARING AND DETERMINATION.—Upon a hearing for the purpose of determining whether a sale will be confirmed, it is the duty of the court to inquire into the manner in which a judicial sale is made, and to hear evidence in support of or against the report.<sup>73</sup> It is usual practice to allow either party to read *ex parte* affidavits,<sup>74</sup> but the court may, in the exercise of its discretion, require depositions to be taken in whole or in part instead,<sup>75</sup> or it may refer the matter to one of its commissioners.<sup>76</sup> The hearing is limited to a determination whether the sale was had in conformity to law, and whether it was made fairly and in good faith.<sup>77</sup>

Whether the sale shall be confirmed rests in the sound legal discretion of the court and depends upon the circumstances of each case.<sup>78</sup>

grounds upon which he seeks to set aside the sale. *Parrat v. Neligh*, 7 Neb. 456.

71. *McCallum v. Chicago Title & Tr. Co.*, 203 Ill. 142, 67 N. E. 823.

72. *Houghton v. Mountain Lake Land Co.*, 93 Va. 149, 24 S. E. 920, and to suspend proceedings in the suit until the matters set up in the petition have been adjudicated.

[a] On the filing of such a petition, rules should be awarded against the parties named as defendants, and an opportunity given the parties to take depositions, or the matter may be referred to a commissioner to take evidence and report. If the parties have proceeded to a hearing on affidavits without objection, the appellate court will not reverse the case for this reason alone. *Houghton v. Mountain Lake Land Co.*, 93 Va. 149, 24 S. E. 920.

73. *James v. Nease* (Tex. Civ. App.), 69 S. W. 110; *Wells v. Mills*, 22 Tex. 302.

[a] Although there are no objections to the report, it is the duty of the court to investigate the sale and approve or reject the same as seems proper to it. *In re Assignment of Citizens' Stock Bank*, 86 Mo. App. 14.

74. *U. S.*—*Savery v. Sypher*, 6 Wall. 157, 18 L. ed. 822. *Va.*—*Robertson v. Smith*, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 723. *W. Va.*—*Hughes v. Hamilton*, 19 W. Va. 366; *Kable v. Mitchell*, 9 W. Va. 492, 517.

75. *Robertson v. Smith*, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 723; *Hughes & Co. v. Hamilton*, 19 W. Va.

366; *Kable v. Mitchell*, 9 W. Va. 492, 517.

76. *Robertson v. Smith*, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 723.

77. *Cal.*—*Bennallack v. Richards*, 125 Cal. 427, 58 Pac. 65; *In re Pearson's Est.*, 98 Cal. 603, 33 Pac. 451. *N. Y.*—*Bostwick v. Atkins*, 3 N. Y. 53. *Tex.*—*James v. Nease* (Tex. Civ. App.), 69 S. W. 110; *Hardin v. Smith*, 49 Tex. 420; *Hirshfield v. Davis*, 43 Tex. 155.

[a] Limits of Inquiry.—Ordinarily when everything has been regular, the confirmation is a mere matter of form and inquiry on the hearing extends no further than to see that the order of sale has been complied with and that the sale has taken place as the statute requires. But when the appointment and qualification of the administrator is disputed and the authority of the court appointing him is disputed, it becomes the duty of the court, wherein the case is tried as if an original action, to determine and adjudicate the questions presented to the end that the statute shall be complied with. *Broadwater v. Richards*, 4 Mont. 80, 2 Pac. 546.

[b] In Alabama the statute limits the court to consider only the fairness of the sale, adequacy of price, and the sufficiency of the sureties. *Meadows v. Meadows*, 81 Ala. 451, 1 So. 29.

78. *U. S.*—*Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732; *Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. ed. 608; *Milwaukee R. Co. v. Soutter*, 5

It depends upon the state of facts existing at the date of the sale, not on subsequent events,<sup>79</sup> and upon the evidence before the court.<sup>80</sup> This discretion must be exercised in accordance with the established principles of law,<sup>81</sup> with a just regard for the rights of all concerned,<sup>82</sup> and if an injustice will be inflicted upon a party not in default the court will withhold its approval.<sup>83</sup> The court may refuse to confirm

Wall. 660, 18 L. ed. 678; *Bidwell v. Huff*, 176 Fed. 174; *Nevada Nickel Syndicate v. Nat. Nickel Co.*, 103 Fed. 391. **Ala.**—*Roy v. O'Neill*, 168 Ala. 354, 52 So. 946; *Eatman v. Eatman*, 83 Ala. 478, 3 So. 850; *Bland v. Bowie*, 53 Ala. 152. **Ark.**—*George v. Norwood*, 77 Ark. 216, 91 S. W. 557, 113 Am. St. Rep. 143; *Southwestern Arkansas & I. T. R. Co. v. Hays*, 63 Ark. 355, 38 S. W. 665; *State Nat. Bank v. Neel*, 53 Ark. 110, 13 S. W. 700, 22 Am. St. Rep. 185. **Cal.**—*In re Baz-zuro's Estate*, 161 Cal. 71, 118 Pac. 434; *Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847. **Del.**—*Central Trust & Savings Co. v. Chester County Electric Co.*, 9 Del. Ch. 123, 77 Atl. 771. **D. C.**—*Parsons v. Little*, 28 App. Cas. 218; *Rowland v. Munk*, 15 App. Cas. 403. **Ga.**—*Hall v. Taylor*, 133 Ga. 606, 66 S. E. 478; *Walters v. Hargrove*, 61 Ga. 267. **Ill.**—*Stivers v. Stivers*, 236 Ill. 160, 86 N. E. 209; *Abbott v. Beebe*, 226 Ill. 417, 80 N. E. 991, 117 Am. St. Rep. 257; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580; *Ayers v. Baumgarten*, 15 Ill. 444. **Kan.**—*Taylor v. Hosick*, 13 Kan. 518. **Ky.**—*Hughes v. Swope*, 88 Ky. 254, 1 S. W. 394. **Miss.**—*Swofford v. Garmon*, 51 Miss. 348; *Henderson v. Herrod*, 23 Miss. 434. **Mo.**—*Desloge v. Tucker*, 196 Mo. 587, 94 S. W. 283; *Wauchope v. McCormick*, 158 Mo. 660, 59 S. W. 970. **Neb.**—*Roberts v. Robinson*, 49 Neb. 717, 68 N. W. 1035, 59 Am. St. Rep. 567. **N. Y.**—*Matter of Supt. of Banks*, 207 N. Y. 11, 100 N. E. 428; *Attorney General v. Continental Life Ins. Co.*, 94 N. Y. 199. **N. C.**—*Trull v. Rice*, 92 N. C. 572. **Ohio.**—*Craig's Admx. v. Fox*, 16 Ohio 563. **Pa.**—*In re De Haven's Appeal*, 106 Pa. 612. **Tenn.**—*Lasell v. Powell*, 7 Coldw. 277. **Tex.**—*Hirshfield v. Davis*, 43 Tex. 155; *Wells v. Mills*, 22 Tex. 302; *Davis v. Stewart*, 4 Tex. 223. **Va.**—*Moore v. Triplett*, 96 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882; *Carr v. Carr*, 88 Va. 735, 14 S. E. 368; *Terry v. Cole's Exr.*, 80 Va. 695; *Brock v. Rice*, 27 Gratt. (68

Va.) 812. **W. Va.**—*Lowman v. Funkhouser*, 90 S. E. 340; *Moran v. Clark*, 30 W. Va. 358, 4 S. E. 303, 8 Am. St. Rep. 66; *Hughes & Co. v. Hamilton*, 19 W. Va. 366; *Beaty v. Veon*, 18 W. Va. 291; *Marling v. Robrecht*, 13 W. Va. 440.

See 6 STANDARD PROC. 572.

[a] Whether the property is sold for a price disproportionate to its value is a question within the discretion of the court. *In re Scott's Estate* (Cal.), 157 Pac. 242.

**79. Cal.**—*Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847. **Md.**—*Farmers' Bank v. Clarke*, 28 Md. 145; *Tyson v. Mickle*, 2 Gill 376. **Pa.**—*McRee's Estate*, 6 Phila. 75.

**80. Md.**—*Connaughton v. Bernard*, 84 Md. 577, 36 Atl. 265. **Va.**—*Terry v. Cole's Exr.*, 80 Va. 695. **W. Va.**—*Hughes & Co. v. Hamilton*, 19 W. Va. 366.

**81. Ala.**—*Roy v. O'Neill*, 168 Ala. 354, 52 So. 946; *Eatman v. Eatman*, 83 Ala. 478, 3 So. 850. **Ark.**—*George v. Norwood*, 77 Ark. 216, 91 S. W. 557, 113 Am. St. Rep. 143. **Cal.**—*In re Baz-zuro's Estate*, 161 Cal. 71, 118 Pac. 434; *Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847. **Ill.**—*Abbott v. Beebe*, 226 Ill. 417, 80 N. E. 991; *Wilson v. Ford*, 190 Ill. 614, 60 N. E. 876; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580. **Va.**—*Moore v. Triplett*, 96 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882.

**82. Dunn v. Dunn**, 137 Cal. 51, 69 Pac. 847; *Roudabush v. Miller*, 32 Gratt. (73 Va.) 454.

As to advertisement generally, see *supra*, VII.

**83. Columbia Paper Bag Co. v. Carr**, 116 Md. 541, 82 Atl. 442; *Kauffman v. Walker*, 9 Md. 229; *Penn v. Brewer*, 12 Gill & J. (Md.) 113; *Hyman v. Smith*, 13 W. Va. 744.

[a] Where confirmation has been delayed by the parties for such an unreasonable time, that the purchaser, not in default, will suffer loss, the sale will not be confirmed. *Hyman v. Smith*, 13 W. Va. 744.

a sale for any reason that would be a good ground for setting aside the sale.<sup>84</sup> It may refuse to confirm even though the letter of the statute may have been complied with in giving notice.<sup>85</sup> Ordinarily, however, when everything has been regular, confirmation is much a matter of form.<sup>86</sup> Mere inadequacy of price is generally no ground for disproving the sale,<sup>87</sup> unless so gross as to raise a presumption of fraud, or shock the conscience.<sup>88</sup> Nor will the court refuse to confirm a sale simply because of an advance offer,<sup>89</sup> unless so provided by statute.<sup>90</sup>

84. *Beaty v. Radenhurst*, 3 Ch. Chamb. (Can.) 344.

[a] It is no valid objection to confirmation that a small sum of money had been paid on the judgment after rendition. *Fisk v. Gulliford* (Neb.), 95 N. W. 494.

As to grounds for setting aside, see *infra*, XII, D.

[b] Where the decree of sale was reversed before confirmation because the amount of liens adjudicated were found excessive the court should not confirm the sale. *George v. Wood*, 94 Miss. 268, 49 So. 147.

85. *Van Meter v. Van Meter's Assignee*, 88 Ky. 448, 11 S. W. 80, 289; *Craig's Admx. v. Fox*, 16 Ohio 563.

86. *Broadwater v. Richards*, 4 Mont. 80, 2 Pac. 546.

[a] Confirmation is a matter of course, and of right unless good cause be shown against it. *Redus v. Hayden*, 43 Miss. 614.

87. Ark.—*Nix v. Draughan*, 56 Ark. 240, 19 S. W. 669; *Fry v. Street*, 44 Ark. 502. Cal.—*Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847. Del.—*Central Trust & Sav. Co. v. Chester County Electric Co.*, 9 Del. Ch. 123, 77 Atl. 771. Ill.—*Schulz v. Hasse*, 227 Ill. 156, 81 N. E. 50; *Quick v. Collins*, 197 Ill. 391, 64 N. E. 288. Miss.—*Redus v. Hayden*, 43 Miss. 614; *Mitchell v. Harris*, 43 Miss. 314; *Henderson v. Herrod*, 23 Miss. 434. N. J.—*Porch v. The Agnew Co.*, 66 N. J. Eq. 232, 57 Atl. 726. N. Y.—*Wilber v. Wilber*, 119 App. Div. 740, 104 N. Y. Supp. 179.

See *Parker v. Bluffton Car Wheel Co.*, 108 Ala. 140, 18 So. 938; *Phillips v. Benson*, 82 Ala. 500, 2 So. 93.

[a] If no exceptions are taken to the report, the court may confirm it although the amount realized is disproportionate to its value. *Cates v. Johnson*, 109 Ala. 126, 19 So. 416.

[b] Where a sale was made subject to the court's approval, the court may refuse to confirm the sale because the

price was inadequate. *Merchants' Bank v. Moore*, 68 Minn. 468, 71 N. W. 671.

[c] But where the property is not sold in such a manner as to bring the highest price the sale will be held invalid on the application of the party aggrieved. *Tatum v. Holliday*, 59 Mo. 422.

[d] Inadequacy of price coupled with the fact that the property was sold in gross instead of in parcels, or sold in such a manner that the full value could not be realized is ground for setting aside the sale. *Schroeder v. Young*, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. ed. 721.

[e] If the sheriff's discretion in selling was fairly exercised the court will not set the sale aside because the court may think a better price would have been realized by a different mode. *National Bank v. Sprague*, 20 N. J. Eq. 159.

[f] In Mississippi, under statute, the court may refuse confirmation of a judicial sale because of inadequacy of price where the party objecting enters into a bond conditioned that the property at resale will bring an advance of 15% upon the former sale. *Allen v. Martin*, 61 Miss. 78.

88. Cal.—*Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847. Ill.—*Schulz v. Hasse*, 227 Ill. 156, 81 N. E. 50; *Quick v. Collins*, 197 Ill. 391, 64 N. E. 288. Miss.—*George v. Wood*, 94 Miss. 268, 49 So. 147; *Pattison v. Josselyn*, 43 Miss. 373. Va.—*Cole's Heirs v. Cole's Exr.*, 83 Va. 525, 5 S. E. 673.

Confirmation as curing defects, see *infra*, XI, O.

89. *Bethea v. Bethea*, 136 Ala. 584, 34 So. 28, of \$500.00.

[a] A guaranty that the property will bring ten per cent. more on a resale is not ground for refusing to confirm the sale. *Parker v. Bluffton Car Wheel Co.*, 108 Ala. 140, 18 So. 938.

90. *Estate of Leonis*, 138 Cal. 194,

Fraud,<sup>91</sup> or mistake to the detriment of the owner or purchaser,<sup>92</sup> may be grounds for withholding confirmation, as may be negligence or misconduct in any person connected with the sale.<sup>93</sup> The objection that property was appraised too low can only avail where fraud has been established.<sup>94</sup>

**Confirmation in Part.**—The court may confirm a sale in part only.<sup>95</sup>

**Imposing Terms.**—Some courts holding that they cannot impose terms upon which they will confirm a sale, as their jurisdiction is limited merely to confirming or setting aside the sale,<sup>96</sup> while others hold that terms may be imposed.<sup>97</sup> It seems that there may be a conditional confirmation.<sup>98</sup>

**M. ORDER OF CONFIRMATION. — 1. In General.**—If the court is satisfied that the sale has been regularly and fairly conducted it should make an order confirming the sale.<sup>99</sup> Such an order is a judicial and not a ministerial act.<sup>1</sup> It is a judgment by which the rights of the purchaser are fixed and determined by the appropriate tribunal,<sup>2</sup> and possesses the same force and effect as other decrees or judgments.<sup>3</sup>

71 Pac. 171, if a sum exceeding the amount bid by ten per cent. can be obtained the court will not confirm the sale.

91. *Swofford v. Garmon*, 51 Miss. 348; *Hartley & Co. v. Roffe*, 12 W. Va. 401.

[a] **Collusion** between defendant and purchaser to sell without complainant's knowledge, together with inadequacy of price is ground for setting aside sale. *Pattison v. Josselyn*, 43 Miss. 373.

92. *Hartley & Co. v. Roffe*, 12 W. Va. 401; *Hilleary v. Thompson*, 11 W. Va. 113.

93. *Swofford v. Garmon*, 51 Miss. 348; *Mitchell v. Harris*, 43 Miss. 314; *Pattison v. Josselyn*, 43 Miss. 373.

[a] But a court will not refuse to confirm on motion of an interested party merely to protect him against the results of his own negligence where he is under no disability. *Abbott v. Beebe*, 226 Ill. 417, 80 N. E. 991; *Barling v. Peters*, 134 Ill. 606, 25 N. E. 765.

94. *Omaha L. & T. Co. v. Fitzpatrick*, 59 Neb. 303, 80 N. W. 907; *Ballou v. Sherwood*, 58 Neb. 20, 78 N. W. 383.

95. *Delaplaine v. Lawrence*, 3 N. Y. 301.

[a] **Where different parcels of land have been sold**, the court may determine independently in each case whether the sale of the particular parcel shall be confirmed or vacated, and

may thus confirm the sale in part and vacate it in part. *Delaplaine v. Lawrence*, 3 N. Y. 301.

96. **Kan.**—*Benz v. Hines*, 3 Kan. 390, 89 Am. Dec. 594. **Md.**—*Kinnear v. Lee*, 28 Md. 488. **Miss.**—See *Allen v. Martin*, 61 Miss. 78. **Neb.**—*Griffith v. Jenkins*, 50 Neb. 719, 70 N. W. 256; *Fitch v. Minshall*, 15 Neb. 328, 18 N. W. 80; *Green v. State Bank*, 9 Neb. 165, 2 N. W. 228. **Ohio.**—*Ohio Life Ins. & Trust Co. v. Goodin*, 10 Ohio St. 557.

97. *State Nat. Bank v. Neel*, 53 Ark. 110, 13 S. W. 700, 22 Am. St. Rep. 185, as that the bid shall be increased to a certain amount.

98. *Thompson v. Tolmie*, 2 Pet. (U. S.) 157, 7 L. ed. 381, wherein the sale became absolute on payment of the purchase price.

99. *Bennallack v. Richards*, 125 Cal. 427, 433, 58 Pac. 65; *In re Pearson's Est.*, 98 Cal. 603, 612, 33 Pac. 451; *Field v. Peoples*, 180 Ill. 376, 54 N. E. 304, the lack of such formal order does not render sale invalid.

See the cases cited *infra*, this section.

1. *Harrington v. Hayes County*, 81 Neb. 231, 115 N. W. 773, 129 Am. St. Rep. 680.

2. *Redus v. Hayden*, 43 Miss. 614; *Henderson v. Herrod*, 23 Miss. 434; *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586, 5 S. E. 676; *Brook v. Rice*, 27 Gratt. (68 Va.) 812, 816.

3. See *infra*, XI, M, 4.

2. **Time of Entry.**—The order of confirmation may be entered *nunc pro tunc*.<sup>4</sup>

3. **Form and Contents.**—No precise form<sup>5</sup> or formal entry<sup>6</sup> is necessary, but it is sufficient if it can be gathered from the whole record that the court sanctions the sale.

4. **Conclusiveness.**—An order of confirmation has the same force and effect as any other final decree or judgment.<sup>7</sup> It is final and conclusive, until reversed, unless vacated for fraud or other matter which would render it void,<sup>8</sup> and it cannot be collaterally impeached.<sup>9</sup> The

4. *Reid v. Morton*, 119 Ill. 118, 6 N. E. 414; *Campbell v. Farley*, 158 N. C. 42, 73 S. E. 103.

5. *Ala.*—*Worthington v. McRoberts*, 9 Ala. 297. *Ark.*—*Miller v. Henry*, 105 Ark. 261, 150 S. W. 700, Ann. Cas. 1914D, 754. *Mo.*—*Agan v. Shannon*, 103 Mo. 661, 15 S. W. 757. *Okla.*—*Threadgill v. Coleord*, 16 Okla. 447, 85 Pac. 703. *Tex.*—*Moody v. Butler*, 63 Tex. 210; *Robertson v. Johnson*, 57 Tex. 62; *Neill v. Cody*, 26 Tex. 286; *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 44 S. W. 1002.

See also 6 STANDARD PROC. 572.

**Form of order of confirmation**, see 9 STANDARD PROC. 751.

[a] Any action of the court in recognition of the validity of the sale is as good as a formal confirmation. *Redus v. Hayden*, 43 Miss. 614; *Conger v. Robinson*, 4 Smed. & M. (Miss.) 210, 221.

[b] An order of the court directing a deed to be made to lands sold under an order or decree is a virtual confirmation of the sale. *Livingston v. Cochran*, 33 Ark. 294; *Valle v. Fleming*, 19 Mo. 454, 61 Am. Dec. 566.

[c] Approval of the report is a sufficient confirmation of the sale. *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 44 S. W. 1002.

[d] The decree of confirmation cannot go beyond the decree directing the sale, but is restricted thereby. *State v. Mercantile Bank*, 95 Tenn. 212, 31 S. W. 989.

[e] The reasons governing the court in confirming or rejecting a sale need not be placed on record. *Davis v. Stewart*, 4 Tex. 223.

6. *Carey v. West*, 139 Mo. 146, 40 S. W. 661; *Henry v. McKerlie*, 78 Mo. 416; *Grayson v. Weddle*, 63 Mo. 523; *Valle v. Fleming*, 19 Mo. 454, 61 Am. Dec. 566; *Moody v. Butler*, 63 Tex.

210; *Neill v. Cody*, 26 Tex. 286; *Berryman v. Biddle*, 48 Tex. Civ. App. 624, 107 S. W. 922; *Corley v. Anderson*, 5 Tex. Civ. App. 213, 23 S. W. 839. See *Simmons v. Blanchard*, 46 Tex. 266.

7. *Ark.*—*Bank of Pine Bluff v. Levi*, 90 Ark. 166, 118 S. W. 250. *Miss.*—*Henderson v. Herrod*, 23 Miss. 424. *Va.*—*Allison v. Allison*, 88 Va. 328, 13 S. E. 549; *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586, 5 S. E. 676; *Terry v. Cole's Exr.*, 80 Va. 695; *Brock v. Rice*, 27 Gratt. (68 Va.) 812.

[a] A decree of confirmation founded on a false report of sale may be impeached by an interested party guiltless of fraud or neglect. *Springston v. Morris*, 47 W. Va. 50, 34 S. E. 766.

As to judgments generally, see the title "Judgments."

8. *Alaska.*—*Ebner v. Heid*, 2 Alaska 600. *Cal.*—*Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167. *Md.*—*Brown v. Gilmor's Exrs.*, 8 Md. 322. *Minn.*—See *In re Shea*, 57 Minn. 415, 59 N. W. 494. *Miss.*—*Bland v. Munceaster*, 24 Miss. 62, 57 Am. Dec. 162. *Neb.*—*Watson v. Tromble*, 33 Neb. 450, 50 N. W. 331, 29 Am. St. Rep. 492. *N. D.*—*Dakota Inv. Co. v. Sullivan*, 9 N. D. 303, 83 N. W. 233, 81 Am. St. Rep. 584. *R. I.*—*Andrews v. Goff*, 17 R. I. 205, 21 Atl. 347.

[a] Where no exceptions have been made to the report within the statutory period the order of approval and confirmation form a conclusive bar to further litigation concerning such approval and confirmation. *Davies v. Gibbs*, 174 Ill. 272, 51 N. E. 220.

[b] A recital in an order of confirmation that the matter was heard before the date set for the hearing by consent of the parties is conclusive of that fact. *Smith v. Huffman*, 132 N. C. 600, 44 S. E. 113.

9. See *infra*, XIX.

order of confirmation adjudicates only the regularity of the proceedings under the order of sale,<sup>10</sup> and is not conclusive either as to the jurisdiction of the court,<sup>11</sup> or the regularity of any prior proceeding.<sup>12</sup>

N. REVIEW.—1. **By Motion for New Trial.**—It seems that the proceeding by motion for a new trial is not applicable to an order refusing to confirm a sale.<sup>13</sup>

2. **By Appeal.**—A decree confirming,<sup>14</sup> or refusing to confirm,

10. *Burrell v. Chicago, M. & St. P. R. Co.*, 43 Minn. 363, 45 N. W. 849; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *Kampman v. Nicewaner*, 60 Neb. 208, 82 N. W. 623; *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614; *Taylor v. Courtney*, 15 Neb. 190, 16 N. W. 842.

[a] **Matters Adjudicated.**—(1) The statute provides that if it appears to the court that the sale was legally made and fairly conducted, that the sum bid was not disproportionate to the value of the property the court shall confirm such sale. The order adjudicates these facts alone. It passes on nothing else and is not proof of any prior proceeding. *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462, approved in *Burrell v. Chicago, M. & St. P. Ry. Co.*, 43 Minn. 363, 45 N. W. 849. (2) Confirmation simply adjudicates that the property brought the highest price that could be obtained. *Koegel v. Koegel*, 83 N. J. Eq. 179, 89 Atl. 861. (3) The report of the trustee, when confirmed, is conclusive as to the terms of the sale. *Brown v. Wallace*, 2 Bland (Md.) 585.

[b] **The confirmation applies merely to the regularity of the proceedings.** It has no relation to such grounds for equitable relief as were unknown to the parties and to the court at the time the order was entered. *Kampman v. Nicewaner*, 60 Neb. 208, 82 N. W. 623; *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614; *Taylor v. Courtney*, 15 Neb. 190, 16 N. W. 842.

[c] **The confirmation is conclusive upon all persons bound by that decree** that the terms of the decree of sale were complied with. *Heinroth v. Griffin*, 149 Ill. App. 103; *Price v. Springfield R. E. Assn.*, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595; *Hughes v. McDivitt*, 102 Mo. 77, 14 S. W. 660, 15 S. W. 756.

[d] **Not conclusive as to constitu-**

tionality of law governing the proceedings. *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325.

11. *Jeter v. Hewitt*, 22 How. (U. S.) 352, 16 L. ed. 345; *Chase v. Ross*, 36 Wis. 267.

[a] A confirmation is conclusive where the record does not affirmatively show that the jurisdiction did not attach. *Butler v. Stephens*, 77 Tex. 599, 14 S. W. 202.

12. *Burrell v. Chicago, M. & St. P. R. Co.*, 43 Minn. 363, 45 N. W. 849; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *Chase v. Ross*, 36 Wis. 267.

13. *In re Richards' Estate*, 139 Cal. 72, 72 Pac. 633, concurring opinion of McFarland and Henshaw.

14. *Ala.*—*McQueen v. Grigsby*, 152 Ala. 656, 44 So. 961; *Kellam v. Richards*, 56 Ala. 238; *Field v. Gamble*, 47 Ala. 443. *Ark.*—*State Nat. Bank v. Neel*, 53 Ark. 110, 13 S. W. 700, 22 Am. St. Rep. 185. *Cal.*—*In re Estate of Bell*, 125 Cal. 539, 58 Pac. 153; *Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167. *Idaho.*—*McGregor v. Jensen*, 18 Idaho 320, 109 Pac. 729. *Ill.*—*Barnes v. Henshaw*, 226 Ill. 605, 80 N. E. 1076; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580. See *Barling v. Peters*, 134 Ill. 606, 25 N. E. 765; *Ex parte Guernsey*, 21 Ill. 443; *Ayers v. Baumgarten*, 15 Ill. 444. *Ky.*—*Ramey v. Francis, Day & Co.*, 169 Ky. 469, 84 S. W. 380; *Carter v. Crow's Admr.*, 130 Ky. 41, 112 S. W. 1098; *Dawson v. Litsey*, 10 Bush 408; *Allen v. Graves*, 3 Bush 491; *Underwood's Admr. v. Cartwright*, 20 Ky. L. Rep. 809, 47 S. W. 580. *Mo.*—*Desloge v. Tucker*, 196 Mo. 587, 94 S. W. 283; *Rogers v. Johnson*, 125 Mo. 202, 28 S. W. 635; *Noland v. Barrett*, 122 Mo. 181, 188, 26 S. W. 692, 43 Am. St. Rep. 572; *Henry v. McKerlie*, 78 Mo. 416; *Tutt v. Boyer*, 51 Mo. 425, 431; *McVey v. McVey*, 51 Mo. 406. *N. D.*—*Dakota Inv. Co. v. Sul-*

a sale<sup>15</sup> is a final order from which an appeal may be taken.

**Who May Appeal.**—Any party may appeal from a refusal to confirm a sale and order a resale.<sup>16</sup> A purchaser at a judicial sale is a quasi party to the suit in which he purchases,<sup>17</sup> and may appeal from an order confirming or refusing to confirm the sale to him,<sup>18</sup> as may his assignee.<sup>19</sup> But a commissioner appointed to sell is not a party to the action and has no such interest as will give him the right of appeal.<sup>20</sup>

**Hearing and Decision.**—The appellate court will not disturb the discretion vested in the lower court unless there has been an abuse thereof.<sup>21</sup> The decree authorizing the sale is not open for re-

livan, 9 N. D. 303, 83 N. W. 233, 81 Am. St. Rep. 584. **Ohio.**—Reeves v. Skenett, 13 Ohio St. 574; Kern's Admr. v. Foster, 16 Ohio 274. **Pa.**—Snodgrass' Appeal, 96 Pa. 420, where an appeal from an order of sale was disallowed because of the fact that the whole proceeding could be reviewed on appeal from final confirmation. **Tex.**—Hirshfield v. Davis, 43 Tex. 155. But see Wells v. Mills, 22 Tex. 302; Yerby v. Hill, 16 Tex. 377, 381. **W. Va.**—Dick v. Robinson, 19 W. Va. 159; Marling v. Robrecht, 13 W. Va. 440; Kable v. Mitchell, 9 W. Va. 492. **Wis.**—Downer v. Cross, 2 Wis. 371; Strong v. Catton, 1 Wis. 471.

As to objections to confirmation, see *infra*, XI, J.

[a] **Confirmation of Private Sale.** An appeal lies from an order, decree, or judgment confirming a sale of real estate at private sale by an assignee or trustee under the insolvency laws. *Brown v. Wallace*, 60 Ohio St. 177, 53 N. E. 957. See *Aultman, Miller & Co. v. Seiberling*, 31 Ohio St. 201.

15. **Cal.**—*Estate of Leonis*, 138 Cal. 194, 71 Pac. 171; *Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847. **Idaho.**—*Estate of Christensen*, 15 Idaho 692, 99 Pac. 829. **Ill.**—*Barnes v. Henshaw*, 226 Ill. 605, 80 N. E. 1076; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580. **Ky.**—*Ramey v. Francis, Day & Co.*, 169 Ky. 469, 184 S. W. 380. **S. C.**—*State v. Burnside*, 33, S. C. 276, 11 S. E. 787. **Tex.**—*Hirshfield v. Davis*, 43 Tex. 155; *Davis v. Stewart*, 4 Tex. 223.

[a] **A writ of error will lie to review an order of the probate court disapproving a guardian's report of a sale of the ward's property.** *McCallum v. Chicago Title & Trust Co.*, 203 Ill. 142, 67 N. E. 823.

16. *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 586, 5 S. E. 676.

[a] **A devisee under a will may appeal from an order approving or disapproving an administrator's sale.** *In re Divine* (N. J. Eq.), 46 Atl. 649.

17. *Newland v. Gaines*, 1 Heisk. (Tenn.) 720; *Turnbull v. Mann*, 99 Va. 41, 37 S. E. 288; *Robertson v. Smith*, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 723; *Carr v. Carr*, 88 Va. 735, 14 S. E. 368; *Shirley v. Rice*, 79 Va. 442.

18. **U. S.**—*Blossom v. Milwaukee, etc. R. Co.*, 1 Wall. 655, 18 L. ed. 43; *Magann v. Segal*, 92 Fed. 252, 34 C. C. A. 323. **Cal.**—*Dunn v. Dunn*, 137 Cal. 51, 69 Pac. 847. **Ill.**—*Stivers v. Stivers*, 236 Ill. 160, 86 N. E. 209. **Ky.**—*Allen v. Graves*, 3 Bush 491. **Tex.**—*Hirshfield v. Davis*, 43 Tex. 155. **Va.**—*Turnbull v. Mann*, 99 Va. 41, 37 S. E. 288; *Todd v. Gallego Mills Co.*, 84 Va. 586, 5 S. E. 676.

[a] **In Missouri, the purchaser at a partition sale is not given the right by statute to appeal from the refusal of the court to confirm the sale.** *Thomas v. Elliott*, 215 Mo. 598, 605, 114 S. W. 987.

[b] **One who has failed to comply with the terms of the first sale, and at a resale attempts to bid through an agent cannot appeal from a decree confirming a sale to another person.** *Hildreth v. Turner*, 89 Va. 858, 17 S. E. 471.

19. *Newland v. Gaines*, 1 Heisk. (Tenn.) 720.

20. *Summerlin v. Morrissey*, 168 N. C. 409, 84 S. E. 689.

21. **Ark.**—*Bank of Pine Bluff v. Levi*, 90 Ark. 166, 118 S. W. 250; *Culver Lumber & Mfg. Co. v. Culver*, 81 Ark. 102, 99 S. W. 391, 118 Am. St. Rep. 17. **Cal.**—*In re Bazzuro's Estate*, 161 Cal. 71, 118 Pac. 434. **D. C.**—*Rowland v. Munck*, 15 App. Cas. 403. **Ill.**

view,<sup>22</sup> and objections to the confirmation not urged in the lower court cannot avail in the appellate court.<sup>23</sup>

O. EFFECT OF CONFIRMATION. — The confirmation of a judicial sale completes the sale,<sup>24</sup> and relates back to the date of sale,<sup>25</sup> but in the case of real estate, it vests merely an equitable, not a legal, title in the purchaser.<sup>26</sup> In the case of personalty however, the confirmation, when no lien is retained, vests a good and valid title in the purchaser.<sup>27</sup> Confirmation cures all non-jurisdictional irregularities,<sup>28</sup> and validates

Slack *v.* Cooper, 219 Ill. 138, 76 N. E. 84; *Sowards v. Pritchett*, 37 Ill. 517. **Kan.**—*Townsend v. Johnson*, 10 Kan. App. 547, 63 Pac. 25. **Minn.**—*Merchants' Bank v. Moore*, 68 Minn. 468, 71 N. W. 671. **Mo.**—*Wauchope v. McCormick*, 158 Mo. 660, 59 S. W. 970. **N. Y.**—*In re Supt. of Banks*, 207 N. Y. 11, 100 N. E. 428. **Tex.**—*Hirshfield v. Davis*, 43 Tex. 155. **W. Va.**—*Kable v. Mitchell*, 9 W. Va. 492.

22. See 12 STANDARD PROC. 841.

23. *Philadelphia Mortgage & Trust Co. v. Mockett*, 55 Neb. 323, 75 N. W. 845; *Creighton University v. Riley*, 50 Neb. 341, 69 N. W. 943; *Creighton University v. Mulvihill*, 49 Neb. 577, 68 N. W. 931; *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113; *Ecklund v. Willis*, 44 Neb. 129, 62 N. W. 493; *Johnson v. Bemis*, 7 Neb. 224.

24. *Cromwell's Heirs v. Mason's Heirs*, 2 Bush (Ky.) 439; *Thornton v. McGrath*, 1 Duv. (Ky.) 349; *Young v. Thompson*, 2 Coldw. (Tenn.) 596; 12 STANDARD PROC. 839.

25. **U. S.**—*Nevada Nickel Syndicate v. Nat. Nickel Co.*, 103 Fed. 391. **Ala.**—*Tennessee Coal, Iron & R. Co. v. Gardner*, 131 Ala. 599, 32 So. 622; *Haralson v. George's Exr.*, 56 Ala. 295; *Brown v. Isbell*, 11 Ala. 1009. **Del.**—*Caulk v. Caulk*, 3 Houst. 81. **Kan.**—*Missouri Valley Land Co. v. Barwick*, 50 Kan. 57, 31 Pac. 685; *Galbreath v. Drought*, 29 Kan. 711, 717. **Ky.**—*Hughes v. Swope*, 88 Ky. 254, 1 S. W. 394; *Neal v. Louisville*, 6 Ky. L. Rep. 300. **Md.**—*Wagner v. Cohen*, 6 Gill 97, 46 Am. Dec. 660. **Neb.**—*Clark & L. Inv. Co. v. Way*, 52 Neb. 204, 71 N. W. 1021. **Ohio.**—*Jashenosky v. Volrath*, 59 Ohio St. 540, 53 N. E. 46, 69 Am. St. Rep. 786. **S. C.**—*Connor v. McCoy*, 83 S. C. 165, 65 S. E. 257. **Tex.**—*Edwards v. Gill*, 5 Tex. Civ. App. 203, 23 S. W. 742. **Va.**—*Terry v. Cole's Exr.*, 80 Va. 695; *Evans v. Spurgin*, 6 Gratt. (47 Va.) 107, 52 Am. Dec. 105; *Taylor v. Cooper*, 10 Leigh (37 Va.) 317, 34

Am. Dec. 737. **W. Va.**—*Cale's Admr. v. Shaw*, 33 W. Va. 299, 10 S. E. 637. **Eng.**—*Anson v. Towgood*, 1 Jacob & Walk. 637, 37 Eng. Reprint 511. *Contra*, *Rogers v. Rogers*, 101 Tenn. 428, 47 S. W. 701.

26. **U. S.**—*In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 133 C. C. A. 126, reversing 209 Fed. 138; *Stang v. Redden*, 28 Fed. 11. **Cal.**—*Scarf v. Aldrich*, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190. **Mo.**—*Henry v. McKerlie*, 78 Mo. 416. **Tenn.**—*Camp v. Riddle*, 128 Tenn. 294, 160 S. W. 844; *Webster v. Hill*, 3 Sneed 333. See *Griffith v. Philips*, 9 Lea 417.

See 12 STANDARD PROC. 841.

[a] The legal title does not vest until after a deed is made by the master, or until after the lapse of a reasonable time after he is ordered to make the deed and he has failed to do so. *Camp v. Riddle*, 128 Tenn. 294, 160 S. W. 844, Ann. Cas. 1915C, 145. See *Griffith v. Philips*, 9 Lea (Tenn.) 417. See 12 STANDARD PROC. 841.

27. *Young v. Thompson*, 2 Coldw. (Tenn.) 596.

28. **U. S.**—*In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 133 C. C. A. 126, reversing 209 Fed. 138; *Nevada Nickel Syndicate v. Nat. Nickel Co.*, 103 Fed. 391. **Ala.**—*Morring v. Tipton*, 126 Ala. 350, 28 So. 562; *Cargile v. Ragan*, 65 Ala. 287; *Kellam v. Richards*, 56 Ala. 238; *Doe ex dem. Hudgens v. Jackson*, 51 Ala. 514. **Ark.**—*Neely v. Lee Wilson & Co.*, 190 S. W. 431; *Gleason v. Boone*, 123 Ark. 523, 185 S. W. 1093; *Bank of Pine Bluff v. Levi*, 90 Ark. 166, 118 S. W. 250; *Alexander v. Hardin*, 54 Ark. 480, 16 S. W. 264; *Fleming v. Johnson*, 26 Ark. 421. **Ind.**—*Hammann v. Mink*, 99 Ind. 279. **Kan.**—*Frazier v. Jenkins*, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575. **Mich.**—*Coon v. Fry*, 6 Mich. 506. **Minn.**—*Bottineau v. Aetna Life Ins. Co.*, 31 Minn. 125, 16 N. W. 849. **Mo.**—*Blikenstetter v. Hanna*, 231 Mo. 93, 132 S. W. 678. **Mont.**

Plains L. & I. Co. *v.* Lynch, 38 Mont. 271, 99 Pac. 847, 129 Am. St. Rep. 645. **Neb.**—Watson *v.* Tromble, 33 Neb. 450, 50 N. W. 331, 29 Am. St. Rep. 492; McKeighan *v.* Hopkins, 19 Neb. 33, 26 N. W. 614; Neligh *v.* Keene, 16 Neb. 407, 20 N. W. 277. **N. D.**—Dakota Inv. Co. *v.* Sullivan, 9 N. D. 303, 83 N. W. 233, 81 Am. St. Rep. 584. **Ohio.** Mechanic's Savings & Bldg. L. Assn. *v.* O'Conner, 29 Ohio St. 651. **Pa.** Smith *v.* Wildman, 178 Pa. 245, 35 Atl. 1047, 56 Am. St. Rep. 760, 36 L. R. A. 834; Potts *v.* Wright, 82 Pa. 498. **S. C.**—Connor *v.* McCoy, 83 S. C. 165, 65 S. E. 257. **Tex.**—Brown *v.* Christie, 27 Tex. 73, 84 Am. Dec. 607; Altgelt *v.* Merwitz, 37 Tex. Civ. App. 397, 83 S. W. 891. **Va.**—Robertson *v.* Smith, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 723; Langyher *v.* Patterson, 77 Va. 470; Daniel *v.* Leitch, 13 Gratt. (54 Va.) 195. **Wash.**—Prince *v.* Mottman, 84 Wash. 287, 146 Pac. 841; Miller *v.* Winslow, 70 Wash. 401, 126 Pac. 906. **W. Va.**—Castleman *v.* Castleman, 67 W. Va. 407, 68 S. E. 34; Klapneck *v.* Keltz, 50 W. Va. 331, 40 S. E. 570.

See 12 STANDARD PROC. 839.

[a] **Substance.**—The order confirming the sale cures nothing of substance. Frazier *v.* Jeakins, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575.

[b] **Confirmation raises a presumption** of regularity in the sale which must prevail where the evidence attacking it is conflicting. Du Hadway *v.* Driver, 75 Ark. 9, 86 S. W. 807; Bartley's Heirs *v.* Harris, 70 Tex. 181, 7 S. W. 797.

[c] **Confirmation of the sale will cure such irregularities** as (1) a failure of the decree to state the terms of sale (Plains L. & I. Co. *v.* Lynch, 38 Mont. 271, 99 Pac. 847, 129 Am. St. Rep. 645), (2) an omission to give notice of application for the sale (Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102), (3) a failure to have lands appraised (Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102); Neligh *v.* Keene, 16 Neb. 407, 20 N. W. 277), (4) a failure to give the notice required by law (Miss. Hanks *v.* Neal, 44 Miss. 212; Bland *v.* Muncaster, 24 Miss. 62, 57 Am. Dec. 162; Minor *v.* Natchez, 4 Smed. & M. 602, 43 Am. Dec. 488. **Mo.**—Robbins *v.* Boulware, 190 Mo. 33, 88 S. W. 674, 109 Am. St. Rep. 746; Jackson *v.*

Magruder, 51 Mo. 55. **Neb.**—Bressee *v.* Preston, 91 Neb. 174, 135 N. W. 544, where twenty-nine days' notice was given instead of thirty), or (5) to properly advertise the sale (Nevada Nickel Syndicate *v.* Nat. Nickel Co., 103 Fed. 391; Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. 102), (6) a mistake in the advertisement which is not misleading (Neff *v.* Elder, 84 Ark. 277, 105 S. W. 260, 120 Am. St. Rep. 67), (7) a failure to take security for the purchase money (Wilkerson *v.* Allen, 67 Mo. 502), (8) an omission of a verification of the report (Mayer *v.* Wick, 15 Ohio St. 548), (9) irregularities in the appraisement (**U. S.**—Blanton *v.* Kentucky Distilleries & Warehouse Co., 120 Fed. 318. **Mo.**—Noland *v.* Barrett, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572; McVey *v.* McVey, 51 Mo. 406. **Neb.**—Watson *v.* Tromble, 33 Neb. 450, 50 N. W. 331, 29 Am. St. Rep. 492. **Ohio.**—Mayer *v.* Wick, 15 Ohio St. 548), (10) a sale on different terms (Robertson *v.* Smith, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 723; Langyher *v.* Patterson, 77 Va. 470), (11) in different order (Emery *v.* Vroman, 19 Wis. 689, 88 Am. Dec. 726), (12) in a different manner (Blickensderffer *v.* Hanna, 231 Mo. 93, 132 S. W. 678 [a public sale where a private sale was directed]; Klapneck *v.* Keltz, 50 W. Va. 331, 40 S. E. 570 [private sale when a public sale is directed]), or (13) at a different time (Harrison *v.* Harrison, 1 Md. Ch. 331), (14) or place (**Kan.**—Thompson *v.* Burge, 60 Kan. 549, 57 Pac. 110, 72 Am. St. Rep. 369. **Md.**—Harrison *v.* Harrison, 1 Md. Ch. 331. **Miss.**—Ladd *v.* Craig, 94 Miss. 659, 47 So. 777. **Tex.**—Brown *v.* Christie, 27 Tex. 73, 84 Am. Dec. 607), than prescribed in the decree or order; (15) a sale en masse instead of in parcels (Osman *v.* Trap-hagen, 23 Mich. 80), and (16) a sale by an unauthorized person. Core *v.* Strickler, 24 W. Va. 689.

[d] **A confirmation of a sale made without previous authority** will pass title to the land such as cannot be attacked collaterally. Fishback *v.* Page, 17 Tex. Civ. App. 183, 43 S. W. 317, affirmed, 93 Tex. 639; Pelham *v.* Murray, 64 Tex. 477. But see Ball *v.* Collins (Tex.), 5 S. W. 622.

[e] **In Louisiana** under statute,.

any acts which the court might have authorized originally,<sup>29</sup> but will not render a void sale valid,<sup>30</sup> or cure jurisdictional errors.<sup>31</sup>

**XII. VACATING AND SETTING ASIDE THE SALE.**—A. IN GENERAL.—It is the policy of the law that there must be stability and permanency in judicial sales.<sup>32</sup> This policy, however, will yield to the policy of maintaining the purity of such sales,<sup>33</sup> and should not be enforced contrary to the rights of infants or others under disability,<sup>34</sup> even after confirmation.<sup>35</sup> The sale cannot be disturbed or set aside ex-

§3543 C. C., unless objections are made within five years from date of sale, all irregularities of the sale are cured, whether against minors, married women, or interdicted persons. *Fried v. Marrero*, 137 La. 778, 69 So. 172.

29. **Md.**—*Harrison v. Harrison*, 1 Md. Ch. 331. **Va.**—*Robertson v. Smith*, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 723; *Evans v. Spurgin*, 6 Gratt. 107, 52 Am. Dec. 105. **W. Va.**—*Klapneck v. Keltz*, 50 W. Va. 331, 40 S. E. 570.

30. **U. S.**—*Doolittle v. Bryan*, 14 How. 563, 14 L. ed. 543; *Shriver's Lessee v. Lynn*, 2 How. 43, 11 L. ed. 172. **Kan.**—*Frazier v. Jeakins*, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575. **Ky.**—*Bethel v. Bethel*, 6 Bush 65, 99 Am. Dec. 655. **Mo.**—*Cunningham v. Anderson*, 107 Mo. 371, 17 S. W. 972, 28 Am. St. Rep. 417; *Farrar v. Dean*, 24 Mo. 16. **N. Y.**—*O'Donoghue v. Boies*, 159 N. Y. 87, 53 N. E. 537. **Tenn.**—*Carnes & Perry v. Polk*, 4 Coldw. 87. See *Andrews v. Andrews*, 7 Heisk. 234. **Wis.**—*Blackman v. Baumann*, 22 Wis. 611.

[a] The chancery court cannot confirm a void sale. *Hously v. Lindsay*, 10 Heisk. (Tenn.) 651.

31. *Neely v. Lee Wilson & Co.* (Ark.), 190 S. W. 431. And see cases in preceding notes.

32. **U. S.**—*Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732; *Conro v. Crane*, 110 U. S. 403, 4 Sup. Ct. 102, 28 L. ed. 191; *In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 133 C. C. A. 126, reversing 209 Fed. 138; *Nevada Nickel Syndicate v. Nat. Nickel Co.*, 103 Fed. 391. **Ill.**—*Skakel v. Cycle Trade Pub. Co.*, 237 Ill. 482, 86 N. E. 1058; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580; *Conover v. Musgrave*, 68 Ill. 58. **Ky.**—*Leavell v. Carter*, 112 S. W. 1118; *Benningfield v. Reed*, 8 B. Mon. 102.

**Md.**—*Davis v. Helbig*, 27 Md. 452, 92 Am. Dec. 646; *Cunningham v. Schley*, 6 Gill 207; *Gibbs v. Cunningham*, 1 Md. Ch. 44. **N. J.**—*Cropper v. Brown*, 76 N. J. Eq. 406, 74 Atl. 987, 139 Am. St. Rep. 770; *Ryan v. Wilson*, 64 N. J. Eq. 797, 52 Atl. 993, 53 Atl. 1039; *Zimmerman v. Place*, 61 N. J. Eq. 273, 53 Atl. 1125. **N. C.**—*Pinnell v. Borroughs*, 168 N. C. 315, 84 S. E. 364; *Sutton v. Schonwald*, 86 N. C. 198, 41 Am. Rep. 455. **S. C.**—*Tederall v. Bouknight*, 25 S. C. 275; *Catheart v. Sugenheimer*, 18 S. C. 123. **Tenn.**—*Morton, Smith & Co. v. Sloan*, 11 Humph. 278. **Va.**—*Litton v. Flanary*, 116 Va. 710, 82 S. E. 692; *Coleman v. Virginia Stave Co.*, 112 Va. 61, 70 S. E. 545; *Watkins v. Jones*, 107 Va. 6, 57 S. E. 608; *Moore v. Triplett*, 96 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882.

33. *Garrett v. Moss*, 20 Ill. 549; *Harwood v. Cox*, 26 Ill. App. 374; *Bussey v. Hardin*, 2 B. Mon. (Ky.) 407.

34. *Stivers v. Stivers*, 236 Ill. 160, 86 N. E. 209; *Kiebel v. Leiek*, 216 Ill. 474, 75 N. E. 187; *Townsend v. Johnson*, 10 Kan. App. 547, 63 Pac. 25.

35. *Nugent v. Nugent*, 54 Mich. 557, 20 N. W. 584. *Compare*, *Virginia Fire & M. Ins. Co. v. Cottrell*, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108; *Hickson v. Rucker*, 77 Va. 135, holding it is by no means a matter of discretion with the court to rescind a sale which has once been confirmed. Some special ground must be laid, such as fraud, accident, mistake, or misconduct on the part of the purchaser or other person connected with the sale which has worked injustice to the complaining party.

[a] Where no notice of the order asked to be vacated, or of the order of sale, or of confirmation was given the defendant and he takes his remedy at the first opportunity after such no-

cept for some legal reason.<sup>36</sup> The complaining party must suffer some injury,<sup>37</sup> and must not have been guilty of inexcusable neglect.<sup>38</sup>

The commissioner's conducting a sale of an intestate's property at public auction cannot annul the sale or set aside the proceedings.<sup>39</sup>

**B. JURISDICTION AND VENUE.**—Where the proceeding is by motion, the court confirming the sale has jurisdiction to set aside the order at the term at which it was rendered,<sup>40</sup> but not after the term,<sup>41</sup> unless

tice the court has discretion to set the sale aside and order a resale even after confirmation. *Nugent v. Nugent*, 54 Mich. 557, 20 N. W. 584.

36. *McCotter v. Jay*, 30 N. Y. 80.

As to grounds for setting aside, see *infra*, XII, D.

37. **U. S.**—*Stockmeyer v. Tobin*, 139 U. S. 176, 196, 11 Sup. Ct. 504, 35 L. ed. 123; *Nevada Nickel Syndicate v. National Nickel Co.*, 103 Fed. 391. **Cal.**—*Bechtel v. Wier*, 152 Cal. 443, 93 Pac. 75, 15 L. R. A. (N. S.) 549; *Summerville v. March*, 142 Cal. 554, 76 Pac. 388, 100 Am. St. Rep. 145; *Humboldt, etc. Society v. March*, 136 Cal. 321, 68 Pac. 968. **Idaho.**—*In re Great Western Beet Sugar Co.*, 22 Idaho 328, 125 Pac. 799, 43 L. R. A. (N. S.) 671. **La.**—*Gilmer v. Nicholson*, 21 La. Ann. 589; *Stockton v. Downey*, 6 La. Ann. 581. **Md.**—*Gregory v. Lenning*, 54 Md. 51. **Mass.**—*Old Colony Trust Co. v. Great White Spirit Co.*, 181 Mass. 413, 63 N. E. 945. **Neb.**—*Gray v. Eurich*, 2 Neb. (Unof.) 194, 96 N. W. 343; *Gray v. Naiman*, 2 Neb. (Unof.) 196, 96 N. W. 343. **Pa.**—*Hazlett's Estate*, 137 Pa. 587, 21 Atl. 804. **Va.**—*Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144. **W. Va.**—*Klapneck v. Keltz*, 50 W. Va. 331, 40 S. E. 570; *Trimble v. Herold*, 20 W. Va. 602; *Hughes & Co. v. Hamilton*, 19 W. Va. 366. **Wis.**—*Lloyd v. Frank*, 30 Wis. 306.

38. **Ala.**—*Helena Coal Co. v. Sibley*, 132 Ala. 651, 32 So. 718. **Ark.**—*Miller v. Henry*, 105 Ark. 261, 150 S. W. 700, Ann. Cas. 1914D, 754. **N. J.**—*Hayes v. Stiger*, 29 N. J. Eq. 196. **N. Y.**—*American Ins. Co. v. Oakley*, 9 Paige 259; *Housman v. Wright*, 50 App. Div. 606, 64 N. Y. Supp. 71. **Va.**—*Redd v. Dyer*, 83 Va. 331, 2 S. E. 283, 5 Am. St. Rep. 272.

39. *Peirson v. Fisk*, 99 Mich. 43, 57 N. W. 1080; *Samson v. Honrado*, 12 Phil. Isl. 37.

40. *Indiana & Arkansas Lumb. & Mfg. Co. v. Milburn*, 161 Fed. 531, 88 C. C. A. 473.

[a] **The probate court of Ohio** (1) is not granted jurisdiction to set aside a deed of conveyance and when a deed has been made in pursuance of its decree of confirmation, its power is at an end. *Saxton v. Seiberling*, 48 Ohio St. 554, 29 N. E. 179. (2) But in Montana the probate court has authority to set aside the sale for the purpose of ordering a resale but not otherwise. *State v. District Court*, 27 Mont. 415, 71 Pac. 401.

41. **Ark.**—*State Nat. Bank v. Neel*, 53 Ark. 110, 13 S. W. 700, 22 Am. St. Rep. 185. **Ill.**—*Barnes v. Henshaw*, 226 Ill. 605, 80 N. E. 1076; *Schweinfurth v. Poehlman*, 83 Ill. App. 428. **Ky.**—*Kincaid v. Tutt*, 88 Ky. 392, 11 S. W. 297; *Schlosser v. Murnan*, 20 Ky. L. Rep. 1468, 49 S. W. 421. **Miss.**—*Turnbull v. Endicott*, 3 Smed. & M. 302. See *Henderson v. Herrod*, 23 Miss. 434. **Tenn.**—*Jackson v. Gholson*, 62 S. W. 324; *Young v. Thompson*, 2 Coldw. 596; *Bond v. Clay*, 2 Head 379. **Tex.**—*Davis v. Stewart*, 4 Tex. 223.

See generally the title "Judgments."

[a] **After the Term.**—After confirmation the court may set aside the order of confirmation and the sale for the same causes as would have justified a refusal to confirm in the first instance; but after the term at which confirmation was made the power of the court over the subject-matter has ceased, unless the purchaser at the sale was a party to the suit in which the decree for the sale was originally made and the suit is still pending. "In such a case the court would still have the parties before it; we do not say that an order of confirmation might not be set aside by petition at a subsequent time." *Henderson v. Herrod*, 23 Miss. 434.

[b] **That the ground of relief is fraud** is immaterial. *Jackson v. Gholson* (Tenn.), 62 S. W. 324; *Turnbull v. Endicott*, 3 Smed. & M. (Miss.) 302. But see *Barnes v. Henshaw*, 226 Ill. 605, 80 N. E. 1076, dictum.

the motion is continued to the next term;<sup>42</sup> this jurisdiction belongs exclusively to a court of chancery.<sup>43</sup> The latter court has inherent power to set aside sales made by its order,<sup>44</sup> and jurisdiction to set aside all sales made by authority of law or by virtue of process of other courts.<sup>45</sup> An action to annul a sale need not be brought in the same court that granted the order of sale,<sup>46</sup> but it must be commenced in a court of general jurisdiction, such as a court of equity.<sup>47</sup>

C. WHEN PROCEEDING INSTITUTED.—Proceedings to set aside or vacate the sale may be taken either before<sup>48</sup> or after<sup>49</sup> confirmation, but they cannot be taken before the report or return is filed.<sup>50</sup> The sale may be vacated, although a conveyance may have been made.<sup>51</sup> Where the judgment debtor had notice of the sale his application to

[c] Where terms are abolished, this rule is necessarily inapplicable. *In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 133 C. C. A. 126.

42. *Niles v. Parks*, 49 Ohio St. 370, 34 N. E. 735.

43. *Jackson v. Gholson* (Tenn.), 62 S. W. 324.

44. **U. S.**—*Kent v. Lake Superior Ship Canal Co.*, 144 U. S. 75, 12 Sup. Ct. 650, 36 L. ed. 352. **Fla.**—*Marsh v. Marsh*, 72 So. 638. **Mich.**—*Butters v. Butters*, 153 Mich. 153, 117 N. W. 203, whether the property is bid in by a party to the suit or a stranger. **Miss.** *Hopton v. Swan*, 50 Miss. 545. **N. J.** *Woodward v. Bullock*, 27 N. J. Eq. 507. **N. Y.**—*Le Fevre v. Laraway*, 22 Barb. 167. **N. C.**—*Harrell v. Blythe*, 140 N. C. 415, 53 S. E. 232; *Wood v. Parker*, 63 N. C. 379; *Clayton v. Glover*, 56 N. C. 371. **Tenn.**—*Deaderick v. Smith*, 6 Humph. 138. **Utah.**—*Gray v. Matthews*, 17 Utah 312, 53 Pac. 976.

45. *Howell v. Sebring*, 14 N. J. Eq. 84.

[a] Where a sale is impeached for fraud or unfair practices of officer or purchaser to the prejudice of the owner, a court of chancery is the proper tribunal to afford relief. *Cocks v. Izard*, 7 Wall. (U. S.) 559, 19 L. ed. 275; *Slater v. Maxwell*, 6 Wall. (U. S.) 268, 18 L. ed. 796.

[b] The federal courts have jurisdiction to set aside a judicial sale in a state court, for fraud in obtaining the decree. *Johnson v. Waters*, 111 U. S. 640, 657, 4 Sup. Ct. 619, 28 L. ed. 547.

46. *Stapleton v. Butterfield*, 34 La. Ann. 822, it is not an action to annul a judgment.

47. *Coffey v. Coffey*, 16 Ill. 141; *Jackson v. Gholson* (Tenn.), 62 S. W. 324; *Bond v. Clay*, 2 Head (Tenn.) 379; *Young v. Shumate*, 3 Sneed (Tenn.) 369; *Deaderick v. Smith*, 6 Humph. (Tenn.) 138.

48. **Ala.**—*Jones v. Burden*, 20 Ala. 282. **Ark.**—*Wells v. Lenox*, 108 Ark. 366, 159 S. W. 1099. **Minn.**—*Rogers v. Holyoke*, 14 Minn. 220. **Mont.**—*In re First Trust*, etc. Bank of Billings, 45 Mont. 89, 122 Pac. 561, Ann. Cas. 1913C, 1327. **Tenn.**—*Bryant v. McCollum*, 4 Heisk. 511.

As to objections to confirmation, see *supra*, XI, J.

49. **U. S.**—*In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 133 C. C. A. 126, reversing 209 Fed. 138. **Fla.**—*Marsh v. Marsh*, 72 So. 638. **Miss.**—*Tooley v. Kane*, Smed. & M. Ch. 518. **Mont.** *In re First Trust*, etc. Bank of Billings, 45 Mont. 89, 122 Pac. 561, Ann. Cas. 1913C, 1327. **N. J.**—*Koegel v. Koegel*, 83 N. J. Eq. 179, 89 Atl. 861. **Tenn.** *Bryant v. McCollum*, 4 Heisk. 511. **Wis.**—*Strong v. Catton*, 1 Wis. 471.

50. *Smith v. Denson*, 2 Smed. & M. (Miss.) 326.

51. **Ala.**—*Aderholt v. Henry*, 82 Ala. 541, 3 So. 114. **Neb.**—*Omaha Loan & Bldg. Assn. v. Hendee*, 108 N. W. 190. See *Paulett v. Peabody*, 3 Neb. 196. **N. J.**—*Barker v. Richardson*, 41 N. J. Eq. 656, 7 Atl. 637; *Mutual Life Ins. Co. v. Goddard*, 33 N. J. Eq. 482; *Mutual Life Ins. Co. v. Sturges*, 33 N. J. Eq. 328. **Pa.**—*Johnson's Appeal*, 114 Pa. 132, 6 Atl. 556. **Tex.**—*Hampton v. Hampton*, 9 Tex. Civ. App. 497, 29 S. W. 423.

As to the showing which must be made in such case, see *infra*, XII, I.

set aside the sale should be made before the right of redemption has expired.<sup>52</sup> If the proceeding is by motion to set aside the order of confirmation it must be taken during the term at which the order was made.<sup>53</sup>

**D. GROUNDS.—1. In General.**<sup>54</sup>—A court of probate can vacate or set aside a sale on the grounds provided for by the statute conferring the right.<sup>55</sup> But a court of equity may set aside a sale upon grounds which are insufficient to confer an absolute right to a resale upon the objecting party.<sup>56</sup> A sale may be set aside on the ground of accident,<sup>57</sup> misrepresentation as to the terms, or manner of sale,<sup>58</sup> or the violation of some duty by the officer conducting the sale,<sup>59</sup> or by the purchaser,<sup>60</sup> or for other causes for which equity would give relief.<sup>61</sup> But the misconduct of the original trustee cannot avail to set aside a sale by his successor.<sup>62</sup>

**2. Inadequacy of Price.**—Mere inadequacy of price is not suffi-

52. *Miller v. McAlister*, 197 Ill. 72, 64 N. E. 254; *Clark v. Glos*, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; *Power v. Larabee*, 3 N. D. 502, 57 N. W. 789, 44 Am. St. Rep. 577.

53. See *supra*, XII, B.

54. As to opening biddings on advance bid, see *supra*, IX, K, 10.

55. *Estate of Leonis*, 138 Cal. 194, 71 Pac. 171. But see *supra*, XII, B, as to jurisdiction of probate court in Ohio, and see generally the title "Probate Courts."

56. *Fisher v. Hersey*, 78 N. Y. 387.

57. *Ala.*—*Helena Coal Co. v. Sibley*, 132 Ala. 651, 32 So. 718. *Ill.*—*McMullen v. Gable*, 47 Ill. 67. *Miss.*—*Swoford v. Garmon*, 51 Miss. 348; *Redus v. Hayden*, 43 Miss. 614; *Mitchell v. Harris*, 43 Miss. 314. *Mo.*—*Patton v. Hanna*, 46 Mo. 314. *N. J.*—*Mutual Life Ins. Co. v. Goddard*, 33 N. J. Eq. 482; *Hayes v. Stiger*, 29 N. J. Eq. 196. *Va.*—*Harman v. Copenhaver*, 89 Va. 836, 17 S. E. 482; *Virginia Fire & Marine Ins. Co. v. Cottrell*, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108.

58. *Columbia Paper Bag Co. v. Carr*, 116 Md. 541, 82 Atl. 442; *Billingslea v. Baldwin*, 23 Md. 85; *Bolgiano v. Cooke*, 19 Md. 375.

[a] **Misrepresentation.**—A sale will be set aside where the trustee makes promises or representations to the bidders that the estate is free from incumbrances, or that the title is better or different from that which would flow from the proceedings, and such turns out to be erroneous and cannot

be complied with. *Speed v. Smith*, 4 Md. Ch. 299.

59. *Skakel v. Cycle Trade Pub. Co.*, 237 Ill. 482, 86 N. E. 1058; *McMullen v. Gable*, 47 Ill. 67; *Mullins v. Franz*, 162 App. Div. 418, 147 N. Y. Supp. 418.

[a] Where creditors are prevented from attending and bidding because of an impression received from the master that the sale will not take place on the day appointed although there was no collusion between the master and purchaser, a resale will be ordered if the creditors offer to make an advance bid sufficient to cover their demands. *Collier v. Whipple*, 13 Wend. (N. Y.) 224.

60. *Ill.*—*Skakel v. Cycle Trade Pub. Co.*, 237 Ill. 482, 86 N. E. 1058; *McMullen v. Gable*, 47 Ill. 67. *Mich.* *Page v. Kress*, 80 Mich. 85, 44 N. W. 1052, 20 Am. St. Rep. 504. *N. Y.* *Mullins v. Franz*, 162 App. Div. 316, 147 N. Y. Supp. 418.

61. *Patton v. Hanna*, 46 Mo. 314; *Harman v. Copenhaver*, 89 Va. 836, 17 S. E. 482; *Allison v. Allison*, 88 Va. 328, 13 S. E. 549; *Virginia Fire & M. Ins. Co. v. Cottrell*, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108.

[a] That a party has such defective eyesight that he cannot read and was not at the sale because he did not see the advertisement will not authorize a resale. *Parkhurst v. Cory*, 11 N. J. Eq. 233.

62. *Dungan v. Vondersmith*, 49 Md. 249.

cient to justify the setting aside of a judicial sale,<sup>63</sup> unless the inade-

63. **U. S.**—*Ballentyne v. Smith*, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. ed. 803; *Nalle v. Young*, 160 U. S. 624, 16 Sup. Ct. 420, 40 L. ed. 560; *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. ed. 839; *In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 133 C. C. A. 126 (*reversing* 209 Fed. 138); *Layton v. R. I. Hospital Trust Co.*, 205 Fed. 276, 125 C. C. A. 263; *Files v. Brown*, 124 Fed. 133, 59 C. C. A. 403. **Ala.**—*Pollock & Co. v. Haigler*, 70 So. 258; *Roy v. O'Neill*, 168 Ala. 354, 52 So. 946; *Montague v. Int. Trust Co.*, 142 Ala. 544, 38 So. 1025; *Helena Coal Co. v. Sibley*, 132 Ala. 651, 32 So. 718; *Parker v. Bluffton Car Wheel Co.*, 108 Ala. 140, 18 So. 938. **Ark.**—*Wells v. Lenox*, 108 Ark. 366, 159 S. W. 1099, Ann. Cas. 1914D, 11; *George v. Norwood*, 77 Ark. 216, 91 S. W. 557, 7 Ann. Cas. 171, 113 Am. St. Rep. 143; *Nix v. Draughon*, 56 Ark. 240, 19 S. W. 669; *Hershey v. DuVal*, 47 Ark. 86, 14 S. W. 469. **Cal.**—*Summerville v. March*, 142 Cal. 554, 76 Pac. 388, 100 Am. St. Rep. 145; *Anglo-Californian Bank v. Cerf*, 142 Cal. 303, 75 Pac. 902; *Connick v. Hill*, 127 Cal. 165, 59 Pac. 832. **Colo.**—*La Fitte v. Salisbury*, 43 Colo. 248, 95 Pac. 1065; *Conway v. John*, 14 Colo. 30, 23 Pac. 170. **Del.**—*Roger v. Ocheltree*, 4 Houst. 452; *Booth's Exr. v. Webster*, 5 Harr. 129; *Cowgill v. Cahoon*, 3 Harr. 23. **Fla.**—*MacFarlane v. MacFarlane*, 50 Fla. 570, 39 So. 995; *Lawyers' Co-Operative Pub. Co. v. Bennett*, 34 Fla. 302, 16 So. 185; *Coker v. Dawkins*, 20 Fla. 141. **Ga.**—*Oswald v. Johnson*, 140 Ga. 62, 78 S. E. 333, Ann. Cas. 1914D, 1; *Palmer v. Roper*, 119 Ga. 10, 45 S. E. 790. **Haw.**—*Smith v. Pacific Heights Ry. Co.*, 17 Hawaii 96 (*affirmed*, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. ed. 803); *Smith v. Steamship City of Columbia*, 11 Hawaii 709. **Ill.**—*Osmond v. Evans*, 269 Ill. 278, 110 N. E. 16; *Haggerty v. Haggerty*, 268 Ill. 295, 109 N. E. 34; *Bondurant v. Bondurant*, 251 Ill. 324, 96 N. E. 306; *Abbott v. Beebe*, 226 Ill. 417, 80 N. E. 991; *Mansfield v. Wallace*, 217 Ill. 610, 75 N. E. 682; *Quick v. Collins*, 197 Ill. 391, 64 N. E. 288. **Ind.**—*Sowle v. Champion*, 16 Ind. 165; *Benton v. Shreeve*, 4 Ind. 66. **Ia.**—*Koch v. West*, 118 Iowa 468, 92 N. W. 663, 96 Am. St. Rep. 394. See *Central Trust Co. v. Gate City Elec. St. R. Co.*, 96 Iowa 646, 65 N. W. 982. **Kan.**—*Cowles v. Phoenix Mut. Life Ins. Co.*, 63 Kan. 883, 65 Pac. 217; *Means v. Rosevear*, 42 Kan. 377, 22 Pac. 319; *Babcock v. Canfield*, 36 Kan. 437, 13 Pac. 787; *Wolfert v. Milford Savings Bank*, 5 Kan. App. 222, 47 Pac. 175. **Ky.**—*Hazel v. Buckner*, 158 Ky. 618, 165 S. W. 969; *Conclin v. Grand Central S. & B. Assn.*, 144 Ky. 237, 138 S. W. 312; *Foor v. Mechanics Bank & Trust Co.*, 144 Ky. 682, 139 S. W. 840, Ann. Cas. 1913A, 714; *Columbia Finance & Trust Co. v. Bates*, 24 Ky. L. Rep. 2412, 74 S. W. 248; *Scott v. O'Neil's Admr.*, 23 Ky. L. Rep. 331, 62 S. W. 1042. **Md.**—*Vollum v. Beall*, 117 Md. 617, 83 Atl. 1095, Ann. Cas. 1914D, 16; *Garritte v. Popplein*, 73 Md. 322, 20 Atl. 1070; *Mahoney v. Mackubin*, 52 Md. 357; *Cohen v. Wagner*, 6 Gill 236; *Glenn v. Clapp*, 11 Gill & J. 1. **Miss.**—*George v. Wood*, 94 Miss. 268, 49 So. 147; *Allen v. Martin*, 61 Miss. 78; *Swofford v. Garmon*, 51 Miss. 348; *Redus v. Hayden*, 43 Miss. 614; *Pattison v. Joselynn*, 43 Miss. 373. **Mo.**—*Mangold v. Bacon*, 237 Mo. 496, 141 S. W. 650; *Knoop v. Kelsey*, 121 Mo. 642, 26 S. W. 683; *Walters v. Hermann*, 99 Mo. 529, 12 S. W. 890; *Phillips v. Stewart*, 59 Mo. 491; *Bobb v. Graham*, 15 Mo. App. 289; *Million v. McRee*, 9 Mo. App. 344. **Mont.**—*In re First Trust*, etc. Bank of Billings, 45 Mont. 89, 122 Pac. 561, Ann. Cas. 1913C, 1327; *Burton v. Kipp*, 30 Mont. 275, 76 Pac. 563. **Nev.**—*Dazet v. Landry*, 21 Nev. 291, 30 Pac. 1064. **N. J.**—*Krieger v. Scheuer* (N. J. Eq.), 86 Atl. 534; *Knickerbocker Trust Co. v. Carteret Steel Co.*, 81 N. J. Eq. 130, 86 Atl. 55; *Hoffman v. Godfrey*, 79 N. J. Eq. 617, 82 Atl. 900; *Ryan v. Wilson*, 64 N. J. Eq. 797, 52 Atl. 993, 53 Atl. 1039; *Morrisse v. Inglis*, 46 N. J. Eq. 306, 19 Atl. 16. **N. M.**—*Las Vegas Ry. & Power Co. v. Trust Co.*, 15 N. M. 634, 110 Pac. 856; *Cattle Co. v. Schofield*, 9 N. M. 136, 49 Pac. 954. **N. Y.**—*In re Supt. of Banks*, 207 N. Y. 11, 16, 100 N. E. 428; *Howell v. Mills*, 53 N. Y. 322; *Lockwood v. McGuire*, 57 How. Pr. 266; *State Realty & Mtg. Co. v. Vil-laume*, 121 App. Div. 793, 106 N. Y. Supp. 698; *Wilber v. Wilber*, 119 App.

quacy is so great as to shock the conscience,<sup>64</sup> or raise a presumption of

Div. 740, 104 N. Y. Supp. 179; *Barnard v. Jersey*, 39 Misc. 212, 79 N. Y. Supp. 380. **N. C.**—*Davis v. Keen*, 142 N. C. 496, 55 S. E. 359. See *Harrell v. Blythe*, 140 N. C. 415, 53 S. E. 232; *Branch v. Griffin*, 99 N. C. 173, 5 S. E. 393, 398; *Sumner v. Sessoms*, 94 N. C. 371; *Vass v. Arrington*, 89 N. C. 10. **N. D.**—*Bailey v. Hendrickson*, 25 N. D. 500, 143 N. W. 134, Ann. Cas. 1915C, 739; *Grove v. Great Northern Loan Co.*, 17 N. D. 352, 116 N. W. 345, 138 Am. St. Rep. 707; *Power v. Larabee*, 3 N. D. 502, 57 N. W. 789, 44 Am. St. Rep. 577. **Pa.**—*Levi v. Greer*, 236 Pa. 475, 84 Atl. 917; *Carson v. Ambrose*, 183 Pa. 88, 38 Atl. 508; *In re Carson's Sale*, 6 Watts 140; *Haspel v. Lyons*, 41 Pa. Super. 285. **S. C.**—*McLean v. Crouch*, 99 S. C. 118, 82 S. E. 988; *Connor v. McCoy*, 83 S. C. 165, 65 S. E. 257; *Ex parte Cooley*, 69 S. C. 143, 48 S. E. 92; *Ex parte Alexander*, 35 S. C. 409, 14 S. E. 854. **S. D.**—*First Nat. Bank v. Black Hills Fair Assn.*, 2 S. D. 145, 48 N. W. 852. **Tenn.**—*Smith v. Miller*, 42 S. W. 182; *Myers v. James*, 4 Lea 370. **Tex.**—*Pearson v. Hudson*, 52 Tex. 352; *Agricultural, M. & B. Assn. v. Brewster*, 51 Tex. 257; *Trans-Pecos L. & Irr. Co. v. Arno Co-op. Irr. Co.* (Tex. Civ. App.), 180 S. W. 928; *Kennedy v. Walker* (Tex. Civ. App.), 138 S. W. 1115; *First Nat. Bank v. So. Beaumont Land Co.*, 60 Tex. Civ. App. 315, 128 S. W. 436; *Dilley v. Jasper Lumb. Co.* (Tex. Civ. App.), 114 S. W. 878. **Vt.**—*Carver v. Spence*, 67 Vt. 563, 32 Atl. 493. **Va.**—*Benet v. Ford*, 113 Va. 442, 74 S. E. 394; *Hazlewood v. Forrer*, 94 Va. 703, 27 S. E. 507; *Harman v. Copenhaver*, 89 Va. 836, 17 S. E. 482; *Allison v. Allison*, 88 Va. 328, 13 S. E. 549; *Virginia Marine Fire Ins. Co. v. Cottrell*, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108; *Coles v. Coles*, 83 Va. 525, 5 S. E. 673. **Wash.**—*Miller v. Winslow*, 70 Wash. 401, 126 Pac. 906, Ann. Cas. 1914B, 853; *Roger v. Whitham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. Rep. 1105, 21 Ann. Cas. 272. **W. Va.**—*Schmertz v. Hammond*, 51 W. Va. 408, 41 S. E. 184; *Laidley v. Jasper*, 49 W. Va. 526, 39 S. E. 169; *Connell v. Wilhelm*, 36 W. Va. 598, 15 S. E. 245; *Moran v. Clark*, 30 W. Va. 358, 4 S. E. 303, 8 Am. St. Rep. 66; *Trimble v. Herold*, 20 W.

Va. 602. **Wis.**—*John Paul Lumb. Co. v. Neumeister*, 106 Wis. 243, 82 N. W. 144; *Meehan v. Blodgett*, 86 Wis. 511, 57 N. W. 291; *Maxwell v. Newton*, 65 Wis. 261, 27 N. W. 31; *Strong v. Catton*, 1 Wis. 471. **Can.**—*O'Connor v. Woodard*, 6 Ont. Pr. 223.

[a] **Inadequacy of consideration** in no wise affects the good faith of the purchaser. *Koch v. West*, 118 Iowa 468, 92 N. W. 663, 96 Am. St. Rep. 394.

[b] **Sales of Personalty and Realty Distinguished.**—Mere inadequacy of price will not impeach a sale of personalty, though sometimes it is sufficient to set aside a sale of real estate. *Swires v. Brotherline*, 41 Pa. 135, 80 Am. Dec. 601.

[c] **Inadequacy of price has significance only when taken in connection with other facts tending to show bad faith, mistake, an undue advantage, or other grounds of equitable relief.** *Hudgins v. Morrow*, 47 Ark. 515, 2 S. W. 104.

64. **U. S.**—*Ballentyne v. Smith*, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. ed. 803; *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732; *In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 133 C. C. A. 126 (reversing 209 Fed. 138); *Layton v. Rhode Island Hospital Trust Co.*, 205 Fed. 276, 125 C. C. A. 263; *Magann v. Segal*, 92 Fed. 252, 34 C. C. A. 323. **Ark.**—*George v. Norwood*, 77 Ark. 216, 91 S. W. 557, 113 Am. St. Rep. 143. **Haw.**—*Smith v. Pacific Heights Ry. Co.*, 17 Hawaii 96. **Ill.**—*Wilson v. Ford*, 190 Ill. 614, 60 N. E. 876. **Miss.**—*George v. Wood*, 94 Miss. 268, 49 So. 147; *Pattison v. Josselyn*, 43 Miss. 373. **Mo.**—*Mangold v. Bacon*, 237 Mo. 496, 141 S. W. 650, the phrase "shock the conscience" means causing the moral sense, the inward monitor to be stunned, to recoil. **N. J.**—*Marlatt v. Warwick*, 18 N. J. Eq. 108. **N. M.**—*Las Vegas Ry. & Power Co. v. Trust Co.*, 15 N. M. 634, 110 Pac. 856. **N. Y.**—*In re Supt. of Banks*, 207 N. Y. 11, 100 N. E. 428; *State Realty & Mfg. Co. v. Villaume*, 121 App. Div. 793, 106 N. Y. Supp. 698; *Wesson v. Chapman*, 76 Hun 592, 28 N. Y. Supp. 192. **W. Va.**—*Schmertz v. Hammond*, 51 W. Va. 408, 41 S. E. 184.

unfairness,<sup>65</sup> fraud,<sup>66</sup> or mistake on the part of one interested in the

[a] **Purchase by a Stranger.**—Where the property is sold to a stranger the sale will not be set aside for mere inadequacy of price, no matter how gross, unless there is unfair practice at the sale, or surprise without fault on the part of those interested. *Helena Coal Co. v. Sibley*, 132 Ala. 651, 32 So. 718; *Parker v. Bluffton Car Wheel Co.*, 108 Ala. 140, 18 So. 938; *Littell v. Zunts*, 2 Ala. 256, 36 Am. Dec. 415.

[b] **Illustrations.**—(1) Where property worth \$150 was sold for twenty-five cents there is such inadequacy as shocks the conscience, and the sale will be set aside even though title has passed and the property delivered. *Maxwell v. Burns* (Tenn.), 59 S. W. 1067. (2) Where property worth \$8000 was sold for \$65.38 the amount is grossly inadequate. *Berry v. Lovi*, 107 Ill. 612. (3) A sale en masse, without having first offered the separate parcels, of property valued at \$2000 for \$60 will be set aside as being grossly inadequate on proper application within a reasonable time. *Lurton v. Rodgers*, 139 Ill. 554, 29 N. E. 866, 32 Am. St. Rep. 214.

65. **Ark.**—*George v. Norwood*, 77 Ark. 216, 91 S. W. 557, 113 Am. St. Rep. 143. **Haw.**—*Smith v. Pacific Heights Ry. Co.*, 17 Hawaii 96. **Md.** *Vollum v. Beall*, 117 Md. 617, 83 Atl. 1095, Ann. Cas. 1914D, 16. **N. Y.** *Wesson v. Chapman*, 76 Hun 592, 28 N. Y. Supp. 431.

[a] **Illustration.**—Where property worth \$8000 sold for \$1500 the sum was so grossly inadequate as to raise the inference of unfairness. *Johnson v. Avery*, 60 Minn. 262, 62 N. W. 283, 51 Am. St. Rep. 529.

66. **U. S.**—*In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 133 C. C. A. 126, reversing 209 Fed. 138. **Ark.**—*George v. Norwood*, 77 Ark. 216, 91 S. W. 557, 113 Am. St. Rep. 143. **Ill.**—*Osmond v. Evans*, 269 Ill. 278, 110 N. E. 16; *Bondurant v. Bondurant*, 251 Ill. 324, 96 N. E. 306; *Abbott v. Beebe*, 226 Ill. 417, 80 N. E. 991, 117 Am. St. Rep. 257; *Clark v. Glos*, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; *Kerfoot v. Billings*, 160 Ill. 563, 43 N. E. 804, trustee's sale. **Md.**—*Vollum v. Beall*, 117 Md. 617, 83 Atl. 1095, Ann. Cas. 1914D, 16; *Garritee v. Popplein*,

73 Md. 322, 20 Atl. 1070. **Miss.**—*Allen v. Martin*, 61 Miss. 78. **Mo.**—*Phillips v. Stewart*, 59 Mo. 491; *Million v. McRee*, 9 Mo. App. 344. **N. J.**—*Marlatt v. Warwick*, 18 N. J. Eq. 108. **N. Y.**—*State Realty Co. v. Villaume*, 121 App. Div. 793, 106 N. Y. Supp. 698; *Wesson v. Chapman*, 76 Hun 592, 28 N. Y. Supp. 192. **W. Va.**—*Schmertz v. Hammond*, 51 W. Va. 408, 41 S. E. 184.

[a] **Illustrations.**—In the following cases sales were set aside because the price was so grossly inadequate as to be evidence of fraud: **Mo.**—*Mangold v. Bacon*, 237 Mo. 496, 141 S. W. 650 (where property worth \$1200 was sold for \$12.50); *Mitchell v. Jones*, 50 Mo. 438, where property worth \$1600 was sold for \$50. **N. J.**—*Porch v. The Agnew Co.*, 66 N. J. Eq. 232, 57 Atl. 726, where property worth from \$60,000 to \$100,000 sold for \$33,000. **N. C.**—*Harrell v. Blythe*, 140 N. C. 415, 53 S. E. 232, where property worth \$450 sold for \$125. **W. Va.**—*Sinnett v. Cralle's Admr.*, 4 W. Va. 600, where property worth \$10,000 sold for \$2520.

[b] In the following cases the court refused to set aside the sale because of inadequacy of price: **U. S.**—*West v. Davis*, 4 McLean 241, 29 Fed. Cas. No. 17,422, where property worth \$600 sold for \$100. **Colo.**—*Conway v. John*, 14 Colo. 30, 23 Pac. 170, where property worth \$550 sold for \$50. **Fla.**—*Coker v. Dawkins*, 20 Fla. 141, where property worth \$1300 sold for \$475. **Ga.**—*Palmer v. Roper*, 119 Ga. 10, 45 S. E. 790, where property worth \$25,000 sold for \$5,275. **Ill.**—*O'Callaghan v. O'Callaghan*, 91 Ill. 228 (where property worth \$4000 sold for \$10); *Watt v. McGalliard*, 67 Ill. 513 (where property worth \$3500 sold for \$384.70, sold subject to equity of redemption). **Ind.**—*Sowle v. Champion*, 16 Ind. 165, where property worth \$1500 sold for \$155. **Ia.**—*Wood v. Young*, 38 Iowa 102, where property worth \$400 sold for \$60, subject to a \$100 mortgage. **Kan.**—*Babeock v. Canfield*, 36 Kan. 437, 13 Pac. 787 (where property worth \$500 sold for \$180); *Northrop v. Cooper*, 23 Kan. 432, where property worth \$933 sold for \$100. **Ky.**—*Conclin v. Grand Central Savings & B. Assn.*, 144 Ky. 237, 138 S. W. 312, where property

property.<sup>67</sup> This is especially true where there is a right of redemption.<sup>68</sup> But inadequacy of price, accompanied by other circumstances,<sup>69</sup> such as fraud,<sup>70</sup> unfairness in the purchase or the sale proceedings,<sup>71</sup>

worth \$15,000 sold for \$8,950. **Mo.** *Briant v. Jackson*, 99 Mo. 585, 13 S. W. 91, where property worth \$8,000 was sold for \$900. **N. J.**—*Eberhart v. Gilchrist*, 11 N. J. Eq. 167, where property worth \$5000, sold for \$1500. **Va.** *Hazlewood v. Forrer*, 94 Va. 703, 27 S. E. 507, where property worth \$10,000 sold for \$2,150.

67. **Ky.**—*Columbia Finance & Trust Co. v. Bates*, 24 Ky. L. Rep. 2412, 74 S. W. 248. **Neb.**—*Paulett v. Peabody*, 3 Neb. 196. **N. J.**—*Raphael v. Zehner*, 56 N. J. Eq. 836, 42 Atl. 1015; *Wetzler v. Schaumann*, 24 N. J. Eq. 60; *Klopping v. Stellmacher*, 21 N. J. Eq. 328. **N. Y.**—*Griffith v. Hadley*, 10 Bosw. 587. **S. D.**—*Kirby v. Ramsey*, 9 S. D. 197, 68 N. W. 328. **Wis.**—*Strong v. Catton*, 1 Wis. 471.

[a] Where because of the absence of parties in interest who thought the sale would be postponed pending an appeal in the cause, the property sold for a very inadequate price and the sale was suspiciously hurried; the court should vacate the sale. *Kemp v. Hein*, 48 Wis. 32, 3 N. W. 831.

68. **Cal.**—*Anglo-Californian Bank v. Cerf*, 142 Cal. 303, 75 Pac. 902; *Connick v. Hill*, 127 Cal. 162, 165, 59 Pac. 832. **Ill.**—*Skakel v. Cycle Trade Pub. Co.*, 237 Ill. 482, 86 N. E. 1058. **Ky.** *Miles v. Lyons*, 20 Ky. L. Rep. 1727, 50 S. W. 15. **N. D.**—*Power v. Larabee*, 3 N. D. 502, 57 N. W. 789, 44 Am. St. Rep. 577.

69. See cases in preceding and following notes.

[a] **Failure To Comply With Agreement To Bid.**—Where property sold for much less than its conceded value because appellant had expected a party to bid according to an agreement but he did not do so, a resale should be ordered. *Packard v. Lyon*, 145 App. Div. 950, 130 N. Y. Supp. 229.

[b] **Surprise.**—Where defendant had obtained from complainant an agreement to postpone the sale, and he had relied thereon, but the complainant had neglected to have the sale postponed, and the property was sold for considerably less than its value, an order for

a resale is a proper method of relief. *Demaray v. Little*, 19 Mich. 244.

70. **Ark.**—*Hudgins v. Morrow*, 47 Ark. 515, 2 S. W. 104. **Ga.**—*Oswald v. Johnson*, 140 Ga. 62, 78 S. E. 333, Ann. Cas. 1914D, 1. **Haw.**—*Smith v. Pacific Heights Ry. Co.*, 17 Hawaii 96. **Ill.** *Quick v. Collins*, 197 Ill. 391, 64 N. E. 288; *Wilson v. Ford*, 190 Ill. 614, 60 N. E. 876; *Barling v. Peters*, 134 Ill. 606, 25 N. E. 765. **Md.**—*Bank of Commerce v. Lanahan*, 45 Md. 396. **Mass.** *King v. Bronson*, 122 Mass. 122. **Miss.** *Swofford v. Garmon*, 51 Miss. 348. **Mo.** *Bobb v. Graham*, 15 Mo. App. 289. **Nev.** *Dazet v. Landry*, 21 Nev. 291, 30 Pac. 1064. **N. J.**—*Krieger v. Scheuer* (N. J. Eq.), 86 Atl. 534; *Knickerbocker Trust Co. v. Carteret Steel Co.*, 81 N. J. Eq. 130, 86 Atl. 55; *Hoffman v. Godfrey*, 79 N. J. Eq. 617, 82 Atl. 900; *Ryan v. Wilson*, 64 N. J. Eq. 797, 52 Atl. 993. **N. Y.**—*Silver Creek Co.-Op. Sav. & Loan Assn. v. Smith*, 154 N. Y. Supp. 881; *Lockwood v. McGuire*, 57 How. Pr. 266; *Whitbeck v. Rowe*, 25 How. Pr. 403; *March v. Ludlum*, 3 Sandf. Ch. 35; *Billington v. Forbes*, 10 Paige 487; *American Ins. Co. v. Oakley*, 9 Paige 259. **Pa.**—*But see McBride's Estate*, 9 Pa. Dist. 216. **S. D.**—*First Nat. Bank v. Black Hills Fair Assn.*, 2 S. D. 145, 48 N. W. 852. **Wis.**—*John Paul Lumb. Co. v. Neumeister*, 106 Wis. 243, 82 N. W. 144.

[a] **Where the mortgagor is prevented from attending the sale and the property sold greatly below its value, a resale will be ordered.** *Tripp v. Cook*, 26 Wend. (N. Y.) 143.

[b] **Slight circumstances indicating unfairness or fraud, either upon the party, the officer, the purchaser, or the party to the record benefited by the sale will furnish sufficient ground for equitable interposition where the property sold for a grossly inadequate price.** *Miller v. McAlister*, 197 Ill. 72, 64 N. E. 254. To the same effect, *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. ed. 839.

71. **U. S.**—*Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. ed. 839. **Md.**—*Bank of Commerce v. Lanahan*, 45 Md. 396; *Johnson v. Dorsey*, 7 Gill

accident,<sup>72</sup> mistake,<sup>73</sup> or some irregularity in the sale,<sup>74</sup> or in the judgment ordering the sale,<sup>75</sup> will justify setting aside the sale.

Where a party asks for a resale on the ground that the property will

269. **N. Y.**—*In re* Supt. of Banks, 207 N. Y. 11, 100 N. E. 428. **S. D.**—First Nat. Bank v. Black Hills Fair Assn., 2 S. D. 145, 48 N. W. 552.

[a] **Unfairness in Method of Advertising.**—Where the notice of advertisement was published in a paper of small circulation more than twenty miles from the place of sale so that neither the public nor the parties interested should have notice and the price brought at the sale was greatly inadequate, there is such an element of unfairness as coupled with inadequacy of price that warrants setting aside the sale. *MacFarlane v. MacFarlane*, 50 Fla. 570, 39 So. 995.

[b] **Where a purchaser agreed, with others who had come to bid, to enter into a partnership for the purchase of the property at a certain price, the court will set aside the sale.** *Haggerty v. Haggerty*, 268 Ill. 295, 109 N. E. 34. See *supra*, IX, K, 5.

72. **Haw.**—*Smith v. Pacific Heights Ry. Co.*, 17 Hawaii 96. **Ky.**—*Yowell v. Gaines*, 2 Bush 211. **N. J.**—*Hoffman v. Godfrey*, 79 N. J. Eq. 617, 82 Atl. 900; *Morrisse v. Inglis*, 46 N. J. Eq. 306, 19 Atl. 16. **S. D.**—First Nat. Bank v. Black Hills Fair Assn., 2 S. D. 145, 48 N. W. 552.

[a] **Where the owner was prevented from attending the sale by an accident and the property was sold at a great sacrifice, the sale will be set aside.** *Foor v. Mechanics' Bank & Trust Co.*, 144 Ky. 682, 139 S. W. 840, Ann. Cas. 1913A, 714.

73. **Haw.**—*Smith v. Pacific Heights Ry. Co.*, 17 Hawaii 96. **Ky.**—*Shuck v. Price*, 22 Ky. L. Rep. 1261, 60 S. W. 487, misunderstanding as to the quantity of land sold. **Md.**—*Bank of Commerce v. Lanahan*, 45 Md. 396. **N. J.**—*Hoffman v. Godfrey*, 79 N. J. Eq. 617, 82 Atl. 900; *Morrisse v. Inglis*, 46 N. J. Eq. 306, 19 Atl. 16. See *Rowan v. Congdon*, 53 N. J. Eq. 385, 33 Atl. 404. **N. Y.**—*State Realty & Mtge. Co. v. Villaume*, 121 App. Div. 793, 106 N. Y. Supp. 698. **S. D.**—First Nat. Bank v. Black Hills Fair Assn., 2 S. D. 145, 48 N. W. 552. **Wis.**—*John Paul Lumb. Co.*

*v. Neumeister*, 106 Wis. 243, 82 N. W. 144.

[a] **The Mistake Must Not Only Be Material but Genuine.**—A sale will not be set aside where the petitioner was present and intended to bid but failed to do so because he thought the bid made by another person was not bona fide, but made with the view of running the property up on him. *Fiske v. Weigel* (N. J. Eq.), 21 Atl. 452.

74. **Md.**—*Bank of Commerce v. Lanahan*, 45 Md. 396. **Minn.**—*Labor v. McCarthy*, 24 Minn. 417. **N. J.**—*Polhemus v. Princilla* (N. J. Eq.), 61 Atl. 263.

[a] **Where Proper Notice Was Not Given.**—*Central Trust Co. v. Gate City Electric St. Ry. Co.*, 96 Iowa 646, 65 N. W. 982.

[b] **Because the sale was not advertised as directed in the decree.** *Conroy v. Carroll*, 82 Md. 127, 33 Atl. 423.

[c] **Shortness of Notice.**—Where the decree of sale fixed no time for notice of sale, shortness of notice is not of itself sufficient ground to set aside the sale, yet when coupled with inadequacy of price or other irregularity in the conduct of the sale it will be regarded as important. *Sowards v. Pritchett*, 37 Ill. 517.

[d] **Failure of advertisement to designate the hour of sale.** *Bondurant v. Bondurant*, 251 Ill. 324, 96 N. E. 306.

[e] **A defective return of the officer selling, coupled with inadequacy of price affords sufficient ground for setting aside the sale.** *Evans v. Bushnell*, 59 Kan. 160, 52 Pac. 419.

75. *In re* First Trust, etc. Bank of Billings, 45 Mont. 89, 122 Pac. 561, Ann. Cas. 1913C, 1327.

[a] **The omission of the name of the party against whom judgment was rendered coupled with inadequacy of price is sufficient to authorize setting aside the sale.** *White v. Taylor*, 46 Tex. Civ. App. 471, 102 S. W. 747.

[b] **Where the judgment of sale fails to fix the terms and conditions of sale and the price was grossly inadequate the sale ought to be set aside.** *Underwood's Admr. v. Cartwright*, 20 Ky. L. Rep. 809, 47 S. W. 580.

bring more money, he should bring the money into court,<sup>76</sup> offer to make an advance bid,<sup>77</sup> or give a guarantee that there will be no loss on a re-sale.<sup>78</sup>

3. **Fraud.**—The well settled principle of law that fraud vitiates all decrees and sales made thereunder, applies to judicial sales.<sup>79</sup>

4. **Surprise and Mistake.**—The general principles of law govern-

76. *Osmond v. Evans*, 269 Ill. 278, 110 N. E. 16; *Barnes v. Henshaw*, 226 Ill. 605, 80 N. E. 1076; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580.

77. *Osmond v. Evans*, 269 Ill. 278, 110 N. E. 16; *Barnes v. Henshaw*, 226 Ill. 605, 80 N. E. 1076; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580; *Schmertz v. Hammond*, 51 W. Va. 408, 41 S. E. 184.

As to reopening biddings on advance bid, see *supra*. IX, K, 10.

78. **Ill.**—*Osmond v. Evans*, 269 Ill. 278, 110 N. E. 16; *Barnes v. Henshaw*, 226 Ill. 605, 80 N. E. 1076; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580; *Ayers v. Baumgarten*, 15 Ill. 444. **Mich.** See *Nugent v. Nugent*, 54 Mich. 557, 20 N. W. 584. **N. J.**—*Krieger v. Scheuer* (N. J. Eq.), 86 Atl. 534; *Porch v. Agnew Co.*, 66 N. J. Eq. 232, 57 Atl. 726. **N. Y.**—See *Brush v. Shuster*, 3 Abb. N. C. 73.

[a] Where but for a misapprehension as to the time of sale, a purchaser could have been had for a sum considerably more than the sale realized, the decree of confirmation should be affirmed unless within thirty days a prospective purchaser enter into a bond that in the event of a resale that sum will be bid, in which case a resale should be directed. *Rowan v. Condon*, 53 N. J. Eq. 385, 33 Atl. 404.

79. **U. S.**—*Ballentyne v. Smith*, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. ed. 803; *Schroeder v. Young*, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. ed. 721; *Arrow-smith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. ed. 630; *Allen v. Gillette*, 127 U. S. 589, 8 Sup. Ct. 1331, 32 L. ed. 271; *Smith v. Black*, 115 U. S. 308, 6 Sup. Ct. 50, 29 L. ed. 398; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. ed. 547. **Ark.**—*Penn's Admr. v. Tolleson*, 20 Ark. 652. **Ga.**—*Southern Cotton Mills v. Ragan*, 138 Ga. 504, 75 S. E. 611; *Southern Marble Co. v.*

*Stegall*, 90 Ga. 236, 15 S. E. 806. **Ill.** *Skakel v. Cycle Trade Pub. Co.*, 237 Ill. 482, 86 N. E. 1058; *Kennedy v. Af-dal*, 229 Ill. 295, 82 N. E. 291; *Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52; *McMullen v. Gable*, 47 Ill. 67. **Md.** *Payne v. Payne*, 97 Md. 678, 55 Atl. 368; *Gregory v. Lenning*, 54 Md. 51. **Mich.**—*Page v. Kress*, 80 Mich. 85, 44 N. W. 1052, 20 Am. St. Rep. 504; *Tong v. Marvin*, 26 Mich. 35. **Miss.**—*Swof-ford v. Garmon*, 51 Miss. 348; *Redus v. Hayden*, 43 Miss. 614; *Mitchell v. Har-ris*, 43 Miss. 314. **Neb.**—*Omaha Loan & Bldg. Assn. v. Hendee*, 108 N. W. 190; *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614. **N. J.**—*Mutual Life Ins. Co. v. Goddard*, 33 N. J. Eq. 482; *Hayes v. Stiger*, 29 N. J. Eq. 196. **N. Y.** *Howell v. Mills*, 53 N. Y. 322; *Le Fevre v. Laraway*, 22 Barb. 167. **Tenn.** *Moore v. Watson*, 4 Coldw. 64; *Rogers v. Clark*, 5 Sneed 665. **Va.**—*Harman v. Copenhaver*, 89 Va. 836, 17 S. E. 482; *Allison v. Allison*, 88 Va. 328, 13 S. E. 549; *Virginia Fire & M. Ins. Co. v. Cot-trell*, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108.

[a] Where the master was directed to sell for not less than \$2600 but actually sold for \$1000 to persons who were informed as to his directions, the court ordered a resale before they had paid their bid. *Requa v. Rea*, 2 Paige (N. Y.) 339.

[b] **Co-defendant Ill.**—Where a co-defendant of mortgagor took advantage of his illness and prevented a post-ponement and bought the property at one-third of its value the court ordered a resale. *Billington v. Forbes*, 10 Paige (N. Y.) 487.

[c] **Fraudulent negligence or misconduct** in any person connected with the sale. *Mitchell v. Harris*, 43 Miss. 314; *Pattison v. Josselyn*, 43 Miss. 373.

**Fraud coupled with inadequacy of price**, see *supra*, XII, D, 2.

**Agreement to stifle competition** as ground, see *infra*, XII, D, 6.

ing surprise, mistake, and misapprehension are applicable also to judicial sales, and they may be sufficient grounds for setting aside a sale.<sup>81</sup> The mistake must have been caused by some one connected with the sale,<sup>81</sup> and must have caused injury.<sup>82</sup> A judicial sale may be set aside where there is surprise or misapprehension created by the conduct of the purchaser,<sup>83</sup> or the officer who conducted the sale.<sup>84</sup>

80. **U. S.**—*In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 133 C. C. A. 126, *reversed*, 209 Fed. 138; *Morrison v. Burnette*, 154 Fed. 617, 83 C. C. A. 391. **Ala.**—*Helena Coal Co. v. Sibley*, 132 Ala. 651, 32 So. 718; *Branch Bank v. Hunt*, 8 Ala. 876. **Cal.**—*Thompson v. San Francisco*, 119 Cal. 538, 51 Pac. 563. **Ill.**—*Skakel v. Cycle Trade Publishing Co.*, 237 Ill. 482, 86 N. E. 1058; *McMullen v. Gable*, 47 Ill. 67. **Md.** *Columbia Paper Bag Co. v. Carr*, 116 Md. 541, 82 Atl. 442; *Hunting v. Walter*, 33 Md. 60 (where purchaser bought under the impression that he was buying free from all incumbrance except a ground rent); *Billingslea v. Baldwin*, 23 Md. 85; *Bolgiano v. Cooke*, 19 Md. 375; *Anderson v. Foulke*, 2 Har. & G. 346. **Miss.**—*Swofford v. Garmon*, 51 Miss. 348; *Redus v. Hayden*, 43 Miss. 614; *Mitchell v. Harris*, 43 Miss. 314. **Mo.**—*Patton v. Hanna*, 46 Mo. 314. **N. Y.**—*Le Fevre v. Laraway*, 22 Barb. 167; *Gould v. Gager*, 24 How. Pr. 440, 18 Abb. Pr. 32. **N. C.**—*Clayton v. Glover*, 56 N. C. 371, mistake of purchaser. **Ohio.**—*Ohio Life Ins. & Trust Co. v. Goodin*, 10 Ohio St. 557. **S. C.** *Bonham v. Cave*, 102 S. C. 308, 86 S. E. 681; *Howlett v. Central Carolina L. & I. Co.*, 50 S. C. 1, 27 S. E. 533, a mutual mistake as to identity of lot, where two lots were sold under one proceeding. **Tenn.**—*Spence v. Armour*, 9 Heisk. 167. **Va.**—*McComb v. Gilkeson*, 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 944; *Nitro-Phosphate Syndicate Co. v. Johnson*, 100 Va. 774, 42 S. E. 995; *Allison v. Allison*, 88 Va. 328, 13 S. E. 549; *Virginia Fire & M. Ins. Co. v. Cottrell*, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108; *Terry v. Cole's Exr.*, 80 Va. 695; *Hickson v. Rucker*, 77 Va. 135; *Berlin v. Melhorn*, 75 Va. 639.

When coupled with inadequacy of price, see *supra*, XII, D, 2.

Mistake in bidding, as a ground, see *infra*, XII, D, 6.

[a] The character of the mistake of fact for which equity will relieve is defined to be some unintentional act, omission or error, arising from ignorance, surprise, imposition, or misplaced confidence. *Mountcastle v. Moore*, 11 Heisk. (Tenn.) 481.

[b] A mistake of the attorney as to the amount of liens on the property and as to the amount the property would bring is no ground for setting aside the sale. *Ex parte Jones*, 47 S. C. 393, 25 S. E. 285.

[c] A mistake of law is not sufficient. *Fraser v. Fraser*, 128 Ill. App. 73 (mistake of counsel); *Hayes v. Stiger*, 29 N. J. Eq. 196, mistake of a purchaser that could have been avoided by the use of ordinary prudence.

[d] Misinformation as to Adjournment.—Where the referee informed the defendants that the sale would be adjourned and this promise was relied upon, the sale will be set aside where the referee next day sold the property at the time advertised. *Angel v. Clark*, 21 App. Div. 339, 47 N. Y. Supp. 731.

[e] Relief from mistake is only granted to the mistaken party. *Wilber v. Wilber*, 119 App. Div. 740, 104 N. Y. Supp. 179.

81. **Ohio.**—*Mechanic's Savings & Bldg. L. Assn. v. O'Conner*, 29 Ohio St. 671. **Pa.**—*Hartman v. Pemberton*, 24 Pa. Super. 222. **S. C.**—*Young v. Teague*, Bailey Eq. 13.

82. *Doughty v. Moss*, 1 Bush (Ky.) 161.

83. **Miss.**—*Mitchell v. Harris*, 43 Miss. 314; *Pattison v. Josselyn*, 43 Miss. 373. **N. J.**—*Woodward v. Bullock*, 27 N. J. Eq. 507. **N. Y.**—*Howell v. Mills*, 53 N. Y. 322; *Le Fevre v. Laraway*, 22 Barb. 167.

84. **Ill.**—*Kennedy v. Afdal*, 229 Ill. 295, 82 N. E. 291. **N. Y.**—*Le Fevre v. Laraway*, 22 Barb. 167; *Griffith v. Hadley*, 10 Bosw. 587. **Wis.**—*Koop v. Burris*, 95 Wis. 301, 70 N. W. 473.

And see cases in preceding note.

5. **Irregularities in Proceedings.**—A judicial sale will be set aside for substantial errors only;<sup>85</sup> mere informalities, irregularities, and technical errors are insufficient.<sup>86</sup> Irregularities which would otherwise be sufficient, however, may justify setting aside the sale when other circumstances such as fraud or inadequacy of price, are present.<sup>87</sup> After confirmation, however, all nonjurisdictional irregularities are cured, and the sale will not be set aside except upon grounds on which a sale between individuals will be set aside.<sup>88</sup>

**Sufficient Grounds.**—A judicial sale may be set aside for want of notice of the pendency of the action,<sup>89</sup> for failure to publish the notice in a newspaper required by statute,<sup>90</sup> for holding the sale at an unusually early hour whereby the property sold for less than its value,<sup>91</sup> or holding the sale during an epidemic which prevents interested parties from attending;<sup>92</sup> for failure to strike the property off to the highest responsible bidder,<sup>93</sup> or for failure of the purchaser to pay<sup>94</sup> the

85. *Columbia Paper Bag Co. v. Carr*, 116 Md. 541, 82 Atl. 442; *Billingslea v. Baldwin*, 23 Md. 85; *Bolgiano v. Cooke*, 19 Md. 375. See 12 STANDARD PROC. 845.

**Purchase by the officer as ground for setting aside the sale**, see 6 STANDARD PROC. 575; 12 STANDARD PROC. 849.

86. *Nalle v. Young*, 160 U. S. 624, 6 Sup. Ct. 420, 40 L. ed. 560, in Louisiana. See 6 STANDARD PROC. 576; 12 STANDARD PROC. 845.

[a] **Insufficient Notice of Confirmation.**—Where the date fixed for confirmation in the motion was the 27th and was served on the 25th, the shortness of the notice is not sufficient to set aside the decree confirming the sale. *Allison v. Allison*, 88 Va. 328, 13 S. E. 549.

[b] **The giving of a deed instead of a certificate of purchase as required by law does not warrant setting aside the sale.** *Burke v. Weaver*, 71 Ill. 359.

87. See *Banning v. Pendery*, 7 Ohio Dec. 677, and *supra*, XII, D, 2.

[a] **A sale made on election day which brings an inadequate price will be set aside.** *Banning v. Pendery*, 7 Ohio Dec. 677.

**Sale en masse where there is fraud or inadequacy of price**, see *infra*, this section.

88. *U. S.*—*In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 133 C. C. A. 126 (*reversed*, 209 Fed. 138); *Morrison v. Burnette*, 154 Fed. 617, 83 C. C. A. 391. *Tenn.* *Spence v. Armour*, 9 Heisk. 167. *Va.* *Nitro-Phosphate Syndicate v. Johnson*, 100 Va. 774, 42 S. E. 995; *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144; *Karn v.*

*Rorer Iron Works*, 86 Va. 754, 11 S. E. 431; *Va. Fire & Marine Ins. Co. v. Cottrell*, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108; *Hickson v. Rucker*, 77 Va. 135; *Berlin v. Melhorn*, 75 Va. 639.

**Effect of confirmation on irregularities**, see *supra*, XI, O.

89. *Kizer Lumb. Co. v. Mosely*, 50 Ark. 544, 20 S. W. 409.

90. *Stout v. Brown*, 64 Ark. 312, 42 S. W. 415, attachment sale.

91. *Thomason v. Craighead*, 32 Ark. 391.

92. *Kirkland v. Texas Express Co.*, 57 Miss. 316.

93. *Spalding v. Murphy*, 63 Neb. 401, 88 N. W. 489.

94. *U. S.*—*Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. ed. 608; *Hearne v. Barry*, 3 Cranch C. C. 168, 11 Fed. Cas. No. 6,303. *Ala.*—*Howison v. Oakley*, 118 Ala. 215, 23 So. 810. *Ark.* *Phelps v. Jackson*, 31 Ark. 272. *Ga.* *Walters v. Hargrove*, 61 Ga. 267. *Ill.* *Harwood v. Cox*, 26 Ill. App. 374. *Ky.* *Napper v. Mutual Life Ins. Co.*, 107 Ky. 134, 53 S. W. 28, 92 Am. St. Rep. 340. *La.*—*Succession of Haggerty*, 28 La. Ann. 87. *Md.*—*Brundige v. Morrison*, 56 Md. 407; *Stephens v. Magruder*, 31 Md. 168. *Miss.*—*Sharpley v. Plant*, 79 Miss. 175, 28 So. 799, 89 Am. St. Rep. 588. *N. Y.*—*Thompson v. Dimond*, 3 Edw. Ch. 298. *N. C.*—*Ex parte Pettillo*, 80 N. C. 50. *Tenn.*—*Mosby v. Hunt*, 9 Heisk. 675; *Munson v. Payne*, 9 Heisk. 672. *Va.*—*Mosby v. Wither's Exrs.*, 80 Va. 82; *Long v. Weller's Exr.*, 29 Gratt. (70 Va.) 347. *W. Va.*—*Hyman, Moses & Co. v. Smith*, 13 W. Va. 744.

[a] **Although the property may have**

purchase price, or furnish the security required.<sup>95</sup> Any misdescription of the estate by the person selling, whether innocently made or not and relied upon by the purchaser entitles him to have the sale set aside.<sup>96</sup>

**Insufficient Grounds.**—It has been held that it is not ground for setting aside the sale that the decree failed to designate the place of sale when the sale was actually held at the proper place,<sup>97</sup> that the writ, under which the property was sold issued for a larger amount than was due,<sup>98</sup> that the notice was not published in every edition of the paper,<sup>99</sup> or that one of the officers designated to make the sale was absent.<sup>1</sup> Nor will a sale be set aside for a refusal of the officer to adjourn the sale in the exercise of a reasonable discretion,<sup>2</sup> for failure of consideration,<sup>3</sup> because the sale was made during a severe financial panic,<sup>4</sup> or on a general state election day;<sup>5</sup> because the officer failed to make a report,<sup>6</sup> or because he did not sign the report properly.<sup>7</sup> A mistake in calculation of the amount of purchase money should be corrected, but is no ground for declaring the sale a nullity, in the absence of fraud.<sup>8</sup>

The sale of lands en masse, unless there has been fraud, injury,<sup>9</sup> or

been conveyed since. *McKenzie v. Bacon*, 40 La. Ann. 157, 4 So. 65.

[b] Where an assignment of the bidder's rights has been made, a resale should be ordered only after default in making payment within a reasonable time by the assignee. *Dist. of Columbia v. McBlair*, 124 U. S. 320, 8 Sup. Ct. 547, 31 L. ed. 449.

95. *Stephens v. Magruder*, 31 Md. 168.

[a] The commissioner selling has a discretion in reselling when the purchaser does not execute the necessary bond for the purchase money. *Swafford v. Howard*, 20 Ky. L. Rep. 1793, 50 S. W. 43.

96. *Doyle v. Whitridge*, 97 Md. 711, 55 Atl. 459; *Laight v. Pell*, 1 Edw. Ch. (N. Y.) 577.

97. *Hooper v. Young*, 58 Ala. 585.

98. *Amato v. Ermann*, 47 La. Ann. 967, 17 So. 505.

[a] That fact would not affect the validity of the title, but simply the question as to the payment of the price. *Lynch v. Kitchen*, 2 La. Ann. 843.

99. *Everson v. Johnson*, 22 Hun (N. Y.) 115.

1. *Hopper v. Hopper*, 79 Md. 400, 29 Atl. 611.

2. *Morris v. Woodward*, 25 N. J. Eq. 32.

3. Ill.—*Wing v. Dodge*, 80 Ill. 564,

this being a defense when sued for the purchase money. Ky.—*Williams v. Glenn's Admr.*, 87 Ky. 87, 7 S. W. 610, 12 Am. St. Rep. 461. Mo.—*Clarke v. Cooper*, 148 Mo. App. 230, 128 S. W. 47.

*Contra*, *Glenn v. Clapp*, 11 Gill & J. (Md.) 1, holding that a purchaser might have a sale set aside before the fund was distributed, where the title was defective and there was a total failure of consideration.

4. *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732.

5. *Bank of Commerce v. Lanahan*, 45 Md. 396; *King v. Platt*, 37 N. Y. 155, 3 Abb. Pr. (N. S.) 434, 35 How. Pr. 23.

6. *Atkinson v. Jefferson College*, 54 W. Va. 32, 46 S. E. 253.

7. *Bean v. Meguiar*, 20 Ky. L. Rep. 885, 47 S. W. 771, where a deputy signed the report in his own name instead of signing as deputy.

8. *Cowan v. Anderson*, 7 Coldw. (Tenn.) 284.

9. Ill.—*Osmond v. Evans*, 269 Ill. 278, 110 N. E. 16; *Ward v. Ward*, 174 Ill. 432, 51 N. E. 806; *Kerfoot v. Billings*, 160 Ill. 563, 43 N. E. 804; *Fairman v. Peck*, 87 Ill. 156. Kan.—*Greenwell v. Moffett*, 77 Kan. 41, 93 Pac. 609. Ky.—*West v. McDonald*, 113 S. W. 872, the objection that the property,

inadequacy of price,<sup>10</sup> is not ground for setting aside the sale.

**6. Matters Relating to Bidding.**—Where a party desirous of purchasing property, by his improper conduct prevents others from bidding against him and thus succeeds in purchasing the property at less than its fair market value, the sale will be set aside.<sup>11</sup> So, an agreement among bidders which prevents competition is a fraud sufficient to set aside a sale.<sup>12</sup> Equity will not, however, set aside the sale at the instance of a party to the agreement.<sup>13</sup> Collusive bidding,<sup>14</sup> and mistake in bidding,<sup>15</sup> are grounds for setting aside the sale, as is the employment of bye bidders or puffers.<sup>16</sup> But it is ordinarily no ground

being divisible, should have been sold in parcels cannot be made by a purchaser. *Miss.*—See *Provine v. Thornton*, 92 *Miss.* 395, 46 *So.* 950. *Mo.* *Benkendorf v. Vincenz*, 52 *Mo.* 441. *N. Y.*—But see *Griffith v. Hadley*, 10 *Bosw.* 587; *Ames v. Lockwood*, 13 *How. Pr.* 555. *Okla.*—*Miller v. Trudgeon*, 16 *Okla.* 337, 86 *Pac.* 523, 8 *Ann. Cas.* 739. *S. D.*—*Thompson v. Browne*, 10 *S. D.* 344, 73 *N. W.* 194. *Tenn.*—*Johnson v. Evans*, 1 *Tenn. Ch.* 603. *Wis.*—*Lloyd v. Frank*, 30 *Wis.* 306.

As to collateral attack, see *infra*, XIX.

As to necessity for sale in parcels, see *supra*, IX, C, 5.

**10. U. S.**—*Schroeder v. Young*, 161 *U. S.* 334, 16 *Sup. Ct.* 512, 40 *L. ed.* 721. *Ill.*—*Bowen v. Bowen*, 265 *Ill.* 638, 107 *N. E.* 129; *Dimmitt v. Flinn*, 229 *Ill.* 111, 82 *N. E.* 249; *Douthett v. Kettle*, 104 *Ill.* 356; *Morris v. Robey*, 73 *Ill.* 462. *Ky.*—*Van Meter v. Van Meter's Assignee*, 88 *Ky.* 448, 11 *S. W.* 80. *N. J.*—See *Ryan v. Wilson*, 64 *N. J. Eq.* 797, 52 *Atl.* 993. *N. Y.*—*American Ins. Co. v. Oakley*, 9 *Paige Ch.* 259.

See *supra*, XII, D, 2.

**11. U. S.**—*Cocks v. Izard*, 7 *Wall.* 559, 19 *L. ed.* 275; *In re Ethier*, 118 *Fed.* 107. *Ill.*—*Kennedy v. Afdal*, 229 *Ill.* 295, 82 *N. E.* 291; *Ingalls v. Rowell*, 149 *Ill.* 163, 36 *N. E.* 1016. *Miss.* *Mitchell v. Harris*, 43 *Miss.* 314; *Patison v. Josselyn*, 43 *Miss.* 373. *N. J.* *Van Dyke v. Van Dyke*, 31 *N. J. Eq.* 176.

[a] **Where Purchaser Chilled Bidding.**—*Toole v. Johnson*, 61 *S. C.* 34, 39 *S. E.* 254; *Herndon v. Gibson*, 38 *S. C.* 357, 17 *S. E.* 145, 37 *Am. St. Rep.* 765, 20 *L. R. A.* 545.

[b] **One who hires another not to bid against him commits a fraud, for**

which the sale may be set aside. *Barne v. Mays*, 88 *Ga.* 696, 16 *S. E.* 67.

**12. Ill.**—*Mansfield v. Wallace*, 217 *Ill.* 610, 75 *S. E.* 682; *Quigley v. Breckenridge*, 180 *Ill.* 627, 54 *N. E.* 580; *Wilson v. Kellogg*, 77 *Ill.* 47; *Garrett v. Moss*, 20 *Ill.* 549. *Ind.*—See *Goldman v. Oppenheim*, 118 *Ind.* 95, 20 *N. E.* 635. *Ia.*—*Fleming's Heirs v. Hutchinson*, 36 *Iowa* 519; *Kerwer v. Allen*, 31 *Iowa* 578. *Mo.*—*Shuck v. Missouri Lumber & Min. Co.*, 244 *Mo.* 366, 148 *S. W.* 609. *Neb.*—*Goble v. O'Connor*, 43 *Neb.* 49, 61 *N. W.* 131. *Ohio.*—*Saxton v. Seiberling*, 48 *Ohio St.* 554, 29 *N. E.* 179. *Pa.*—*Phelps v. Benson*, 161 *Pa.* 418, 29 *Atl.* 86. *Tenn.*—*McMinn's Legatees v. Phipps*, 3 *Sneed* 196.

See *supra*, IX, K, 5.

[a] **There may be exceptions to the rule**, as where bidders are interested with one another in protecting liens, or where one cotenant bids for the others. *Shuck v. Missouri Lumber & Min. Co.*, 244 *Mo.* 366, 148 *S. W.* 609. See also *Fairy v. Kennedy*, 68 *S. C.* 250, 47 *S. E.* 138, and *supra*, IX, K, 5.

**13. Harrell v. Wilson**, 108 *N. C.* 97, 12 *S. E.* 889.

**14. Ark.**—See *Nash v. Delinquent Lands*, 111 *Ark.* 158, 163 *S. W.* 1147. *Mo.*—*Miltenberger v. Morrison*, 39 *Mo.* 71; *Wooton v. Hinkle*, 20 *Mo.* 290. *N. Y.* *Fisher v. Hersey*, 17 *Hun* 370, appeal dismissed, 78 *N. Y.* 387, employment of puffer.

**15. Conover v. Walling**, 15 *N. J. Eq.* 173, where a less price was obtained than otherwise would have been offered.

**16. McDowell v. Simms**, 41 *N. C.* 278; *Morehead v. Hunt*, 16 *N. C.* 35. See *Woods v. Hall*, 16 *N. C.* 411, 415. See *supra*, IX, K, 5.

for vacating a judicial sale that only a few bidders were present,<sup>17</sup> or that only one bid was received.<sup>18</sup>

**7. Reversal and Modification of the Judgment or Decree.**—Where a party to a suit,<sup>19</sup> his attorney,<sup>20</sup> or assignee<sup>21</sup> purchases property at a judicial sale, a subsequent reversal of the judgment or decree under which the sale is made is ground for setting aside the sale.<sup>22</sup> But it is otherwise where the property is bought by a bona fide purchaser without notice,<sup>23</sup> provided the court had jurisdiction to render the decree

**17.** *Learned v. Geer*, 139 Mass. 31, 29 N. E. 215; *Hudgins v. Lanier*, 23 Gratt. (64 Va.) 494.

[a] But where because of inclemency of the weather persons intending to bid are deterred from attending, and the only bidder present lived there, the sale may be set aside, without weighing the conflicting evidence as to the sufficiency of the price at which the sale was made. *Roberts v. Roberts*, 13 Gratt. (54 Va.) 639, 70 Am. Dec. 435.

**18.** *Swires v. Brotherline*, 41 Pa. 135, 80 Am. Dec. 601.

**19. Ala.**—*Phillips v. Benson*, 82 Ala. 500, 2 So. 93; *McDonald v. Mobile Life Ins. Co.*, 65 Ala. 358. **Ark.**—*Millington v. Hill*, 54 Ark. 239, 15 S. W. 606; *Fishback v. Weaver*, 34 Ark. 569. **Cal.** *Barnhart v. Edwards*, 128 Cal. 572, 61 Pac. 176; *Purser v. Cady*, 120 Cal. 214, 52 Pac. 489; *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459. **Ill.**—*Denk v. Fiel*, 249 Ill. 424, 94 N. E. 672; *Hay v. Bennett*, 153 Ill. 271, 38 N. E. 645; *Smith v. Brittenham*, 109 Ill. 540; *Fergus v. Woodworth*, 44 Ill. 374. **Kan.** *Hubbard v. Ogden*, 22 Kan. 671. **Ky.** See *Dist. of Clifton v. Pürman*, 33 Ky. L. Rep. 529, 110 S. W. 406. **N. Y.** *Wambaugh v. Gates*, 8 N. Y. 138. **Ohio.** *Roberts v. Price*, 2 Ohio Dec. 681. See *McBride v. Longworth*, 14 Ohio St. 349, 84 Am. Dec. 383. **Okl.**—*Arnold v. Joines*, 150 Pac. 130. **Tenn.**—*Welcker v. Staples*, 88 Tenn. 49, 12 S. W. 340, 17 Am. St. Rep. 869; *Micou v. Davis*, 16 Lea 257. **Tex.**—*Adams v. Odom*, 74 Tex. 206, 12 S. W. 34, 15 Am. St. Rep. 827. **Wash.**—*Prince v. Mottman*, 84 Wash. 287, 146 Pac. 841. **Va.**—*Buchanan v. Clark*, 10 Gratt. (51 Va.) 164. **W. Va.**—*Lowther v. Lowther-Kauffman Oil & Coal Co.*, 75 W. Va. 171, 83 S. E. 49; *Frederick v. Cox*, 47 W. Va. 14, 34 S. E. 958; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102. **Wis.**—See *Jesup*

*v. Racine Bank*, 15 Wis. 604, 82 Am. Dec. 703.

[a] Whether the reversal is based on an amendable or an incurable defect, the rule obtains. *McDonald v. Mobile Life Ins. Co.*, 65 Ala. 358.

[b] The next friend of an infant complainant stands in the attitude of a party to the suit and is neither such a stranger nor bona fide purchaser as to render his title good as against the owners of the land upon the reversal of the decree ordering the sale. *Carroll v. Draughon*, 152 Ala. 418, 44 So. 553, 126 Am. St. Rep. 51.

[c] **Exception of Lienholder.**—Where lands encumbered by various liens are sold at the suit of one of the lienholders and are purchased by a lienholder and the proceeds are distributed among the various incumbrancers by order of the court, such purchaser, though a party to the suit, is entitled to the protection which the statute affords to purchasers at judicial sales, upon reversal of the judgment or decree under which the sale was made. *McBride v. Longworth*, 14 Ohio St. 349, 84 Am. Dec. 383.

**20. U. S.**—*Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959. **Ala.**—*Phillips v. Benson*, 82 Ala. 500, 2 So. 93; *Marks v. Cowles*, 61 Ala. 299. **Ill.**—*Smith v. Brittenham*, 109 Ill. 540. **Ky.**—*Salter v. Dunn*, 1 Bush 311. **Tex.**—*Stroud v. Casey*, 25 Tex. 740, 78 Am. Dec. 556.

**21.** *McDonald v. Mobile Life Ins. Co.*, 65 Ala. 358.

**22.** Compare *supra*, IX, I.

**23. U. S.**—*Davis v. Gaines*, 104 U. S. 386, 26 L. ed. 757; *McGoon v. Scales*, 9 Wall. 23, 19 L. ed. 545; *Gray v. Brignardello*, 1 Wall. 627, 17 L. ed. 692; *Grignon's Lessee v. Astor*, 2 How. 319, 11 L. ed. 283; *Voorhees v. Bank of United States*, 10 Pet. 449, 9 L. ed. 490; *The John Twohy, Jr.*, 189 Fed. 965. **Ala.**—*Phillips v. Benson*, 82 Ala.

or judgment,<sup>24</sup> and the decree is not void.<sup>25</sup> To be within the protection of the rule the purchaser must have paid the purchase money,<sup>26</sup> and he must show that he is a purchaser of the legal title, not a mere equity, or in other words that he has received a deed to the property.<sup>27</sup> When a judgment has been set aside before confirmation of a sale it necessarily follows that the sale must be set aside.<sup>28</sup>

If the judgment is modified on appeal, but not so as to affect that

- 500, 2 So. 93; *Marks v. Cowles*, 61 Ala. 299. See *Lesslie v. Richardson*, 60 Ala. 563. Ark.—*Moore v. Woodall*, 40 Ark. 42. Cal.—*Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Loring v. Illesley*, 1 Cal. 24. Fla.—*Garvin v. Watkins*, 29 Fla. 151, 10 So. 818. Ill.—*Denk v. Fiel*, 249 Ill. 424, 94 N. E. 672; *Lambert v. Livingston*, 131 Ill. 161, 23 N. E. 352; *Barlow v. Stanford*, 82 Ill. 298; *Wadhams v. Gay*, 73 Ill. 415; *Goudy v. Hall*, 36 Ill. 313, 87 Am. Dec. 217. Ind.—*McCormick v. McClure*, 6 Blackf. 466, 39 Am. Dec. 441; *Doe ex dem. Noble v. Swiggett*, 5 Blackf. 328. Ky.—*Harris v. Hopkins*, 166 Ky. 147, 179 S. W. 14; *Gossom v. Donaldson*, 18 B. Mon. 230, 68 Am. Dec. 723; *Campbell v. Johnston*, 4 Dana 177; *Dist. of Clifton v. Pfirman*, 33 Ky. L. Rep. 529, 110 S. W. 406; *May v. Ball*, 22 Ky. L. Rep. 1681, 60 S. W. 722; *Dunn v. Germania Bank*, 8 Ky. L. Rep. 777, 3 S. W. 425. Md.—*Benson v. Yellott*, 76 Md. 159, 24 Atl. 451; *Brendel v. Zion Church*, 71 Md. 83, 17 Atl. 936; *Newbold v. Schlens*, 66 Md. 585, 9 Atl. 849; *Dorsey v. Thompson*, 37 Md. 25; *Ward v. Hollins*, 14 Md. 158; *Wampler v. Wolfinger*, 13 Md. 337. Minn.—*Branley v. Dambly*, 69 Minn. 282, 71 N. W. 1026. Miss.—*Henderson v. Herrod*, 23 Miss. 434; *Doe ex dem. Helm v. Natchez Ins. Co.*, 8 Smed. & M. 197. Mo.—*Lindell Real Estate Co. v. Lindell*, 142 Mo. 61, 43 S. W. 268. Neb.—*Kazebeer v. Nunemaker*, 82 Neb. 732, 118 N. W. 646; *McAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 358. N. Y.—*Hening v. Punnett*, 4 Daly 543; *Holden v. Sackett*, 12 Abb. Pr. 473. N. C.—*Lanier v. Heilig*, 149 N. C. 384, 63 S. E. 69; *Harrison v. Hargrove*, 120 N. C. 96, 26 S. E. 936, 58 Am. St. Rep. 781; *England v. Garner*, 90 N. C. 197; *Morris v. Gentry*, 89 N. C. 248; *Sutton v. Schonwald*, 86 N. C. 198, 41 Am. Rep. 455. Ohio.—*McBride v. Longworth*, 14 Ohio St. 349, 84 Am. Dec. 383; *Irwin v. Jeffers*, 3 Ohio St. 389; *Miller v. Erdhouse*, 7 Ohio Dec. 294. Pa.—See *In re Markle's Est.*, 182 Pa. 393, 38 Atl. 620. Tenn.—*Behrn v. White*, 108 Tenn. 392, 67 S. W. 810; *Micou v. Davis*, 16 Lea 257; *Winchester v. Winchester*, 1 Head 460; *Lewis v. Baker*, 1 Head 385. Tex.—*Huckins v. Kapf*, 14 S. W. 1016, 4 Wills. Civ. Cas., §16. Va.—*Zirkle v. McCue*, 26 Gratt. (67 Va.) 517. Wash.—*Prince v. Mottman*, 84 Wash. 287, 146 Pac. 841. W. Va.—*Lowther v. Lowther-Kauffman Oil & Coal Co.*, 75 W. Va. 171, 83 S. E. 49; *Chapman v. Branch*, 72 W. Va. 54, 78 S. E. 235; *Hansford v. Tate*, 61 W. Va. 207, 56 S. E. 372; *Perkins v. Pfalzgraff*, 60 W. Va. 121, 53 S. E. 913; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102. Wis.—*Jesup v. Racine Bank*, 15 Wis. 604, 82 Am. Dec. 703.
- [a] Where no bond was given to stay the execution of the decree, the purchaser's rights will not be disturbed or affected by a reversal unless it can be shown that there was unfairness or collusion in making the sale. *Garrittee v. Popplein*, 73 Md. 322, 20 Atl. 1070.
24. U. S.—*Gray v. Brignardello*, 1 Wall. 627, 17 L. ed. 692; *The John Twohy, Jr.*, 189 Fed. 965. Ill.—*Denk v. Fiel*, 249 Ill. 424, 94 N. E. 672; *Lambert v. Livingston*, 131 Ill. 161, 23 N. E. 352. Mich.—*Ritson v. Dodge*, 33 Mich. 463. Okla.—*Threadgill v. Colcord*, 16 Okla. 447, 85 Pac. 703. Va.—*Zirkle v. McCue*, 26 Gratt. (67 Va.) 517.
25. *Phillips v. Benson*, 82 Ala. 500, 2 So. 93; *Lowther v. Lowther-Kauffman Oil & Coal Co.*, 75 W. Va. 171, 83 S. E. 49.
26. *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459.
27. *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459.
28. *Thornton v. Thornton*, 23 Ky. L. Rep. 930, 64 S. W. 524.

portion which directs a sale of the property, the sale will not be set aside even though the plaintiff was the purchaser.<sup>29</sup>

**E. PARTIES.**—A bill to set aside a judicial sale may be maintained by one having an interest in the matter<sup>30</sup> although he is not a party to the suit,<sup>31</sup> but he must be interested and injuriously affected by the sale.<sup>32</sup> The court may set aside a sale and order a resale on its own motion to prevent a sacrifice of an infant's property.<sup>33</sup> All persons who will be affected by the decree setting aside the sale must be made parties in a suit to vacate a judicial sale.<sup>34</sup>

**F. LEAVE OF COURT TO FILE BILL.**—It is not necessary to obtain

29. *Barnhart v. Edwards*, 128 Cal. 572, 61 Pac. 176.

30. *Porter v. Graves*, 104 U. S. 171, 26 L. ed. 691; *In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 133 C. C. A. 126 (*reversing* 209 Fed. 138); *Aderholt v. Henry*, 82 Ala. 541, 3 So. 114.

[a] **An executor, legatee, and creditors** of an estate have sufficient interest to maintain a bill to set aside a judicial sale. *Cohen v. Menard*, 136 Ill. 130, 24 N. E. 604.

[b] **The heirs** may have an administrator's sale to himself set aside. *Shaw v. Swift*, 1 Ind. 565.

[c] **A creditor** in his own behalf and for others may apply by petition to have a sale set aside where the administrator has refused to do so, in the name of the administrator, on such terms as the court may impose. *Van Dyke v. Van Dyke*, 31 N. J. Eq. 176.

[d] **Defendant** may move to set aside the sale. *Moore v. Titman*, 33 Ill. 358.

[e] **A purchaser** (1) at the sale may apply to have the sale set aside. **N. C.** *Clayton v. Glover*, 56 N. C. 371. **Pa.** *Johnson's Appeal*, 114 Pa. 132, 6 Atl. 556. **Tenn.**—*Pearson v. Johnson*, 2 Sneed 580. (2) But he may ask to have the sale set aside only when it was fraudulently conducted without his knowledge of the fraud (*Veazie v. Williams*, 8 How. (U. S.) 34, 12 L. ed. 1018), (3) being usually estopped by acceptance of benefits of the sale. *Porter v. Graves*, 104 U. S. 171, 26 L. ed. 691; *French v. Edwards*, 13 Wall. (U. S.) 506, 20 L. ed. 702.

[f] **Purchaser's Surety.**—If the purchaser does not seek to set aside the sale his security cannot do so. *Lillard v. Puckett*, 9 Baxt. (Tenn.) 568.

31. *Goodell v. Harrington*, 76 N. Y. 547; *Rohrback v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451;

*Gould v. Mortimer*, 26 How. Pr. (N. Y.) 167, 16 Abb. Pr. 448; *Kellogg v. Howell*, 62 Barb. (N. Y.) 280.

[a] **In case of sale of infant's property** a stranger may move to set aside the sale where fraud had been perpetrated on the minor. *Ex parte Guernsey*, 21 Ill. 443. See 12 STANDARD PROC. 851.

32. **U. S.**—*In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 133 C. C. A. 126, *reversing* 209 Fed. 138. **La.**—*Dufour v. Leftwick*, 33 La. Ann. 1471; *Gilmer v. Nicholson*, 21 La. Ann. 589. **Md.** *Presstman v. Mason*, 68 Md. 78, 11 Atl. 764. **W. Va.**—*Klapneck v. Keltz*, 50 W. Va. 331, 40 S. E. 570.

[a] **One who has merely a collateral interest** in some question involved without any actual interest in the subject-matter cannot intervene in the proceedings. *The Lottawanna*, 20 Wall. (U. S.) 201, 22 L. ed. 259.

[b] **A bidder whose bid is not accepted** by the auctioneer cannot, in the absence of any other interest, have the tax sale set aside. *Atanasio v. Thompson*, 88 N. J. L. 38, 95 Atl. 737.

33. See 12 STANDARD PROC. 851.

34. **Ala.**—*Branch State Bank v. Hunt*, 8 Ala. 876. **D. C.**—*Edwards v. Maupin*, 7 Mackey 39. **Fla.**—*Howse v. Moody*, 14 Fla. 59. **Ga.**—*Miller v. Butler*, 137 Ga. 90, 72 S. E. 913. **La.**—*Bank of Louisiana v. Delery*, 2 La. Ann. 649. **N. J.**—*Wimpfheimer v. Prudential Ins. Co.*, 56 N. J. Eq. 585, 39 Atl. 916.

[a] **Creditors and Heirs.**—Where heirs seek to set aside a sale under a decree ordered at a creditor's instance the creditor and all heirs should be made parties. *Hoe v. Wilson*, 9 Wall. (U. S.) 501, 19 L. ed. 762.

[b] **A sheriff conducting the sale** is a proper party defendant. *Commercial Bank v. Sandford*, 99 Fed. 154.

[c] **The purchaser** at a judicial sale

leave of court to file a bill to set aside a sale on the ground of fraud.<sup>35</sup>

G. PLEADINGS. — 1. **In General.** — Before confirmation, a judicial sale may be set aside either on motion,<sup>36</sup> by objection to confirmation,<sup>37</sup> or on petition,<sup>38</sup> but not generally by bill to set it aside.<sup>39</sup> For matters appearing on the face of the papers and proceedings in the case, a sale may be confirmed or set aside without a formal motion.<sup>40</sup> But for matter not appearing in the record the proper method of setting aside a sale is by petition,<sup>41</sup> or motion,<sup>42</sup> not by exceptions to the report.<sup>43</sup>

After confirmation, the appropriate remedy to impeach the sale and to obtain a resale, is by original bill,<sup>44</sup> although in some jurisdictions the

is a necessary party to a proceeding to set the sale aside. **Fla.**—*MacFarlane v. MacFarlane*, 50 Fla. 570, 39 So. 995. **Ill.**—*Ellguth v. Ellguth*, 250 Ill. 214, 95 N. E. 169; *Schulz v. Hasse*, 227 Ill. 156, 81 N. E. 50. **Kan.**—*McDonald v. Citizens Bank*, 58 Kan. 461, 49 Pac. 595; *Pope v. Amidon*, 6 Kan. App. 398, 50 Pac. 1093. **Tex.**—*Chase v. First Nat. Bank*, 1 Tex. Civ. App. 595, 20 S. W. 1027.

As to right of purchaser to be heard in opposition, see XII, H.

[d] **Assignees of Purchaser.**—Where land in partition proceedings were sold to plaintiff and the sale duly confirmed, and he thereafter sold to bona fide purchasers, the latter were not necessary parties nor need they be notified of a motion to vacate the sale. *Welch v. Marks*, 39 Minn. 481, 40 N. W. 611.

As to notice to purchaser, see *infra*, XII, H.

35. *McConnel v. Gibson*, 12 Ill. 128.

36. *Phillips v. Benson*, 82 Ala. 500, 2 So. 93; *Coffey v. Coffey*, 16 Ill. 141; *Day v. Graham*, 6 Ill. 435.

37. *Phillips v. Benson*, 82 Ala. 500, 2 So. 93.

As to objections to confirmation, see *supra*, XI, J.

38. **Ala.**—*Aderholt v. Henry*, 82 Ala. 541, 3 So. 114. **Ill.**—*Coffey v. Coffey*, 16 Ill. 141. **Miss.**—*Henderson v. Herrod*, 23 Miss. 434. **N. J.**—*Knickerbocker Trust Co. v. Carteret Steel Co.*, 81 N. J. Eq. 130, 86 Atl. 55. **Tenn.**—*Spence v. Armour*, 9 Heisk. 167.

[a] **Nature of Proceeding.**—A petition to set aside a sale constitutes a proceeding in equity and not under the common law. *Files v. Brown*, 124 Fed. 133, 59 C. C. A. 403.

39. *Phillips v. Benson*, 82 Ala. 500, 2 So. 93; *Sayre v. Elyton Land Co.*, 73

**Ala.** 85. Compare *Wells v. Lenox*, 108 Ark. 366, 159 S. W. 1099.

[a] **As Exception to Report.**—An action to set aside a sale before confirmation and before the report was filed may be deemed an exception to the report. *Taylor v. Gilpin*, 3 Met. (Ky.) 544.

40. *Baker v. Hall*, 29 Kan. 617, 630, and without notice to any person.

41. *Bryant v. McCollum*, 4 Heisk. (Tenn.) 511.

42. *Baker v. Hall*, 29 Kan. 617, 630.

43. *Bryant v. McCollum*, 4 Heisk. (Tenn.) 511.

44. **Ala.**—*Phillips v. Benson*, 2 Ala. 500, 2 So. 93; *Sayre v. Elyton Land Co.*, 73 Ala. 85. **Cal.**—*Thompson v. Superior Court*, 119 Cal. 538, 51 Pac. 863. **Fla.**—*Marsh v. Marsh*, 72 So. 638. **Ill.**—*Clark v. Glos*, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; *Coffey v. Coffey*, 16 Ill. 141; *Day v. Graham*, 6 Ill. 435; *Schweinfurth v. Poehlman*, 83 Ill. App. 428. **N. J.**—*Koegel v. Koegel*, 83 N. J. Eq. 179, 89 Atl. 861. **N. C.**—*Rawls v. Carter*, 119 N. C. 596, 26 S. E. 154; *Smith v. Gray*, 116 N. C. 311, 21 S. E. 200; *Smith v. Fort*, 105 N. C. 446, 10 S. E. 914. **S. C.**—*Orr v. Orr*, 7 S. E. 381. **Tenn.**—*Spence v. Armour*, 9 Heisk. 167; *McMinn's Legatees v. Phipps*, 3 Sneed 196; *Moore v. Watson*, 4 Coldw. 64. **Utah**—*Moore v. Moore*, 42 Utah 140, 129 Pac. 344.

[a] **Where the sale has been confirmed**, the purchase money paid, and the term closed the sale cannot be set aside unless the grounds upon which the application is made are set out in an original bill, and the opposite party has an opportunity of answering, or interposing a plea or demurrer. *Moore v. Watson*, 4 Coldw. (Tenn.) 64.

[b] **When Bill Proper.**—Where the

sale can be set aside after confirmation upon petition,<sup>45</sup> or on motion, after due notice.<sup>46</sup> A party cannot bring an action to set aside the sale if he could have obtained relief by motion,<sup>47</sup> though it has been held that the manner of bringing the matter to the attention of the court is not of particular importance so long as new rights have not intervened and the parties have notice and opportunity to be heard.<sup>48</sup>

**2. Form and Requisites.**—The pleadings should conform to the usual principles of pleading and set forth the facts upon which relief is sought.<sup>49</sup> A bill to relieve one from a purchase at a judicial sale

original suit is determined, or the purchaser was not a party to the original suit, or where the suit is undetermined and one of the parties was the first purchaser and others not parties have acquired an interest in the property the proceedings should be by bill. *Henderson v. Herrod*, 23 Miss. 434.

**45. Fla.**—*Marsh v. Marsh*, 72 So. 638. **Mich.**—*Butters v. Butters*, 153 Mich. 153, 117 N. W. 203. **N. J.**—*Koegel v. Koegel*, 83 N. J. Eq. 179, 89 Atl. 861; *Mutual Life Ins. Co. v. Goddard*, 33 N. J. Eq. 482; *Woodward v. Bullock*, 27 N. J. Eq. 507. **Va.**—*Langyher v. Patterson*, 77 Va. 470; *Cralle v. Meem*, 8 Gratt. (49 Va.) 496.

[a] **After delivery of the deed**, a sale may be set aside on petition. *Mutual Life Ins. Co. v. Goddard*, 33 N. J. Eq. 482; *Campbell v. Gardner*, 11 N. J. Eq. 423, 69 Am. Dec. 598.

[b] **Treating Bill as Petition.**—If a bill to enjoin collection of the purchase money has been taken, the bill should be treated as a petition, and the matter heard thereon. *Cralle v. Meem*, 8 Gratt. (49 Va.) 496.

[c] **Treating Cross-bill as Petition.** Where a suit is brought in chancery to compel the purchaser to pay the balance of the purchase money, and the purchaser answers averring new matter constituting a claim for affirmative relief and files a cross-bill for the same purpose, the cross-bill and answer of the appellant should be treated as a petition in the original summary proceeding and relief granted upon it therein. *Ammons v. Ammons*, 50 W. Va. 390, 40 S. E. 490.

[d] **Where a sale under a decree in equity is irregular or for some cause inequitable**, the proper remedy of the party is by summary application for resale in the cause. *Brown v. Frost*, 10 Paige (N. Y.) 243; *Nicholl v. Nicholl*, 8 Paige (N. Y.) 349; *Gould v.*

*Mortimer*, 26 How. Pr. (N. Y.) 167, 16 Abb. Pr. 448.

**46. Cal.**—*Thompson v. Superior Court*, 119 Cal. 538, 51 Pac. 863. **N. C.** *Lanier v. Heilig*, 149 N. C. 384, 63 S. E. 69; *Morris v. White*, 96 N. C. 91, 2 S. E. 254. **Utah.**—*Moore v. Moore*, 42 Utah 140, 129 Pac. 344. **Va.**—*Langyher v. Patterson*, 77 Va. 470.

[a] **The proceeding by motion is preferable to that by bill in equity.** *Thompson v. Superior Court*, 119 Cal. 538, 51 Pac. 863; *Moore v. Moore*, 42 Utah 140, 129 Pac. 344.

[b] **Waiver.**—A motion to set aside a confirmation is not waived by later filing a motion to set aside interlocutory orders. *Godfrey v. Cunningham*, 77 Neb. 462, 109 N. W. 765, both motions may be considered at the same time.

**47. Gould v. Mortimer**, 26 How. Pr. (N. Y.) 167, 16 Abb. Pr. 448; *Brown v. Frost*, 10 Paige (N. Y.) 243. *Compare, Thompson v. Superior Court*, 119 Cal. 538, 51 Pac. 863.

**48. Butters v. Butters**, 153 Mich. 153, 117 N. W. 203.

**49. See Godfrey v. Cunningham**, 77 Neb. 462, 109 N. W. 765; *Ward v. West* (Tenn.), 35 S. W. 563; *McMinn's Legatees v. Phipps*, 3 Sneed (Tenn.) 196, and generally the titles "**Bills and Answers**;" "**Declaration and Complaint**."

[a] **Affidavits of the moving party to set aside a sale must state the facts upon which the judicial discretion must be exercised.** *State Realty & Mtg. Co. v. Villaume*, 121 App. Div. 793, 106 N. Y. Supp. 698.

[b] **In alleging fraud the particular acts of fraud must be distinctly alleged.** *Payne v. Payne*, 97 Md. 678, 55 Atl. 368. See also the title "**Fraud and Deceit**," and the following: **U. S.**—*The Kaloolah*, 14 Fed. Cas. No. 7,602. **N. J.**—*Small v. Bou-*

should contain an offer to put the other parties in statu quo.<sup>50</sup>

H. NOTICE.—It seems that before confirmation, a sale may be set aside without notice to the purchaser.<sup>51</sup> After confirmation, however, all parties interested,<sup>52</sup> including the purchaser,<sup>53</sup> must be given notice of the proceedings. It has been held that the assignee of the purchaser should be given notice,<sup>54</sup> although there are cases to the contrary.<sup>55</sup> But if no notice is required, the assignee may come in by peti-

ding, a proper motion on notice to all persons interested in the sale must be made. *Baker v. Hall*, 29 Kan. 617, 630.

[c] **The grounds of nullity** must be set forth. An allegation that the description by which the property was sold is "faulty" does not warrant the conclusion that the sale is a nullity. *Smith v. Krause & Managan Lumber Co.*, 125 La. 703, 51 So. 693.

[d] **The means of preventing competition** in bidding, when such is the ground on which it is sought to set aside the sale, must be fully set out in the petition. *Evers v. Watson*, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. ed. 520.

[e] **Although the secret employment of a bye bidder** may be a fraud upon the vendee, he must aver in his bill and show that he abandoned the contract as soon as he discovered the fraud. *McDowell v. Simms*, 41 N. C. 278.

50. *Fraser v. Fraser*, 128 Ill. App. 73; *Stockton v. Downey*, 6 La. Ann. 581. See also *Farquhar v. Iles*, 39 La. Ann. 874, 2 So. 791; *Barelli v. Gauche*, 24 La. Ann. 324.

[a] **As to pleading tender or return of consideration**, see *Washburn v. Carmichael*, 32 Iowa 475, and generally the titles "Rescission and Cancellation;" "Tender."

51. *Hay's Appeal*, 51 Pa. 58.

[a] **When confirmation is resisted** on the ground that the bid was less than the appraised value, "it is not clear that the court should have directed any notice to" the bidder. However this may be, he cannot complain when he attended the second sale. *Hay's Appeal*, 51 Pa. 58.

[b] **For matters appearing on the face of the proceedings**, a sale may be confirmed or set aside without a formal motion and without notice to any person. But for matters not so appear-

ing, a proper motion on notice to all persons interested in the sale must be made. *Baker v. Hall*, 29 Kan. 617, 630.

[c] **In Missouri**, the court having control over the execution of its process may set aside the sale without notice to the purchaser, at the term to which the report is made. *Burden v. Taylor*, 124 Mo. 12, 27 S. W. 349; *Neiman v. Early*, 28 Mo. 475.

52. *Butters v. Butters*, 153 Mich. 153, 117 N. W. 203; *Langyher v. Patterson*, 77 Va. 470.

[a] **Contents**.—A notice of motion to vacate or set aside a sale must state specifically the grounds of irregularity, and it is not sufficient to state them in the moving affidavits alone. *German-American Bank v. Dorthy*, 39 App. Div. 166, 57 N. Y. Supp. 172.

53. **U. S.**—*Halliday v. Stuart*, 151 U. S. 229, 14 Sup. Ct. 302, 38 L. ed. 141; *Morrison v. Burnette*, 154 Fed. 617, 83 C. C. A. 391. **Ark.**—*Miller v. Henry*, 105 Ark. 261, 150 S. W. 700, Ann. Cas. 1914D, 754. **Cal.**—*Thompson v. Superior Court*, 119 Cal. 538, 51 Pac. 863. **Fla.**—*MacFarlane v. MacFarlane*, 50 Fla. 570, 39 So. 995. **Ill.**—*Schulz v. Hasse*, 227 Ill. 156, 81 N. E. 50; *Roberts v. Clelland*, 82 Ill. 538; *Dunning v. Dunning*, 37 Ill. 306. **Mich.** *Butters v. Butters*, 153 Mich. 153, 117 N. W. 203. **Tex.**—*Burks v. Bennett*, 62 Tex. 277. **Va.**—*Langyher v. Patterson*, 77 Va. 470.

But see *Kirby v. Circuit Court*, 10 S. D. 38, 71 N. W. 140.

**Where purchaser has failed to pay**, see *infra*, XIII, C.

**As to right to be heard**, see *infra*, XII, I.

54. *Lawrence v. Jarvis*, 36 Mich. 281.

55. *Roberts v. Clelland*, 82 Ill. 538; *Kirby v. Circuit Court*, 10 S. D. 38, 71 N. W. 140, because no notice to purchaser was necessary.

tion within a reasonable time and obtain leave of court to contest the motion.<sup>56</sup>

I. HEARING AND DETERMINATION.<sup>57</sup>—The purchaser at a judicial sale has a right to be heard in opposition to an application to set aside the sale.<sup>58</sup> In determining the right of the petitioner to have the sale set aside, the courts must have recourse to the principles which would govern in a proceeding to rescind a contract of sale,<sup>59</sup> considering also whether the parties interested are under disabilities.<sup>60</sup> Where sufficient grounds are alleged, it is error to refuse to hear evidence.<sup>61</sup> The court may view the premises.<sup>62</sup> Whether or not a sale shall be vacated or set aside rests largely in the sound discretion of the court,<sup>63</sup> but a strong case must be presented before relief will be granted where the sale has been confirmed, and the conveyance executed and the pur-

56. *Roberts v. Clelland*, 82 Ill. 538; *Comstock v. Purple*, 49 Ill. 158.

57. **Form of order setting aside sale** on ground of mistake and inadequacy of price, see 9 STANDARD PROC. 751.

58. **U. S.**—*Davis v. Mercantile Trust Co.*, 152 U. S. 590, 14 Sup. Ct. 693, 38 L. ed. 563; *Kneeland v. American L. & Tr. Co.*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. ed. 379; *Blossom v. Milwaukee R. Co.*, 1 Wall. 655, 17 L. ed. 673. **Ala.**—*Aderholt v. Henry*, 82 Ala. 541, 3 So. 114. **Mo.**—*Thomas v. Elliott*, 215 Mo. 598, 114 S. W. 987; *Wauchope v. McCormick*, 158 Mo. 660, 59 S. W. 970. **W. Va.**—*Connell v. Wilhelm*, 36 W. Va. 598, 15 S. E. 245; *Hughes & Co. v. Hamilton*, 19 W. Va. 366.

**As to right to notice**, see *supra*, XII, H.

**Right of assignee to resist motion**, see *supra*, XII, H.

59. *Koegel v. Koegel*, 83 N. J. Eq. 179, 89 Atl. 861.

60. *Kiebel v. Leick*, 216 Ill. 474, 75 N. E. 187.

[a] But the settled principles governing judicial sales are applicable alike to infants and adults, and where there is no ground for setting aside a sale except of an advance bid, the fact that some of the parties are infants will not be controlling. *Litton v. Flanary*, 116 Va. 710, 82 S. E. 692.

61. *Dilley v. Jasper Lumber Co.*, 103 Tex. 22, 122 S. W. 255.

62. *Medland v. Van Etten*, 75 Neb. 794, 106 N. W. 1022, in deciding a motion.

63. **U. S.**—*Milwaukee R. Co. v. Souter*, 5 Wall. 660, 18 L. ed. 678. **Cal.**—*Beehtel v. Wier*, 152 Cal. 443, 93 Pac.

75, 15 L. R. A. (N. S.) 549; *Humboldt, etc. Society v. March*, 136 Cal. 321, 68 Pac. 968; *In re Jack's Est.*, 115 Cal. 203, 46 Pac. 1057. **Del.**—*Central Trust & Savings Co. v. Chester County Electric Co.*, 9 Del. Ch. 123, 77 Atl. 771. **Mich.**—*Brewer v. Landis*, 111 Mich. 217, 69 N. W. 493; *Nugent v. Nugent*, 54 Mich. 557, 20 N. W. 584. **Neb.**—*Strode v. Hoagland*, 76 Neb. 542, 107 N. W. 754; *Roberts v. Robinson*, 49 Neb. 717, 68 N. W. 1035, 59 Am. St. Rep. 567. **N. Y.**—*Matter of Supt. of Banks*, 207 N. Y. 11, 100 N. E. 428; *Fisher v. Hersey*, 78 N. Y. 387; *Hale v. Clauson*, 60 N. Y. 339; *German-American Bank v. Dorthy*, 39 App. Div. 166, 57 N. Y. Supp. 172; *Everson v. Johnson*, 22 Hun 115; *Purdy v. Wilkins*, 95 Misc. 706, 160 N. Y. Supp. 17. **N. C.**—*Harrell v. Blythe*, 140 N. C. 415, 53 S. E. 232. **Okla.**—*Sparks v. National Bank of Lawton*, 21 Okla. 827, 97 Pac. 575. **Wis.**—*Homestead Land Co. v. Schlitz Brewing Co.*, 94 Wis. 600, 69 N. W. 346.

**Review on appeal**, see *infra*, XII, J.

[a] The court's power and discretion is not an arbitrary one, and can be exercised only for cause showing such irregularities or misconduct as presumably interfered with the property bringing its reasonable value. The court must regard the rights of all the parties, including the purchaser. *Bethurum v. Baker*, 166 Ky. 507, 179 S. W. 426.

[b] **Fraud should be established** by clear and satisfactory proof. See the following: **Ill.**—*Wilson v. Kellogg*, 77 Ill. 47. **Ky.**—*Caulder v. Elmore*, 171 Ky. 575, 188 S. W. 666. **Mich.**—*Page v. Kress*, 80 Mich. 85, 44 N. W. 1052,

chaser put in possession.<sup>64</sup> A court in setting aside a sale may impose terms.<sup>65</sup>

**J. REVIEW.—Appealability of Order.** — An order setting aside a sale,<sup>66</sup> or refusing to set it aside,<sup>67</sup> is such a final order as may be appealed.

**Who May Appeal.** — A purchaser at the sale,<sup>68</sup> whether or not he was a party to the suit,<sup>69</sup> or his assignee,<sup>70</sup> may appeal from an order setting aside a sale.

**Determination.** — As the application is addressed to the discretion of the court, the appellate court will not review the determination,<sup>71</sup>

20 Am. St. Rep. 504; *Ledyard v. Phillips*, 32 Mich. 13. *Miss.—Locke v. Keiler*, 90 Miss. 3, 43 So. 673.

[c] But see *Fisher v. Hersey*, 78 N. Y. 387, holding that where fraud is alleged, equity may order a resale upon facts casting such a degree of suspicion upon the fairness of the sale as to render it expedient to vacate the sale although the fraud may not clearly be established.

64. *Southern Cotton Mills v. Ragan*, 138 Ga. 504, 75 S. E. 611. See *Smith's Estate*, 188 Pa. 222, 41 Atl. 542.

[a] Although there may have been irregularities in the sale, the court will not set aside a sale upon a petition filed sixteen months after confirmation, where it appears the purchaser has been placed in possession, paid practically all the purchase money, and there is no offer to refund the money, and no averment in the petition that the land was sold at an inadequate price. *Smith's Estate*, 188 Pa. 222, 41 Atl. 542.

65. *Las Vegas Ry. & Power Co. v. Trust Co.*, 15 N. M. 634, 110 Pac. 856; *German-American Bank v. Dorothy*, 39 App. Div. 166, 57 N. Y. Supp. 172; *German-American Bank v. Dorthy*, 39 App. Div. 646, 57 N. Y. Supp. 171. See *Vingut v. Ketcham*, 102 App. Div. 403, 92 N. Y. Supp. 605.

66. *Ill.—Bondurant v. Bondurant*, 251 Ill. 324, 96 N. E. 306; *Barnes v. Henshaw*, 226 Ill. 605, 80 N. E. 1076. *Neb.—Penn Mutual Life Ins. Co. v. Creighton Theatre Bldg. Co.*, 51 Neb. 659, 71 N. W. 279; *Berkley v. Lamb*, 8 Neb. 392, 1 N. W. 320. *Ohio.—Mayer v. Wick*, 15 Ohio St. 548. *Wis.—Jesup v. Racine Bank*, 15 Wis. 604, 82 Am. Dec. 703.

[a] As Involving a "Freehold." An order setting aside a sale prevents

the purchaser from obtaining title and therefore involves a freehold, so that an appeal therefrom may be taken directly to the supreme court under the Illinois practice. *Bondurant v. Bondurant*, 251 Ill. 324, 96 N. E. 306; *Barnes v. Henshaw*, 226 Ill. 605, 80 N. E. 1076.

67. *Woodward v. Bullock*, 27 N. J. Eq. 507.

[a] **Order Continuing Consideration of Confirmation.**—Where an order does not set aside a sale, but continues the consideration of the confirmation of the sale to a future term it is interlocutory and not appealable. *National Bank v. Jarvis*, 26 W. Va. 785; *Childs v. Hurd*, 25 W. Va. 530.

68. *Neb.—Penn Mut. Life Ins. Co. v. Creighton Theatre Bldg. Co.*, 51 Neb. 659, 71 N. W. 279. *Tenn.—Newland v. Gaines*, 1 Heisk. 720. *W. Va.—Kable v. Mitchell*, 9 W. Va. 492.

[a] A purchaser who has conveyed to another would be injuriously affected by an order setting aside the sale and may appeal. *Lawrence v. Jarvis*, 36 Mich. 281.

[b] In Missouri, the purchaser is not given by statute the right to appeal from an order setting aside a sale in partition. *Thomas v. Elliott*, 215 Mo. 598, 602, 605, 114 S. W. 987, *overruling Wauchope v. McCormick*, 158 Mo. 660, 59 S. W. 970.

69. *Knickerbocker Trust Co. v. Carteret Steel Co.*, 81 N. J. Eq. 130, 86 Atl. 55; *Chamberlain v. Larned*, 32 N. J. Eq. 295.

70. *Newland v. Gaines*, 1 Heisk. (Tenn.) 720.

71. *Neb.—Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900, 65 N. W. 1059; *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281, 58 N. W. 695. *N. Y.—Hale v. Clauson*, 60 N. Y.

except for an abuse of discretion by the court below.<sup>72</sup>

K. **RESTRAINING PROCEEDING.**—It seems that in a proper case an injunction will lie to restrain a party from moving to set aside a sale.<sup>73</sup>

**XIII. RESALE.**—A. **IN GENERAL.**<sup>74</sup>—The court in its discretion may order a resale of the property.<sup>75</sup> Where the sale has been completed, the court alone has power to order a resale.<sup>76</sup> But where the sale was not consummated for want of bidders or other cause, the officer can proceed and sell the property on a new advertisement under the original decree of sale, without an order of court.<sup>77</sup> And where the purchaser refuses to comply with his bid, the commissioner or sher-

339; *Dows v. Congdon*, 28 N. Y. 122; *Wakeman v. Price*, 3 N. Y. 334, 3 Code Rep. 196. **N. C.**—*Weil v. Woodard*, 104 N. C. 94, 10 S. E. 129. **Pa.** *Williams' Estate*, 140 Pa. 187, 21 Atl. 242, as the matter is within the discretion of the court no appeal lies unless there is an abuse of discretion.

See *supra*, XII, 1.

[a] **Statement of Rule.**—It is the exclusive province of the trial judge to find the facts of the matter in applications to relieve from a judgment taken against the party through his mistake, surprise, etc. Such findings are not reviewable by the appellate court. It is, however, the duty of the appellate court to determine whether or not the facts found, in any reasonable view of them, constitute such mistake, surprise, etc., and if they do not, then order a reversal. Or if the court denies the motion on the ground the facts do not present a case for the exercise of his discretion, then the appellate court may review his decision. *Weil v. Woodard*, 104 N. C. 94, 10 S. E. 129.

72. **U. S.**—*In re Shea*, 126 Fed. 153, 61 C. C. A. 219. **Okla.**—*Sparks v. City National Bank*, 21 Okla. 827, 97 Pac. 575. **Wis.**—*John Paul Lumb. Co. v. Neumeister*, 106 Wis. 243, 82 N. W. 144; *Koop v. Burris*, 95 Wis. 301, 70 N. W. 473; *Homestead Land Co. v. Schlitz Brewing Co.*, 94 Wis. 600, 69 N. W. 346.

73. See *Rogers v. Holyoke*, 14 Minn. 220.

[a] **The fact that no report of sale was made** is not sufficient ground for an injunction restraining a party from moving to set aside a sale. *Rogers v. Holyoke*, 14 Minn. 220, the court may be called upon to pass on this objection.

[b] **One not a party to the action**

cannot proceed by a suit for an injunction in the absence of any question which cannot be determined on the motion to set aside the sale. *Rogers v. Holyoke*, 14 Minn. 220.

74. **Form of bond on resale**, see 9 STANDARD PROC. 751.

75. **U. S.**—*Ballentyne v. Smith*, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. ed. 803; *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. ed. 732. **N. Y.**—*Goodell v. Harrington*, 76 N. Y. 547; *Hale v. Clauson*, 60 N. Y. 339. **N. C.**—*Harrell v. Blythe*, 140 N. C. 415, 53 S. E. 232; *Pritchard v. Askew*, 80 N. C. 86.

**Discretion in setting aside sale**, see *supra*, XII, 1.

[a] **There must have been a consummated sale in the first place.** *Greffet v. Willman*, 114 Mo. 106, 21 S. W. 459; *Hall v. Giesing*, 178 Mo. App. 233, 165 S. W. 1181. See also *Schaefer v. O'Brien*, 49 Md. 253. But see *Brown v. Frost*, 10 Paige (N. Y.) 243.

76. *Peirson v. Fisk*, 99 Mich. 43, 57 N. W. 1080.

[a] **The officer selling has no such power.** *Peirson v. Fisk*, 99 Mich. 43, 57 N. W. 1080.

77. **Miss.**—*Vannerson v. Cord, Smed. & M. Ch.* 345. **N. Y.**—*Hewlett v. Davis*, 3 Edw. Ch. 338. **Can.**—*Sherwood v. Campbell*, 1 Ch. Chamb. 299.

[a] **The commissioner's power to sell is not exhausted by his first attempt to sell, unless he is restricted by the decree or his authority limited to a sale at a particular time.** Upon a failure to sell from accident or the non-compliance of the purchaser he has full power to advertise and sell again. *Vannerson v. Cord, Smed. & M. Ch.* (Miss.) 345.

iff may ignore the bid and immediately resell the property,<sup>78</sup> but he cannot wait until the sale is closed and the bidders have departed before again offering the property for sale,<sup>79</sup> unless he readvertises the sale.<sup>80</sup> Where the purchaser has failed to pay the agreed price the court may order a resale at the purchaser's risk, holding him responsible for any deficiency,<sup>81</sup> or may set aside the first sale, release the purchaser, and direct a resale.<sup>82</sup>

78. **Ill.**—See *Dills v. Jasper*, 33 Ill. 262. *Compare*, *Augustine v. Doud*, 1 Ill. App. 588. **Ky.**—*Carter v. Carter*, 23 Ky. L. Rep. 1963, 66 S. W. 624. **Neb.** *Jones v. Null*, 9 Neb. 254, 2 N. W. 350. **N. Y.**—*Egan v. Buellesbach*, 116 App. Div. 306, 101 N. Y. Supp. 476; *In re Philip*, 95 Misc. 709, 160 N. Y. Supp. 49. **Tex.**—*Sypert v. McCowen's Exrs.*, 28 Tex. 635; *Short's Admr. v. Ramsey*, 18 Tex. 397. **W. Va.**—*Lowman v. Funkhouser* (W. Va.), 90 S. E. 340.

79. **Mo.**—*Barnard v. Duncan*, 38 Mo. 170, 90 Am. Dec. 416. **Neb.**—*Jones v. Null*, 9 Neb. 254, 2 N. W. 350. **N. Y.** *In re Philip*, 95 Misc. 709, 160 N. Y. Supp. 49.

80. *In re Philip*, 95 Misc. 709, 160 N. Y. Supp. 49.

[a] **Rule Explained.**—In the rule that the referee may immediately upon the purchaser's refusal to comply with the terms of the sale resell the property without application to the court, the word "immediately" has reference to putting up for sale without a court order. When the property is struck off, the terms of the sale complied with so far as required on the sales day and the bidders have departed, the referee cannot resell without a compliance with the statute as to notice. *In re Philip*, 95 Misc. 709, 160 N. Y. Supp. 49.

81. **U. S.**—*Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. ed. 608. **Ala.**—*Howison v. Oakley*, 118 Ala. 215, 23 So. 810. **Ark.**—*PHELPS v. Jackson*, 31 Ark. 272. **Cal.**—*Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167. **Ga.**—*Smith v. Roberts*, 106 Ga. 409, 32 S. E. 375. **Ill.**—*Thriffs v. Fritz*, 101 Ill. 457; *Hill v. Hill*, 58 Ill. 239; *Dines v. Dussair*, 164 Ill. App. 89. **Ky.**—*Napper v. Mutual Life Ins. Co.*, 107 Ky. 134, 53 S. W. 28, 92 Am. St. Rep. 340; *Page v. Hughes*, 9 B. Mon. 115. **La.**—*Succession of Haggerty*, 28 La. Ann. 87; *Miltenberger v. Hill*, 17 La. Ann. 52. **Md.**—*Schaefer v. O'Brien*,

49 Md. 253; *Gordon v. Matthews*, 30 Md. 235; *Farmers & Planters Bank v. Martin*, 7 Md. 342, 61 Am. Dec. 350. **Mich.**—*Peirson v. Fisk*, 99 Mich. 43, 57 N. W. 1080. **Miss.**—*Mount v. Brown*, 33 Miss. 566, 69 Am. Dec. 362. **Mo.** *Hewitt v. Lally*, 51 Mo. 93. **Mont.** *State v. Dist. Court*, 27 Mont. 415, 71 Pac. 401. **N. Y.**—*Strauss v. Bendheim*, 162 N. Y. 469, 56 N. E. 1007 (*reversing* 44 App. Div. 82, 60 N. Y. Supp. 398); *Goodwin v. Simonson*, 73 N. Y. 133; *Rowley v. Feldman*, 84 App. Div. 400, 82 N. Y. Supp. 679. **N. C.**—*Hudson v. Coble*, 97 N. C. 260, 1 S. E. 688; *Ex parte Pettillo*, 80 N. C. 50; *In re Yates*, 59 N. C. 212. **Tenn.**—*Fulton v. Davidson*, 3 Heisk. 614. **Tex.**—*Dawson v. Miller's Admr.*, 20 Tex. 171, 70 Am. Dec. 380. **W. Va.**—*Lowman v. Funkhouser*, 90 S. E. 340; *Stout v. Philippi Mfg. & Mercantile Co.*, 41 W. Va. 339, 23 S. E. 571; *Hyman, Moses & Co. v. Smith*, 13 W. Va. 744. **Eng.**—*Harding v. Harding*, 4 Myl. & Cr. 514, 41 Eng. Reprint 198. **Can.**—*In re Heely*, 1 Ch. Chamb. (U. C.) 54; *Crooks v. Crooks*, 4 Grant's Ch. (U. C.) 376.

[a] It is entirely discretionary with the court whether upon a motion it will direct the purchaser to complete the sale or direct a resale at the expense of the purchaser. *Burton v. Linn*, 21 App. Div. 609, 47 N. Y. Supp. 835; *Dunlop v. Mulry*, 40 Misc. 131, 81 N. Y. Supp. 260.

As to the order, see *infra*, XIII, E. Sale upon same conditions as a prerequisite to liability, see *infra*, XIII, G.

82. **Cal.**—*Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167. **Ga.**—*Smith v. Roberts*, 106 Ga. 409, 32 S. E. 375. **Md.**—*Sloan v. Safe-Deposit & Trust Co.*, 73 Md. 239, 90 Atl. 922 (where the purchaser became insolvent before complying with the terms of sale); *Gibson's Case*, 1 Bland 50. **N. Y.**—*Latourette v. Latourette*, 25 App. Div. 145, 48 N. Y. Supp. 1076.

**B. HOW ORDER OBTAINED.** — A resale may be ordered on the court's own motion.<sup>83</sup> Where the purchaser fails to comply with his bid, an order of resale may be obtained by a petition<sup>84</sup> or motion<sup>85</sup> in the original cause, or a rule to show cause.<sup>86</sup> There is no necessity of resorting to an original bill where a purchaser on time defaults in his payments.<sup>87</sup>

**C. NOTICE.** — A defendant, who has appeared, is entitled to notice of an application for a resale.<sup>88</sup> In order to charge the purchaser with any deficiency arising on a resale caused by his failure to pay, he must be given notice,<sup>89</sup> although there is authority to the effect that inas-

**N. C.**—Hudson v. Coble, 97 N. C. 260, 1 S. E. 688. **W. Va.**—Stout v. Philippi Mfg. & Merc. Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

**[a] When Bidder May Be Released.** A bidder unable to pay down the 10% in cash according to the terms of sale and upon asking for a day's adjournment to procure it may be excused from his bid when the property was later resold for a sum less than his bid, when he had acted in good faith and thought the practice was to allow time to procure the money. *Leslie v. Saratoga Brew. Co.*, 59 App. Div. 400, 69 N. Y. Supp. 581.

**[b] In case of insolvency or inability to pay the purchaser may be released from his bid.** *Hodder v. Ruffin*, 1 Ves. & B. 544, 35 Eng. Reprint 212; *In re Heely*, 1 Ch. Chamb. (U. C.) 54.

**83.** *Le Fevre v. Laraway*, 22 Barb. (N. Y.) 167.

**84.** *Thrifths v. Fritz*, 101 Ill. 457; *Stephens v. Magruder*, 31 Md. 168. See *supra*, XII, G.

**[a] Origin of Right To Sell at Purchaser's Risk.**—The right to resell at the first purchaser's risk is a condition of every judicial sale implied by law, and depends neither upon conditions in the order of sale nor the terms announced at the time of the sale. *Howison v. Oakley*, 118 Ala. 215, 23 So. 810.

**85.** *Thrifths v. Fritz*, 101 Ill. 457; *Van Name v. Queens Land & Title Co.*, 137 App. Div. 940, 122 N. Y. Supp. 720. See *supra*, XII, G.

**86.** **U. S.**—*Stuart v. Gay*, 127 U. S. 518, 8 Sup. Ct. 1279, 32 L. ed. 191, citing *Koontz v. Northern Bank*, 16 Wall. 196, 21 L. ed. 465, where purchaser on time defaulted. **Va.**—*Whitehead v. Bradley*, 87 Va. 676, 13 S. E. 195. **W. Va.**—*Lowman v. Funkhouser*, 90 S. E. 340.

**87.** *Stuart v. Gay*, 127 U. S. 518, 527, 8 Sup. Ct. 1279, 32 L. ed. 191; *Stephens v. Magruder*, 31 Md. 168.

**[a] Reason.**—The cause is open and pending, awaiting a final decree distributing the proceeds of the sale, in which no further step can be taken until the proceeds are paid in full compliance with its decrees. *Stuart v. Gay*, 127 U. S. 518, 8 Sup. Ct. 1279, 32 L. ed. 191; *Stephens v. Magruder*, 31 Md. 168.

**88.** *Robinson v. Meigs*, 10 Paige (N. Y.) 41. *Compare supra*, XII, G.

**89.** **U. S.**—*Bayne v. Brewer Pottery Co.*, 90 Fed. 622. **Ala.**—See *Oakley v. Howison*, 131 Ala. 505, 32 So. 644. **Cal.**—*Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167. **Ga.**—*Green v. Ansley*, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110. **Ill.**—*Harbison v. Timmons*, 139 Ill. 167, 28 N. E. 982; *Thrifths v. Fritz*, 101 Ill. 457; *Hill v. Hill*, 58 Ill. 239; *Tilton v. Pearson*, 67 Ill. App. 372. **Md.**—*Schaefer v. O'Brien*, 49 Md. 253. **N. C.**—*In re Yates*, 59 N. C. 306. **Ohio.**—*Galpin v. Lamb*, 29 Ohio St. 529. **Va.**—*Thornton v. Fairfax*, 29 Gratt. (70 Va.) 669. **W. Va.**—*Stout v. Philippi Mfg. Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

*Compare supra*, XII, H.

**[a] Form of Notice.**—Where the statute does not provide its character, the notice may be that the purchaser pay the amount of his bid within a certain time, and in default thereof that there be a resale, holding him responsible for any deficiency, or that he appear and show cause why he should not pay his bid and complete the sale. *Peirson v. Fisk*, 99 Mich. 43, 57 N. W. 1080.

**[b] Remedy Where Recital of Notice Is Untrue.**—If an order of resale at the purchaser's risk reciting that he

much as a purchaser becomes a party to the cause by his act of purchase he is not entitled to notice.<sup>90</sup>

D. PREREQUISITES TO ORDER. — Before ordering a resale the amounts and priorities of liens must be ascertained.<sup>91</sup>

E. THE ORDER. — Where the purchaser fails or refuses to complete his purchase, the order may release the purchaser and direct a resale,<sup>92</sup> or it may provide for a resale holding the purchaser responsible for any deficiency.<sup>93</sup> In the latter case, the former sale is not set aside, but the property is sold as that of the purchaser.<sup>94</sup> The court directing the resale may require the first purchaser to release to the purchaser on the resale all the title he may have acquired.<sup>95</sup>

Imposing Conditions. — Where the parties were not entitled as a matter of right to a resale, the court may impose terms as a condition to granting the relief.<sup>96</sup>

F. REVIEW. — The order granting or refusing a resale, in so far as it is discretionary, is not ordinarily reviewable on appeal.<sup>97</sup>

G. THE SALE. — Where a sale is vacated and a resale ordered, the resale must be advertised and conducted in all respects as the first sale,<sup>98</sup> except that it need not necessarily be on the same terms.<sup>99</sup> To hold the first purchaser liable for any deficiency, however, the resale must be made, as near as may be upon the same terms as the first sale.<sup>1</sup>

had notice is untrue in this regard, the purchaser's remedy is to move to vacate or modify the order and upon a denial thereof to appeal. *Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167.

90. *Ky.*—*Fenley v. Tyler*, 18 Ky. L. Rep. 666, 37 S. W. 679. *Miss.*—*Pearson v. Moreland*, 7 Smed. & M. 609, 45 Am. Dec. 319. *Tenn.*—*Simmons v. Redmond*, 62 S. W. 366; *Vaughn v. Tealey*, 39 S. W. 868; *Mosby v. Hunt*, 9 Heisk. 675; *Munson v. Payne*, 9 Heisk. 672.

91. *Payne v. Webb*, 23 W. Va. 558.

92. *Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167. See *supra*, XIII, A.

93. *Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167. See *supra*, XIII, A.

As to action against purchaser, see *infra*, XVI.

[a] To charge the purchaser with any deficiency on the second sale, the order should direct the purchaser to complete his purchase within a time fixed by the court, and, in default thereof, a sale of the property at the bidder's risk and expense. *III.*—*Thriffs v. Fritz*, 101 Ill. 457; *Hill v. Hill*, 58 Ill. 239. *Md.*—*Schaefer v. O'Brien*, 49 Md. 253. *W. Va.*—*Stout v. Philippi*

*Mfg. & Merc. Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

94. *Whitehead v. Bradley*, 87 Va. 676, 13 S. E. 195; *Virginia Fire & M. Ins. Co. v. Cottrell*, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108; *Hurt v. Jones*, 75 Va. 341; *Clarkson v. Read*, 15 Gratt. (56 Va.) 288.

95. *Stuart v. Gay*, 127 U. S. 518, 527, 8 Sup. Ct. 1279, 32 L. ed. 191.

96. *Vingut v. Ketcham*, 102 App. Div. 403, 92 N. Y. Supp. 605. See *German-American Bank v. Dorthy*, 39 App. Div. 166, 57 N. Y. Supp. 172.

97. *Fisher v. Hersey*, 78 N. Y. 387; *Goodell v. Harrington*, 76 N. Y. 547; *Hale v. Clauson*, 60 N. Y. 339. See *supra*, XII, J.

[a] An order refusing a resale is appealable where the facts were such as to give the complaining party a right to have the sale vacated and a resale ordered. *Fisher v. Hersey*, 78 N. Y. 387; *Howell v. Mills*, 53 N. Y. 322, 332.

98. *Howison v. Oakley*, 118 Ala. 215, 23 So. 810.

99. *Ala.*—*Howison v. Oakley*, 118 Ala. 215, 23 So. 810. *Pa.*—*Whilden v. Singerly*, 3 Phila. 218. *Va.*—*Dickinson v. Clement*, 87 Va. 41, 12 S. E. 105.

1. *Cal.*—*Hammond v. Cailleaud*, 111

A resale of property sold under foreclosure must be made subject to redemption.<sup>2</sup>

H. COSTS.—Where the irregular conduct of the purchaser<sup>3</sup> or his mistake,<sup>4</sup> necessitate a resale he may be charged with the costs.

**XIV. RENTING THE PROPERTY.**<sup>5</sup>—An estate ordered to be sold is under the protection of the court, and may be rented until a sale can be effected.<sup>6</sup>

**XV. COMPELLING EXECUTION OF DEED AND GIVING OF POSSESSION.**—A summary proceeding before the court, not mandamus, is the proper remedy to compel the execution of a deed under a certificate of sale,<sup>7</sup> although some courts hold mandamus to be a proper remedy.<sup>8</sup> A writ of assistance is an appropriate remedy to place in possession a purchaser or his assignee under a decree of sale,<sup>9</sup> but where no writ of possession is asked and the case has been finally disposed of, the purchaser will be remitted to his remedy at law to recover possession.<sup>10</sup>

Upon the death of the commissioner before issuance of a deed, the purchaser may by motion have a new commissioner appointed.<sup>11</sup>

**XVI. REMEDIES WHERE PURCHASER FAILS TO COMPLY WITH BID.**<sup>12</sup>—Where after confirmation of a sale the purchaser fails

Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167. Ga.—Smith v. Roberts, 106 Ga. 409, 32 S. E. 375. La.—Labauve v. McCabe, 34 La. Ann. 183. N. J.—Shinn v. Roberts, 20 N. J. L. 435, 43 Am. Dec. 636. N. Y.—Riggs v. Pursell, 74 N. Y. 370; Baecht v. Hevesy, 115 App. Div. 509, 101 N. Y. Supp. 413. Pa.—Weast v. Derrick, 100 Pa. 509.

2. Brusckhe v. Wright, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125, reversing 62 Ill. App. 358.

3. Kennedy v. Afdal, 229 Ill. 295, 82 N. E. 291; Brundige v. Morrison, 56 Md. 407; Schaefer v. O'Brien, 49 Md. 253.

4. Vingut v. Vingut, 62 Hun 622, 17 N. Y. Supp. 159.

5. Determining that rental will not pay judgment within specified period, as condition precedent to sale, see *supra*, III, D.

6. Williams' Case, 3 Bland (Md.) 186. See Barnett v. Kincaid, 2 Lans. (N. Y.) 320.

7. People v. Bowman, 181 Ill. 421, 55 N. E. 148, 72 Am. St. Rep. 265, sale under decree of foreclosure.

8. State v. Cunningham, 6 Idaho 113, 53 Pac. 451.

[a] A sheriff cannot resist the granting of a mandamus to compel him to execute a deed on the ground that he has already issued one to another person, who has sold and conveyed the premises to a bona fide purchaser. People *ex rel.* Post v. Fleming, 2 N. Y. 484.

[b] Conditions Precedent.—A purchaser at a judicial sale will not be entitled to a writ of mandamus to enforce his rights without a clear showing that he has done at the proper time everything necessary to complete the purchase. People *ex rel.* Monroe v. Circuit Judge, 19 Mich. 296.

9. See 3 STANDARD PROC. 143, 144.

[a] Pending Appeal.—Inasmuch as the reversal of the decree cannot affect the rights of the purchaser not a party, he need not await final decision before applying for a writ of possession. Lambert v. Livingston, 131 Ill. 161, 23 N. E. 352.

10. Planters' Bank v. Fowlkes, 4 Sneed (Tenn.) 461.

11. Campbell v. Farley, 158 N. C. 42, 73 S. E. 103; Kemp v. Kemp, 35 N. C. 491, 496.

12. Right of officer to ignore bid and resell, see *supra*, XIII.

or refuses to comply with his bid, the court has the power and may compel him to complete his purchase,<sup>13</sup> upon petition,<sup>14</sup> or by motion,<sup>15</sup>

13. **U. S.**—Wood *v.* Mann, 3 Sumn. 318, 322, 30 Fed. Cas. No. 17,954. See Blossom *v.* Milwaukee, etc. R. Co., 3 Wall. 196, 18 L. ed. 43. **Neb.**—Maul *v.* Hellman, 39 Neb. 322, 58 N. W. 112. **N. Y.**—Archer *v.* Archer, 155 N. Y. 415, 50 N. E. 55, 63 Am. St. Rep. 688 (*affirming* 84 Hun 297, 32 N. Y. Supp. 410, 65 N. Y. St. 609); Proctor *v.* Farnam, 5 Paige 614. **Tenn.**—Dibrell *v.* Williams, 3 Coldw. 528; Vanbibber *v.* Sawyers, 10 Humph. 81, 51 Am. Dec. 694; Deaderick *v.* Smith, 6 Humph. 138. **W. Va.**—Lowman *v.* Funkhouser, 90 S. E. 340. **Wis.**—Atkins *v.* Richardson, 18 Wis. 244.

[a] This jurisdiction continues and will be exercised so long as the control of the court over the case and parties remain. The death of one of the parties or his security will not defeat the jurisdiction of the court. Dibrell *v.* Williams, 3 Coldw. (Tenn.) 528.

[b] **Status of Purchaser.**—A purchaser becomes a party to the proceedings, and brings himself within the court's jurisdiction in the cause for the enforcement, not only of the terms of sale against him, but also of terms in his favor against the officer who has made the sale. *In re* Two Rivers Wood- enware Co., 199 Fed. 877, 118 C. C. A. 325.

[c] The order of the court should require him to pay in a reasonable time, four days being too short and three months too long. Atkinson *v.* Richardson, 15 Wis. 594.

[d] That the purchaser was bidding for another will not prevent the court from enforcing the bid. Ogilvie *v.* Richardson, 14 Wis. 157.

[e] The assignee of the bidder (1) may also be compelled to complete the purchase, for the reason that one who interferes pendente lite with the subject-matter of the suit submits himself to the jurisdiction of the court and may be compelled to complete his purchase. Archer *v.* Archer, 155 N. Y. 415, 50 N. E. 55, 63 Am. St. Rep. 688; Proctor *v.* Farnam, 5 Paige (N. Y.) 614. But see Weaver *v.* Nelson (Miss.), 12 So. 597, holding that (2) where the commissioner sold on credit, and the purchasers without having paid resold the

property, the court could not subject the purchasers from the bidders to an order to pay the bid of the vendors or surrender the property to the commissioner, inasmuch as they were not parties to the original suit.

**Form of order compelling purchaser to complete his purchase**, see 9 STANDARD PROC. 752.

14. **N. J.**—McCarter *v.* Finch, 55 N. J. Eq. 245, 36 Atl. 937; Silver *v.* Campbell, 25 N. J. Eq. 465. **N. Y.**—Wanser *v.* De Nyse, 188 N. Y. 378, 80 N. E. 1088, 117 Am. St. Rep. 871; Archer *v.* Archer, 155 N. Y. 415, 50 N. E. 55, 63 Am. St. Rep. 688; Proctor *v.* Farnam, 5 Paige 614. **Wis.**—Atkinson *v.* Richardson, 18 Wis. 244.

15. **N. Y.**—Carstens *v.* Locasto, 172 App. Div. 760, 159 N. Y. Supp. 270; *In re* Callahan's Will, 159 N. Y. Supp. 942. **N. C.**—Marsh *v.* Nimocks, 122 N. C. 478, 29 S. E. 840, 65 Am. St. Rep. 715; Hudson *v.* Coble, 97 N. C. 260, 1 S. E. 688. **Wis.**—Atkinson *v.* Richardson, 18 Wis. 244.

[a] **In the Pending Action.**—The motion to compel the purchaser to complete the sale should be made in the action in which the sale is ordered. Van Name *v.* Queen's Land & Title Co., 137 App. Div. 940, 122 N. Y. Supp. 720.

**Form of notice of motion to compel purchaser to complete his purchase**, see 9 STANDARD PROC. 752.

**Form of affidavit to move to compel purchaser to complete his purchase**, see 9 STANDARD PROC. 751.

[b] The court may, on motion, and without notice, enter judgment and award execution against him for the purchase money. Blackmore *v.* Barker, 2 Swan (Tenn.) 340; Deaderick *v.* Smith, 6 Humph. (Tenn.) 138, 146.

[c] **Where notes of the purchaser** (1) payable to the clerk are taken, judgment may be rendered on motion without notice, at maturity of the notes. Still *v.* Boon, 5 Sneed (Tenn.) 380; Eagan *v.* Phister, 5 Sneed (Tenn.) 298. (2) The purchaser may appeal from such judgment. Eagan *v.* Phister, 5 Sneed (Tenn.) 298.

[d] **Investigation of Title.**—(1) When an objection, which may involve either a question of fact or a

by summary proceedings without original bill.<sup>16</sup> The purchaser may be proceeded against by rule or attachment,<sup>17</sup> by an action for damages for the purchase price,<sup>18</sup> or in the event of a resale, for the deficiency

question of law on undisputed facts, is made that there are outstanding rights and interests not concluded by the decree of sale, the court will decline to pass upon the objection and will relieve the purchaser from his purchase. *In re Callahan's Will*, 159 N. Y. Supp. 942. But see *Graham v. Bleakie*, 2 Daly (N. Y.) 55, holding that (2) where a rule was made against the purchaser to enforce compliance with his bid, he may have a reference to inquire into the title, and if it prove defective he will not be compelled to complete the purchase.

16. *Silver v. Campbell*, 25 N. J. Eq. 465; *Marsh v. Nimocks*, 122 N. C. 478, 29 S. E. 840, 65 Am. St. Rep. 715.

17. **U. S.**—*Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. ed. 608; *Blossom v. Milwaukee*, etc. R. Co., 1 Wall. 655, 17 L. ed. 673; *The Kate Williams*, 2 Flip. 50, 14 Fed. Cas. No. 7,623. **Cal.**—*Halleck v. Guy*, 9 Cal. 181, 70 Am. Dec. 643. **Fla.**—*Alfred v. McGahagan*, 39 Fla. 118, 21 So. 802. **Ga.** *Smith v. Roberts*, 106 Ga. 409, 32 S. E. 375. **Ill.**—*Kiebel v. Leick*, 216 Ill. 474, 75 N. E. 187. **Ky.**—*Vance's Admr. v. Foster*, 9 Bush 359. **Ia.**—*Lund v. Baccich*, 134 La. 410, 64 So. 226. **Md.** *Schaefer v. O'Brien*, 49 Md. 253; *Farmers & Planters Bank v. Martin*, 7 Md. 342, 61 Am. Dec. 350; *Anderson v. Foulke*, 2 Har. & G. 346. **Mich.**—*Peirson v. Fisk*, 99 Mich. 43, 57 N. W. 1080. **N. J.**—*Bowne v. Ritter*, 26 N. J. Eq. 456. **N. Y.**—*Goodwin v. Simonson*, 74 N. Y. 133; *Brasher's Exrs. v. Cortlandt*, 2 Johns. Ch. 505; *Rowley v. Feldman*, 84 App. Div. 400, 82 N. Y. Supp. 679. **N. C.**—*In re Yates*, 59 N. C. 212. **Ohio.**—*Under Rev. St.*, §5397; *Coreoran v. Pacific Building Assn.*, 8 Ohio Dec. 111, 5 Wkly. L. Bul. 712; *Murphy v. Hardee*, 22 Ohio Cir. Ct. 511, 12 Ohio Cir. Dec. 837. **S. C.**—*Haig v. Confiscated Estates Comm.*, 1 Desaus. Eq. 112. **Va.**—*Richardson v. Jones*, 106 Va. 540, 56 S. E. 343; *Robertson v. Smith*, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 723; *Williams v. Blakey*, 76 Va. 254. **Wash.**—*Rice v. Ahlman*, 70 Wash. 12, 126 Pac. 66. **W. Va.** *Stout v. Philippi Mfg. & Merc. Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St.

Rep. 843. **Eng.**—*Landsdown v. Elderton*, 14 Ves. Jr. 512, 33 Eng. Reprint 617.

[a] **Order To Show Cause.**—The application to punish for contempt must be made by an order to show cause and not on notice of motion. *Dunlop v. Mulry*, 40 Misc. 131, 81 N. Y. Supp. 260, *affirmed*, 83 N. Y. Supp. 177.

[b] **Where no bond or security is given** for the payment of the purchase price the purchaser may be compelled to complete his purchase by a summary order; but where a bond is given the purchaser or his surety cannot be compelled to pay the bond in a summary way, by the court. *Richardson v. Jones*, 3 Gill & J. (Md.) 163, 22 Am. Dec. 293.

18. **Ala.**—See *Culli v. House*, 133 Ala. 304, 32 So. 254, form of complaint. **Cal.**—*Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167. **Ga.**—*Downing v. Peabody*, 56 Ga. 40. **Md.**—*Farmers & Planters Bank v. Martin*, 7 Md. 342, 61 Am. Dec. 350. **N. Y.** See *Latourette v. Latourette*, 25 App. Div. 145, 48 N. Y. Supp. 1076. **Ohio.** *Murphy v. Hardee*, 22 Ohio C. C. 511, 12 Ohio Cir. Dec. 837. **Pa.**—*King v. Gunnison*, 4 Pa. 171. **Tex.**—*Dawson v. Miller's Admr.*, 20 Tex. 171, 70 Am. Dec. 380.

See the title "Specific Performance."

[a] **A confirmation (1) is a necessary prerequisite to the action** (Ark. *Freeman v. Watkins*, 52 Ark. 446, 13 S. W. 79. **Miss.**—*Campe v. Saucier*, 68 Miss. 278, 8 So. 846, 24 Am. St. Rep. 273. **Tex.**—*Dowling v. Duke*, 20 Tex. 181), unless (2) the purchaser has defaulted so as to render confirmation legally impossible. *Culli v. House*, 133 Ala. 304, 32 So. 254.

[b] **After Unsuccessful Suit on Bond.** Where a purchaser at a trustee's sale gave bond according to the order of sale, but afterward by fraud defeated an action brought on the bond, he may still be held liable in equity on a bill showing his improper conduct, though limitations may meanwhile have barred the bond at law. *Richardson v. Jones*, 3 Gill & J. (Md.) 164, 22 Am. Dec. 293.

arising on the second sale,<sup>19</sup> or by a suit for specific performance.<sup>20</sup> Any deficiency on the resale may be recovered in an action by the person entitled to the proceeds,<sup>21</sup> or by the officer who made the sale.<sup>22</sup>

The summary process exercised by courts of equity to compel a purchaser to complete his bid is merely cumulative of the remedy by action at law.<sup>23</sup>

**XVII. COLLECTING AND DISTRIBUTING PROCEEDS.**—As a commissioner appointed by decree to sell has no powers except those conferred upon him by the order of his appointment,<sup>24</sup> generally he is authorized and required to collect the proceeds of the sale.<sup>25</sup> He

[c] **Authority of a special commissioner to sue a purchaser on his notes** may be implied from authority to withdraw and collect them. *Monroe v. Hurry*, 72 W. Va. 821, 79 S. E. 830. See *Clarke's Admr. v. Shanklin*, 24 W. Va. 30.

[d] **Showing in Answer.**—In an action to enforce a bid in order to avoid payment on the ground of mistake the bidder must have asked to have the bid set aside, and offered to place the parties in statu quo, and, where he has resold the property, at least to account for the proceeds of the resale by him. *First Nat. Bank v. Conger*, 37 Iowa 474.

19. *Howison v. Oakley*, 118 Ala. 215, 23 So. 810; *Cobb v. Wood*, 8 Cush. (Mass.) 228.

[a] **An action for damages accrues** as soon as the purchaser refuses to comply with his obligation, and may be brought before the expiration of the time of credit allowed. *Mount v. Brown*, 33 Miss. 566, 69 Am. Dec. 362.

**As to release of purchaser upon ordering a resale**, see *supra*, XIII, A.

**Sale upon same conditions as a prerequisite to liability**, see *supra*, XIII, G.

[b] **The complaint must allege** that the defendant's bid was accepted and approved by the court, but it is not necessary to aver that there was a resale. *Howison v. Oakley*, 118 Ala. 215, 23 So. 810.

20. *Cal.*—*Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167. *Ga.*—*Smith v. Roberts*, 106 Ga. 409, 32 S. E. 375. *N. J.*—*Bowne v. Ritter*, 26 N. J. Eq. 456. *N. C.*—*Hudson v. Coble*, 97 N. C. 260, 1 S. E. 688. *Ohio.*—*Pierce v. Stewart*, 61 Ohio St. 422, 56 N. E. 201. *Va.*—See *McAl-*

*lister v. Harman*, 101 Va. 17, 42 S. E. 920.

See the title "**Specific Performance.**"  
21. *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297.

22. *Ala.*—*Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297. *Ark.*—*Harder v. Sayle-Stegall Comm. Co.*, 61 Ark. 66, 31 S. W. 979. *Cal.*—*Hammond v. Cailleaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167. *Md.*—*Farmers & Planters Bank v. Martin*, 7 Md. 342, 61 Am. Dec. 350. *N. J.*—*Shinn v. Roberts*, 20 N. J. L. 435, 43 Am. Dec. 636. *Ohio.*—*Galpin v. Lamb*, 29 Ohio St. 529, 534; *Mayer v. Wick*, 15 Ohio St. 548; *Murphy v. Hardee*, 22 Ohio Cir. Ct. 511, 12 Ohio Cir. Dec. 837.

[a] **Under statute, a motion by the officer who made the sale will lie** to recover any deficiency arising upon the resale. *Hewitt v. Lally*, 51 Mo. 93.

23. *Ga.*—*Smith v. Roberts*, 106 Ga. 409, 32 S. E. 409. *Ky.*—*Helm v. Dameron*, 10 Ky. L. Rep. 450. *N. J.*—*Townshend v. Simon*, 38 N. J. L. 239; *Shinn v. Roberts*, 20 N. J. L. 435, 43 Am. Dec. 636. *Tex.*—*Dawson v. Miller's Admr.*, 20 Tex. 171, 70 Am. Dec. 380. *Va.*—See *Clarkson v. Read*, 15 Gratt. (56 Va.) 288.

24. *Blair v. Core*, 20 W. Va. 265.

25. *Kan.*—*Studebaker v. Johnson*, 41 Kan. 326, 21 Pac. 271, 13 Am. St. Rep. 287; *Ferguson v. Tutt*, 8 Kan. 370. *Md.*—*Dent v. Maddox*, 4 Md. 522. *Miss.*—*Coulter v. Herrod*, 27 Miss. 685. *Neb.*—*Craw v. Abrams*, 68 Neb. 546, 94 N. W. 639; *Fire Assn. of Philadelphia v. Ruby*, 58 Neb. 730, 79 N. W. 723; *Clark & L. Investment Co. v. Way*, 52 Neb. 204, 71 N. W. 1021. *N. C.*—*Brown v. Coble*, 76 N. C. 391. *Tenn.*—*Matthews v. Thompson*, 2 Heisk. 588. *Va.*—*Finney v. Edwards*, 75 Va. 44.

must hold it until confirmation, and then pay it to the person entitled thereto,<sup>26</sup> without waiting for the execution of the deed.<sup>27</sup> It is the duty of the one selling, when an order distributing the proceeds has been made, either to pay the money to the party directed,<sup>28</sup> or to pay the same into court.<sup>29</sup> If he fails to do so he may in an appropriate proceeding be charged therewith.<sup>30</sup> The proceeds may be distributed upon motion.<sup>31</sup> But the officer selling has no right to file a petition praying a distribution of the proceeds.<sup>32</sup>

**XVIII. REDEMPTION.**—The right of redemption is purely statutory,<sup>33</sup> and one seeking to redeem must comply substantially with all

[a] **A commissioner with authority to take notes** payable to himself, has authority to receive payment of the notes when they fall due. *Matthews v. Thompson*, 2 Heisk. (Tenn.) 588.

[b] **A special commissioner cannot collect the proceeds** unless the original or a subsequent decree or order gives him authority to do so. *Blair v. Core*, 20 W. Va. 265.

26. *Ferguson v. Tutt*, 8 Kan. 370; *Fire Assn. of Philadelphia v. Ruby*, 58 Neb. 730, 79 N. W. 723; *Bachle v. Webb*, 11 Neb. 423, 9 N. W. 473.

[a] **Decree Construed.**—Where the terms of the decree of sale are that the proceeds "will after payment of costs, be applied to pay" certain specified creditors, the master selling cannot pay the money over until the further order of the court. *Penn's Admr. v. Tolleson*, 20 Ark. 652.

27. *Ferguson v. Tutt*, 8 Kan. 370.

28. *Richardson v. State*, 2 Gill (Md.) 439.

[a] **Effect of Absence of Direction.** The fact that the decree appointing the trustee contained no directions that he bring the proceeds of sale into court, cannot be construed as authority for him to disburse them. *Dent v. Maddox*, 4 Md. 522.

[b] **Retaining Proceeds.**—A trustee to sell cannot retain the share of the proceeds awarded to a distributee for the payment of a simple contract debt due to him from the distributee. *Poe v. Snowden*, 70 Md. 383, 17 Atl. 377.

29. *Richardson v. State*, 2 Gill (Md.) 439.

[a] **The court has the power to direct the trustee to bring the proceeds of a sale into court, to be disposed of under its order.** *Sewall v. Costigan*, 1 Md. Ch. 208.

30. *Mackubin v. Brown*, 1 Bland (Md.) 410.

[a] **In North Carolina, an action by the party entitled to the money is the only remedy.** *Smith v. Moore*, 79 N. C. 82.

[b] **Where there is no order directing the master to make a sale, a rule against him to show cause why he has not paid over the proceeds will not lie.** *Ex parte Perry*, Harp. Eq. (S. C.) 50.

31. *Toch v. Toch*, 8 App. Div. 299, 40 N. Y. Supp. 952.

[a] **An action is not necessary.** *Toch v. Toch*, 8 App. Div. 299, 40 N. Y. Supp. 952.

[b] **When Made.**—A motion for distribution of the proceeds should not be made until the sum due from the purchaser has been ascertained, and the money paid into court, and when prematurely made the court may refuse to entertain it, but without prejudice to a later application. *Clark & L. Inv. Co. v. Way*, 52 Neb. 204, 71 N. W. 1021.

[c] **Any person having a lien or entitled to a part of proceeds in court may apply to the court to have their respective interests ascertained and the money paid to the persons entitled thereto.** *Toch v. Toch*, 8 App. Div. 299, 40 N. Y. Supp. 952.

32. *Collins v. Kiederling* (N. J. Eq.), 97 Atl. 948.

33. **Cal.**—*Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 516. **Colo.**—*Conway v. John*, 14 Colo. 30, 23 Pac. 170. **Ill.**—*Zeman v. Ward*, 260 Ill. 93, 102 N. E. 1066; *Hyman v. Bogue*, 135 Ill. 9, 26 N. E. 40; *Littler v. The People*, 43 Ill. 188; *West v. Fleming*, 18 Ill. 248, 68 Am. Dec. 539. **Ky.**—*Columbia Bank v. Carter*, 12 Ky. L. Rep. 969, 15 S. W. 1056. **Minn.**—*Stone v. Bassett*, 4 Minn. 298. **Neb.**—*Gosmunt v. Gloe*, 55 Neb.

the requirements of the statute.<sup>34</sup> The statute allowing redemption from sales on execution and under decrees directing the sale of mortgaged lands does not apply to ordinary chancery sales.<sup>35</sup>

**Who May Redeem**—The persons who may redeem are generally prescribed in the statutes.<sup>36</sup> Generally they may be grouped into three classes: First. The debtor himself, his heirs, devisees or personal representatives. Second. The debtor's vendee, junior mortgagee or assignee of the equity of redemption. Third. The debtor's judgment creditors.<sup>37</sup>

**Time for Redemption.**—The time allowed for redemption is purely statutory.<sup>38</sup> In some states it cannot take place before confirmation,<sup>39</sup> though elsewhere the rule is otherwise.<sup>40</sup>

**To Whom Money May Be Paid.**—The party whose land is sold may pay the redemption money to the purchaser,<sup>41</sup> or to his transferee,<sup>42</sup> or to the clerk of the court in which the property is sold.<sup>43</sup>

709, 76 N. W. 424. **N. Y.**—Crisfield v. Murdock, 127 N. Y. 315, 27 N. E. 1046. **Tenn.**—White v. Bates, 89 Tenn. 570, 15 S. W. 651.

[a] **The right to redemption exists only** in cases of real estate and not of personalty in some states. Conway v. John, 14 Colo. 30, 23 Pac. 170.

[b] **The statute applies to a sale of assigned property** made under a decree obtained by the assignee for creditors. Graves v. Long, 87 Ky. 441, 9 S. W. 297.

[c] **The right to redeem is governed by the law in force at the time of the sale.** Moor v. Seaton, 31 Ind. 11.

[d] **The court cannot take away the right of redemption conferred by statute.** Fitch v. Wetherbee, 110 Ill. 475. See Hall v. Bond, 68 App. Div. 293, 74 N. Y. Supp. 5.

[e] **Where there is no prayer for a sale in bar of the right, a decree of sale barring it is erroneous.** Turner Bros. v. Argo, 89 Tenn. 443, 14 S. W. 930.

34. **Ill.**—Zeman v. Ward, 260 Ill. 93, 102 N. E. 1066; Hyman v. Bogue, 135 Ill. 9, 26 N. E. 40; Littler v. People, 43 Ill. 188; Traeger v. Mutual Bldg. & L. Assn., 63 Ill. App. 286, must be within time allowed by statute. **Ind.** Williams v. Hoffman, 39 Ind. App. 315, 76 N. E. 440. **Ky.**—See Moore v. Bishop, 20 Ky. L. Rep. 1622, 49 S. W. 957. **Minn.**—See White v. Rathbone, 73 Minn. 236, 75 N. W. 1046.

35. West v. Fleming, 18 Ill. 248, 68 Am. Dec. 539; Farnsworth v. Strasler, 12 Ill. 482.

36. See the statutes, and Hewes v. Seal, 80 Miss. 437, 32 So. 55.

37. Owen v. Kilpatrick, 96 Ala. 421, 11 So. 476. See also Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. ed. 721; Fitch v. Wetherbee, 110 Ill. 475; McRoberts v. Conover, 71 Ill. 524.

[a] **As Against Prior Redemptioner.** The right to redeem does not exist in favor of a mortgagee of the debtor as against a prior redemptioner. Owen v. Kilpatrick, 96 Ala. 421, 11 So. 476.

[b] **The death of the judgment debtor after the sale does not affect the judgment creditor's right to redeem.** Jones v. Burden, 20 Ala. 382.

38. See the statutes.

39. Wood v. Morgan, 4 Humph. (Tenn.) 371.

40. Jones v. Burden, 20 Ala. 382; Haskell v. State, 31 Ark. 91.

41. Hitt v. Caney Fork Gulf Coal Co., 124 Tenn. 334, 139 S. W. 693.

[a] **Payment After Notice of Transfer.**—If it is paid to the purchaser after notice of a transfer by him to another the redemption would not be good. Hitt v. Caney Fork Gulf Coal Co., 124 Tenn. 334, 139 S. W. 693.

42. Hitt v. Caney Fork Gulf Coal Co., 124 Tenn. 334, 139 S. W. 693.

[a] **If he pay to the person claiming under the purchaser he assumes the risk of the claim being valid.** Hitt v. Caney Fork Gulf Coal Co., 124 Tenn. 334, 139 S. W. 693.

43. Hitt v. Caney Fork Gulf Coal Co., 124 Tenn. 334, 139 S. W. 693;

A bill to redeem must aver that complainants have paid or tendered the redemption money to the person authorized to receive it.<sup>44</sup> No decree for redemption should be made until the money is paid into court.<sup>45</sup>

**XIX. COLLATERAL ATTACK.**—A sale made and confirmed by a court of competent jurisdiction cannot be attacked in a collateral proceeding, because of errors or irregularities in the proceedings.<sup>46</sup>

Maupin v. Blanton, 93 Tenn. 422, 25 S. W. 99.

44. Hyman v. Bogue, 135 Ill. 9, 26 N. E. 40; Simmons v. Marable, 11 Humph. (Tenn.) 436.

[a] An allegation of readiness to make redemption is insufficient. Hyman v. Bogue, 135 Ill. 9, 26 N. E. 40.

45. Simmons v. Marable, 11 Humph. (Tenn.) 436.

46. U. S.—Hine v. Morse, 218 U. S. 493, 31 Sup. Ct. 37, 54 L. ed. 1123; Thaw v. Falls, 136 U. S. 519, 10 Sup. Ct. 1037, 34 L. ed. 531; Voorhees v. Bank of United States, 10 Pet. 449, 10 L. ed. 490; Jarrell v. Cole, 215 Fed. 315, 131 C. C. A. 589; Wood v. Brown- ing, 176 Fed. 273, 100 C. C. A. 161; May v. Logan County, 30 Fed. 250.

Ala.—Crowder v. Doe *ex dem.* Arnett, 193 Ala. 470, 68 So. 1005; Butler v. Watrous, 185 Ala. 130, 64 So. 346; Birmingham Coal & Iron Co. v. Doe, 181 Ala. 621, 62 So. 26; Haynes v. Simpson, 143 Ala. 554, 39 So. 352; Friedman v. Shamblyn, 117 Ala. 454, 23 So. 821; Daughtry v. Thweatt, 105 Ala. 615, 16 So. 920, 53 Am. St. Rep. 146; Bland v. Bowie, 53 Ala. 152. Alaska. Ebner v. Heid, 2 Alaska 600.

Ark. Washington v. Govan, 73 Ark. 612, 84 S. W. 792; Alexander v. Hardin, 54 Ark. 480, 16 S. W. 264. But see Wells v. Rice, 34 Ark. 346; Fleming v. Johnson, 26 Ark. 421.

Cal.—Searf v. Aldrich, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190; Dennis v. Winter, 63 Cal. 16.

Ill.—Sheahan v. Madigan, 275 Ill. 372, 114 N. E. 135; Redmond v. Cass, 226 Ill. 120, 80 N. E. 708; Frothing- ham v. Petty, 197 Ill. 418, 64 N. E. 270; Field v. Peebles, 180 Ill. 376, 54 N. E. 304; Wing v. Dodge, 80 Ill. 564; Conover v. Musgrave, 68 Ill. 58.

Ind. Denton v. Arnold, 151 Ind. 188, 51 N. E. 240; Meikel v. Borders, 129 Ind. 529, 29 N. E. 29; Davidson v. Hutchins, 112 Ind. 322, 13 N. E. 106; Woolery v. Grayson, 110 Ind. 149, 10 N. E. 935 (unless the decree is void); Hawkins v. Ragan, 20 Ind. 193; Wilkins v. De Pauw, 10 Ind. 159.

Ia.—Ringstad v.

Hanson, 150 Iowa 324, 130 N. W. 145; Hamiel v. Donnelly, 75 Iowa 93, 39 N. W. 210.

Kan.—Lake v. Hathaway, 75 Kan. 391, 89 Pac. 666; Bowman v. Cockrill, 6 Kan. 311; Paine v. Sprat- ley, 5 Kan. 525.

Ky.—Harris v. Hop- kins, 166 Ky. 147, 179 S. W. 14; Sears' Heirs v. Sears' Heirs, 95 Ky. 173, 25 S. W. 600, 44 Am. St. Rep. 213; Daw- son v. Litsey, 10 Bush 408; Guffy v. Anderson, 31 Ky. L. Rep. 407, 102 S. W. 321; McDyer v. Scaggs, 7 Ky. L. Rep. 222.

La.—Hibernia Bk. & Tr. Co. v. Whitney, 122 La. 890, 48 So. 314; Whitaker v. Ashbey, 43 La. Ann. 117, 8 So. 394; Boullemet's Succession, 39 La. Ann. 1046, 3 So. 401; O'Hara v. Booth, 29 La. Ann. 817; Fontelieu's Succession, 28 La. Ann. 638; Doherty v. Leake, 24 La. Ann. 224.

Me.—In- ternational Wood Co. v. The National Assurance Co., 99 Me. 415, 59 Atl. 544, 105 Am. St. Rep. 288.

Md.—Newbold v. Schlens, 66 Md. 585, 9 Atl. 849; Long v. Long, 62 Md. 33; Gregory v. Len- ning, 54 Md. 51.

Mich.—Brown v. Han- nah, 152 Mich. 33, 115 N. W. 980; Pfirman v. Wattles, 86 Mich. 254, 49 N. W. 40.

Miss.—Ladd v. Craig, 94 Miss. 659, 47 So. 777; Morton v. Car- roll, 68 Miss. 699, 9 So. 896; Stampley v. King, 51 Miss. 728.

Mo.—Smith v. Black, 231 Mo. 681, 132 S. W. 1129; Cox v. Boyce, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483; Noland v. Barrett, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572; Exendine v. Morris, 76 Mo. 416; Githens v. Barnhill (Mo. App.), 184 S. W. 145; Bobb v. Graham, 15 Mo. App. 289.

Neb.—Omaha Nat. Bank v. Ferguson, 99 Neb. 131, 155 N. W. 220; Huberman v. Evans, 46 Neb. 784, 65 N. W. 1045; Myers v. Mc- Gavoek, 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627; Neligh v. Keene, 16 Neb. 407, 20 N. W. 277; McKeighan v. Hopkins, 14 Neb. 361, 15 N. W. 711.

N. J.—See Clark v. Costello, 59 N. J. L. 234, 36 Atl. 271; Dickinson v. Tren- ton, 33 N. J. Eq. 63; Runyon v. Newark India-Rubber Co., 24 N. J. L. 467.

N. Y.—Concklin v. Hall, 2 Barb. Ch. 136.

even though the sale was voidable,<sup>47</sup> but it is otherwise where the sale is a nullity.<sup>48</sup>

A decree of sale however erroneous and irregular cannot be collaterally attacked if the court rendering it had jurisdiction,<sup>49</sup> but it is

**N. C.**—Rackley v. Roberts, 147 N. C. 201, 60 S. E. 975; Murray v. Southerland, 125 N. C. 175, 34 S. E. 270. **Ohio.** Herbst v. Bates, 9 Ohio Dec. (Reprint) 444, 13 Wkly. L. Bul. 565. **Okla.** Threadgill v. Coleord, 16 Okla. 447, 85 Pac. 703. **Ore.**—McCulloch v. Estes, 20 Ore. 349, 25 Pac. 724. **S. C.**—McLean v. Crouch, 99 S. C. 118, 82 S. E. 988; Catheart v. Sugenhimer, 18 S. C. 123. As to when proceeding is collateral, see Connor v. McCoy, 83 S. C. 165, 65 S. E. 257. **Tenn.**—Puckett v. Wynns, 132 Tenn. 513, 178 S. W. 1184; Wilson v. Schaefer, 107 Tenn. 300, 64 S. W. 208; Killough v. Warren, 58 S. W. 898; Robertson v. Winchester, 85 Tenn. 171, 1 S. W. 781; Greenlaw v. Greenlaw, 16 Lea 435; Harris McClanahan, 11 Lea 181; Johnson v. Evans, 1 Tenn. Ch. 603; Greenlaw v. Kernahan, 4 Sneed 371. **Tex.**—Holland v. Nance, 102 Tex. 177, 114 S. W. 346; Nash v. Milburn, 25 Tex. 783; Berryman v. McDonald, 49 Tex. Civ. App. 81, 107 S. W. 944; Storer v. Lane, 1 Tex. Civ. App. 250, 20 S. W. 852. **Utah.**—Moore v. Moore, 42 Utah 140, 129 Pac. 344. **Va.**—Lawson v. Moorman, 85 Va. 880, 9 S. E. 150; Wilcher v. Robertson, 78 Va. 602. **W. Va.**—Lee v. Smith, 54 W. Va. 89, 46 S. E. 352; Klapneck v. Keltz, 50 W. Va. 331, 40 S. E. 570. **Wis.**—Anderson v. Chicago Title & Trust Co., 101 Wis. 385, 77 N. W. 710; Eaton v. White, 18 Wis. 517; Farmers & Millers Bank v. Luther, 14 Wis. 96.

[a] One not a party cannot collaterally attack the proceedings. **Ill.** Clark v. Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223. **Tex.**—Grant v. Hill (Tex. Civ. App.), 29 S. W. 247. **Va.**—Turnbull v. Mann, 99 Va. 41, 37 S. E. 288.

As to collateral attack generally see the title "Judgments."

47. **U. S.**—Gibson v. Lyon, 115 U. S. 439, 6 Sup. Ct. 129, 29 L. ed. 440; Ludlow v. Ramsey, 11 Wall. 581, 20 L. ed. 216; Harvey v. Tyler, 2 Wall. 328, 17 L. ed. 871; Voorhees v. Bank of United States, 10 Pet. 449, 9 L. ed. 490; Thompson v. Tolmie, 2 Pet. 157, 7 L. ed. 381. **Ill.**—Clark v. Glos, 180 Ill. 556,

54 N. E. 631, 72 Am. St. Rep. 223. **Ind.** Eliason v. Bronnenburg, 147 Ind. 248, 46 N. E. 582. **Mo.**—Evans v. Robber-son, 92 Mo. 192, 4 S. W. 941, 1 Am St. Rep. 701.

48. Camden v. Haymond, 9 W. Va. 680.

49. **U. S.**—Central Trust Co. v. Peoria, D. & E. R. Co., 118 Fed. 30, 55 C. C. A. 52; Mootry v. Grayson, 104 Fed. 613, 44 C. C. A. 83. **Ala.**—Crowder v. Doe ex dem. Arnett, 193 Ala. 470, 68 So. 1005; Moring v. Tipton, 126 Ala. 350, 28 So. 562; Moore v. Cottingham 113 Ala. 148, 20 So. 994, 59 Am. St. Rep. 100; Cobb v. Garner, 105 Ala. 467, 17 So. 47, 53 Am. St. Rep. 136; Bland v. Bowie, 53 Ala. 152. **Ark.**—Sturdy v. Jacoway, 19 Ark. 499. **Cal.**—Estate of Devincenzi, 119 Cal. 498, 51 Pac. 845; Ions v. Harbison, 112 Cal. 260, 44 Pac. 572; Dane v. Layne, 10 Cal. App. 366, 101 Pac. 1067. **Fla.**—Mann v. Jennings, 25 Fla. 730, 6 So. 771. **Ga.**—Martin v. Dix, 134 Ga. 481, 68 S. E. 80; Adams v. Adams, 113 Ga. 824, 39 S. E. 291. See Sirmans & Bro. v. Sirmans, 74 Ga. 541. **Ill.**—Reinhardt v. Seamans, 208 Ill. 448, 69 N. E. 847; Bradley v. Drone, 187 Ill. 175, 58 N. E. 304, 79 Am. St. Rep. 214. **Ind.**—Thomas v. Thompson, 149 Ind. 391, 49 N. E. 268; Lantz v. Maffett, 102 Ind. 23, 26 N. E. 195. **Ia.**—Rice v. Bolton, 126 Iowa 654, 100 N. W. 634, 102 N. W. 509. **Kan.**—Watkins Land Mortgage Co. v. Mullen, 62 Kan. 1, 61 Pac. 385, 84 Am. St. Rep. 372. **Ky.**—Dennis v. Alves, 113 S. W. 483; Blackwell v. Townsend, 91 Ky. 609, 16 S. W. 587. **Me.**—Lebroke v. Damon, 89 Me. 113, 35 Atl. 1028. **Md.**—Scarlett v. Robinson, 112 Md. 202, 76 Atl. 181; Simpson v. Bailey, 80 Md. 421, 30 Atl. 622; Hamilton v. Traber, 78 Md. 26, 27 Atl. 229, 44 Am. St. Rep. 258. **Mass.**—Thayer v. Winchester, 133 Mass. 447; Perkins v. Fairfield, 11 Mass. 227. **Mich.**—Pratt v. Houghtaling, 45 Mich. 457, 8 N. W. 72. **Miss.**—Shannon v. Summers, 86 Miss. 619, 38 So. 345; Sivley v. Summers, 57 Miss. 712. **Mo.**—Blickensderffer v. Hanna, 231 Mo. 93, 132 S. W. 678; Stark v. Kirchnergraber, 186 Mo. 633, 85 S. W. 868, 105

otherwise if the court had no jurisdiction to make the decree.<sup>50</sup>

The order of confirmation cannot be collaterally impeached for non-jurisdictional irregularities.<sup>51</sup>

Am. St. Rep. 629; *Covington v. Chamblin*, 156 Mo. 574, 57 S. W. 728; *Rogers v. Johnson*, 125 Mo. 202, 28 S. W. 635. **Mont.**—*Plains L. & I. Co. v. Lynch*, 38 Mont. 271, 99 Pac. 847, 129 Am. St. Rep. 645. **Neb.**—*Omaha Nat. Bank v. Ferguson*, 99 Neb. 131, 155 N. W. 220; *Schroeder v. Wilcox*, 39 Neb. 136, 57 N. W. 1031. **N. H.**—*Merrill v. Harris*, 26 N. H. 142, 57 Am. Dec. 359. **N. Y.**—*Smith v. Blood*, 106 App. Div. 317, 94 N. Y. Supp. 667. **N. C.**—*Barefoot v. Musselwhite*, 153 N. C. 208, 69 S. E. 71; *Dickens v. Long*, 109 N. C. 165, 13 S. E. 841. **Ore.**—*Smith v. Whiting*, 55 Ore. 393, 106 Pac. 791. **Pa.**—*Snyder v. Markel*, 8 Watts 416; *Fox v. Winters*, 4 Rawle 174. **S. C.**—*Epperson v. Jackson*, 83 S. C. 157, 65 S. E. 217. **Tenn.**—*Puckett v. Wynns*, 132 Tenn. 513, 178 S. W. 1184; *Wilson v. Schaefer*, 107 Tenn. 300, 64 S. W. 208. **Tex.**—*Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852; *Ross v. Martin* (Tex. Civ. App.), 128 S. W. 718. **Va.**—*Peirce v. Graham*, 85 Va. 227, 7 S. E. 189. **Wash.**—*McKenna v. Cosgrove*, 41 Wash. 332, 83 Pac. 240. **W. Va.**—*First Nat. Bank v. Hyer*, 46 W. Va. 13, 32 S. E. 1000.

See 6 STANDARD PROC. 565.

See generally the title "Judgments."

[a] Though a statute provides that a decree made against a defendant without personal service, who does not appear, is not absolute for eighteen months, or for six months after service of a copy on him, a decree executed by a sale made twelve months after its rendition, which sale was confirmed, is not void on collateral attack on the ground that the record does not show the service of a copy of the decree upon him. *Seelye v. Smith*, 85 Ala. 25, 4 So. 664 (court obtained jurisdiction by publication), *distinguishing Sayre v. Elyton Land Co.*, 73 Ala. 85, wherein the sale was made within six months after rendition of decree upon the ground that attack was a direct and not a collateral one.

[b] Though the failure to execute a bond required to be executed before the execution of a decree of sale, furnishes good ground for refusing to confirm the sale or for setting it aside in a direct proceeding made within a reasonable time, it furnishes no ground for a collateral attack upon a sale made and confirmed, especially where such attack is not made until after a considerable lapse of time, during which there was no complaint on this ground. *Seelye v. Smith*, 85 Ala. 25, 32, 4 So. 664, *distinguishing Sayre v. Elyton Land Co.*, 73 Ala. 85, on the ground that the attack made therein was a direct and not a collateral attack.

50. **Cal.**—*Estate of Devineenzi*, 119 Cal. 498, 51 Pac. 845. **Mo.**—See *Desloge v. Tucker*, 196 Mo. 587, 94 S. W. 283; *Stark v. Kirchgraber*, 186 Mo. 633, 85 S. W. 868, 105 Am. St. Rep. 629. **Neb.**—*Wells v. Steckleberg*, 50 Neb. 670, 70 N. W. 242.

[a] Whether the want of jurisdiction appears affirmatively in the record or not, an unauthorized decree of sale may be attacked collaterally. *Smith v. Wildman*, 178 Pa. 245, 35 Atl. 1047, 56 Am. St. Rep. 760, 36 L. R. A. 834; *Sager v. Mead*, 164 Pa. 125, 30 Atl. 284.

51. **Ala.**—*Kellam v. Richards*, 56 Ala. 238. **Minn.**—*Hotchkiss v. Cutting*, 14 Minn. 537. **Mo.**—*Price v. Springfield R. E. Assn.*, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595; *Tutt v. Boyer*, 51 Mo. 425. **N. C.**—*Spivey v. Harrell*, 101 N. C. 48, 7 S. E. 693. **Tex.**—*Stroud v. Hawkins*, 28 Tex. Civ. App. 321, 67 S. W. 534.

[a] **Fraud.**—An order confirming a judicial sale cannot be collaterally attacked except for fraud practiced upon the court in the procurement of the judgment. *Bank of Pine Bluff v. Levi*, 90 Ark. 166, 118 S. W. 250. But see *Spivey v. Harrell*, 101 N. C. 48, 7 S. E. 693.

# JURIES AND JURORS

By the Editorial Staff.

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## IX. CUSTODY, CONDUCT AND DELIBERATION OF JURY. [See 17 STANDARD PROC.]

## X. DISCHARGE. [See 17 STANDARD PROC.]

### CROSS-REFERENCES:

Coroner's Inquest;	New Trial;
Embracery;	Province of Judge and Jury;
Grand Jury;	Special Interrogatories to Jury;
Inquiry, Writ of;	Trial;
Instructions;	Venire de Novo;
Issues in Pleading and Practice;	Verdict;
Justices of the Peace;	View.

As to trial by jury before a justice of the peace, see the title "Justices of the Peace."

As to issues to jury, see the title "Issues in Pleading and Practice."

As to view by jury see the title "View," and 13 ENCY. OF EV. 953.

As to jurors as witnesses, see 3 ENCY. OF EV. 218, et seq.

For forms, see 9 STANDARD PROC. 752, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. DEFINITION.**<sup>1</sup> — A jury is a body of men who are sworn to declare the facts of a case as they are proven from evidence placed before them.<sup>2</sup> Ordinarily the term "jury" is applied to the petit or trial jury distinctively,<sup>3</sup> which is a body, usually of twelve men, possessing the requisite qualifications, duly summoned, and sworn as required by law.<sup>4</sup>

**II. RIGHT TO TRIAL BY JURY.** — **A. GENERALLY.** — The expression "trial by jury" has a fixed legal significance and imports the

1. As to definition of grand jury, see 10 STANDARD PROC. 608.

As to definition of special or struck jury, see *infra*, VII, G.

2. *State v. Stentz*, 30 Wash. 134, 70 Pac. 241, 63 L. R. A. 807; *State v. Voorhies*, 12 Wash. 53, 40 Pac. 620, quoting *Bouvier's L. Dict.*

Necessity for jury being sworn, see *infra*, VIII.

[a] For other definitions, see the following: Ark.—*State v. Cox*, 8 Ark. 436. Ind.—*Hunnell v. State*, 86 Ind. 431. N. H.—*In re Opinion of Justices*, 41 N. H. 550. Ohio.—*Zanesville, etc. R. Co. v. Bolen*, 76 Ohio St. 376, 81 N. E. 681, 10 Ann. Cas. 658, 11 L. R. A. (N. S.) 1107; *Smith v. Atlantic, etc. R. Co.*, 25 Ohio St. 91; *Lamb v. Lane*, 4 Ohio St. 167, 179. Wash. *State v. Stentz*, 30 Wash. 134, 70 Pac. 241, 63 L. R. A. 807; *State v. Voorhies*, 12 Wash. 53, 40 Pac. 620, citing Code Proc., §50. Wis.—*Norval v. Rice*, 2 Wis. 22.

3. *Bouvier's L. Dict.* (3rd ed.) 1769.

4. *Zanesville, etc. R. Co. v. Bolen*, 76 Ohio St. 376, 81 N. E. 681, 10 Ann. Cas. 658, 11 L. R. A. (N. S.) 1107; *People v. Hopt*, 3 Utah 396, 4 Pac. 256.

[a] Other Definitions.—(1) A petit jury is a body of men, of a designated number, drawn by lot from the jurors in attendance upon the court at a particular session, and sworn to try and determine a question of fact. *State v. Voorhies*, 12 Wash. 53, 40 Pac. 620. (2) "A petit or traverse jury is a jury who try the question in issue and pass finally upon the truth of the facts in dispute." *Bouvier L. Dict.* (3rd ed.) 1769.

As to number of jurors, see *infra*, II, B, 2.

As to qualifications of jurors, see *infra*, VII, F.

As to oath of jury, see *infra*, VIII.

right to such trial in the mode and according to the settled rules of the common law.<sup>5</sup> This right has always been guarded<sup>6</sup> with the ut-

5. **U. S.**—*Black v. Jackson*, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. ed. 801; *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873; *Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. ed. 1061. **Ala.** *Collins v. State*, 88 Ala. 212, 7 So. 260. **Ark.**—*State v. Cox*, 8 Ark. 436. **Idaho.** *In re Dawson*, 20 Idaho 178, 117 Pac. 696, 35 L. R. A. (N. S.) 1146. **Ind.** *Zimmerman v. Carr*, 59 Ind. App. 245, 109 N. E. 218. **Ky.**—*Chesapeake & Ohio Ry. Co. v. Kelly's Admx.*, 161 Ky. 655, 171 S. W. 185. **Mo.**—*Kansas City v. Smith*, 238 Mo. 323, 141 S. W. 1103; *State v. Mansfield*, 41 Mo. 470. **Nev.**—*State v. McClear*, 11 Nev. 39. **N. H.**—*State v. Almy*, 67 N. H. 274, 28 Atl. 372, 22 L. R. A. 744; *Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194; *In re Opinion of Justices*, 41 N. H. 550. **N. J.**—*Brown v. State*, 62 N. J. L. 666, 42 Atl. 811; *Edwards v. Elliott*, 36 N. J. L. 449, 13 Am. Rep. 463. **N. Y.**—*People ex rel. Murray v. Justices*, 74 N. Y. 406; *People ex rel. Metropolitan Bd. of Health v. Lane*, 6 Abb. Pr. (N. S.) 105. **N. C.**—*State v. Rogers*, 162 N. C. 656, 78 S. E. 293, Ann. Cas. 1914A, 867, 46 L. R. A. (N. S.) 38; *State v. Scruggs*, 115 N. C. 805, 20 S. E. 720. **Ohio.**—*Lamb v. Lane*, 4 Ohio St. 167; *Willyard v. Hamilton*, 7 Ohio 111 (pt. 2), 30 Am. Dec. 195. **Pa.**—*Smith v. Times Pub. Co.*, 178 Pa. 481, 36 Atl. 296, 35 L. R. A. 819. **Tenn.**—*Woods v. State*, 130 Tenn. 100, 169 S. W. 558, L. R. A. 1915F, 531. **Tex.**—*Jones v. State*, 52 Tex. Crim. 303, 106 S. W. 345, 124 Am. St. Rep. 1097. **Vt.**—*State v. Peterson*, 41 Vt. 504. **Wis.**—*Reliance Auto Repair Co. v. Nugent*, 159 Wis. 488, 149 N. W. 377; *Oborn v. State*, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966; *Norval v. Rice*, 2 Wis. 22.

[a] From time immemorial a trial by jury "has meant a trial by a tribunal of twelve men, acting only upon a unanimous determination. The origin of this mode of trial is lost in the dimness of the past." *Kleinschmidt v. Dunphy*, 1 Mont. 118.

[b] The words "trial by jury" ex vi termini mean "a trial by twelve men impartially selected from the county in which the alleged crime was

committed, who must unanimously concur in the guilt of the accused before he could be legally convicted." *State v. Hamey*, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846.

[c] The "distinction between trial by jury and inquest of office, is so familiar to every mind, as to leave no sufficient ground for extending to the latter that inviolability which could have been intended only for the former. The one appertains to a mere remedy for the recovery of money, which may be altered at any time without any danger to private security; the other is justly regarded in every state in the union as among the most inestimable privileges of a freeman." *Lessee of Livingston v. Moore*, 7 Pet. (U. S.) 469, 552, 8 L. ed. 751.

[d] In Commissioner's Court.—A trial by a jury consisting of twelve men in a commissioner's court is not a trial by jury in the common-law or constitutional sense. *Luce v. Garrett*, 4 Ind. Ter. 54, 64 S. W. 613.

6. **Colo.**—*City of Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403. **Ga.**—*Flint River S. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248. **N. C.**—*State v. Holt*, 90 N. C. 749, 47 Am. Rep. 544. **Ohio.** *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671.

[a] "Whatever may be the origin or true history of the jury trial, it is certain that, ever since the Magna Charta, the right to it has been esteemed a peculiar and inestimable privilege by the English race. For centuries this Great Charter has been appealed to, as the protector of this people against the encroachment of the prerogative or despotism of the sovereign. The English colonists who settled in America brought with them this love for and veneration of this cherished right." *Alford v. State*, 170 Ala. 178, 54 So. 213, Ann. Cas. 1912C, 1093.

[b] The constitutional right of trial by jury "cannot be too faithfully preserved; and any legislative provision tampering with it should, at the least, be very strictly construed." *Sharp v. Mayor*, 18 How. Pr. (N. Y.) 213.

[c] It "is a most substantial right and, where it has been given its ob-

most care, and is preserved inviolate by the federal and various state constitutions.<sup>7</sup>

**B. COMPOSITION OF JURIES.—1. In General.**—Trial by jury means a trial by a body of men of such number and possessing such qualifications and selected as the law in force at the time prescribes for juries and jurors serving in the courts;<sup>8</sup> and who are in the pres-

servance, should be rigidly enforced.” *Brown v. Greer*, 16 Ariz. 215, 141 Pac. 841.

[d] If “there is any right to which, more than all others, the people . . . have clung with unrelaxing grasp, it is that of trial by jury. They brought it with them from the land of their fathers. In every constitution which has been adopted, they have taken care to secure it against infringement, and put it beyond the power of either the executive, the legislature, or the courts to take it away from any individual.” *North Pennsylvania Co. v. Snowden*, 42 Pa. 488.

7. **U. S.**—*Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. ed. 1061. **Ala.**—*Collins v. State*, 88 Ala. 212, 7 So. 260. **Ariz.**—*Brown v. Greer*, 16 Ariz. 215, 141 Pac. 841. **Cal.**—*Koppikus v. State Capitol Comrs.*, 16 Cal. 248. **Colo.**—*City of Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403. **Del.**—*Bailey v. Philadelphia, etc. R. Co.*, 4 Harr. 389, 44 Am. Dec. 593. **Fla.**—*Blanchard v. Raines’ Exrx.*, 20 Fla. 467. **Ga.**—*Flint River Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248. **Idaho.**—*In re Dawson*, 20 Idaho 178, 117 Pac. 696, 35 L. R. A. (N. S.) 1146. **Ill.**—*Gage v. Ewing*, 107 Ill. 11. **Ind.**—*Zimmerman v. Carr*, 59 Ind. App. 245, 109 N. E. 218. **Ia.**—*In re Bresee*, 82 Iowa 573, 48 N. W. 991. **Kan.**—*Kimball v. Connor*, 3 Kan. 414. **Ky.**—*Rieger v. Schulte*, 151 Ky. 129, 151 S. W. 395. **Minn.**—*Whallon v. Baneroff*, 4 Minn. 109. **Miss.**—*Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300. **Mo.**—*Kansas City v. Smith*, 238 Mo. 323, 141 S. W. 1103; *State v. Allen*, 45 Mo. App. 551. **Mont.**—*Kleinschmidt v. Dunphy*, 1 Mont. 118. **Nev.**—*State v. McClear*, 11 Nev. 39. **N. H.**—*Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194. **N. J.**—*Raphael v. Lane*, 56 N. J. L. 108, 28 Atl. 421; *Edwards v. Elliott*, 36 N. J. L. 449, 13 Am. Rep. 463. **N. Y.**—*People v. McCarthy*, 45 How. Pr. 97. **Ohio.**—*Furnpike Co. v. Parks*, 50 Ohio St. 568, 35 N. E. 304, 28 L. R. A. 769. **Ore.**—*Raymond v. Flavel*, 27 Ore. 219, 40

Pac. 158. **Pa.**—*Byers v. Com.*, 42 Pa. 89. **R. I.**—*Crandall v. James*, 6 R. I. 144. **S. C.**—*White v. Kendrick*, 1 Brev. 469. **S. D.**—*Belatti v. Pierce*, 8 S. D. 456, 66 N. W. 1088. **Tenn.**—*Trigally v. Memphis*, 6 Coldw. 382. **Tex.**—*Cockrill v. Cox*, 65 Tex. 669. **Wis.**—*Reliance Auto Repair Co. v. Nugent*, 159 Wis. 488, 149 N. W. 377.

[a] “The constitutional principle which underlies the right is one to which the people governed by the common law have clung with, perhaps, more tenacity than to any other, and they have justly regarded it as not preserving simply one form of investigating the facts in preference to another, where both would have attained the same result, but as securing the mode of trial which was best calculated to insure a just result and to secure the citizens against the usurpation of authority and against arbitrary or prejudiced action on the part of single individuals, who chanced to be possessed of judicial power.” *Van Sickle v. Kellogg*, 19 Mich. 49, *per Cooley*, J.

8. **U. S.**—*Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873. **Ind. Ter.**—*Dennee v. McCoy*, 4 Ind. Ter. 233, 69 S. W. 858. **Minn.**—*Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437. **Nev.**—*State v. McMahon*, 17 Nev. 365, 30 Pac. 1000; *State v. McClear*, 11 Nev. 39. **N. H.**—*State v. Wilson*, 48 N. H. 398; *In re Opinion of Justices*, 41 N. H. 550. **N. Y.**—*People ex rel. Eckerson v. Trustees*, 151 N. Y. 75, 45 N. E. 384; *Blair v. McCormack Const. Co.*, 123 App. Div. 30, 107 N. Y. Supp. 750; *Hallett v. Boyer*, 114 N. Y. Supp. 559. **Wis.**—*May v. Milwaukee & M. Ry. Co.*, 3 Wis. 219.

[a] The term “jury” means “twelve competent men who are free from all the ties of consanguinity and all other relations that would tend to make them dependent on either party. It means twelve men who are not interested in the event of the suit, and who have no such bias or prejudice in favor

ence and under the superintendence of a judge empowered to instruct them on the law, and, in those jurisdictions where permissible, to advise them on the facts.<sup>9</sup>

A defendant is not entitled to be tried by a jury composed of his own race.<sup>10</sup> Thus, a negro cannot insist upon having a jury composed partly or entirely of colored men.<sup>11</sup> Nor may a member of a certain religious sect insist that men of his religious faith be upon the jury.<sup>12</sup> But a person has the right to insist that each juror shall be impartially selected, and not excluded solely because of his color or religious faith.<sup>13</sup>

**2. Number of Jurors.**<sup>14</sup>—Generally the term jury, without addition or prefix, imports a body of twelve men;<sup>15</sup> and such was the num-

of, or against, either party as would render them partial toward either party." *State v. McClear*, 11 Nev. 39.

As to selection of jurors, see *infra*, III and VII.

**9. U. S.**—*Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873; *United States v. Philadelphia & R. R. Co.*, 123 U. S. 113, 8 Sup. Ct. 77, 31 L. ed. 138; *United States v. Bags of Merchandise*, 2 Sprague 85. **Ind. Ter.**—*Dennet v. McCoy*, 4 Ind. Ter. 233, 69 S. W. 858. **N. H.**—*In re Opinion of Justices*, 41 N. H. 550. **Ohio.**—*Willyard v. Hamilton*, 7 Ohio (pt. 2), 111, 30 Am. Dec. 195.

As to instructions to jury, see the title "Instructions."

**10. People v. Chin Mook Sow**, 51 Cal. 597 (aliens expressly excluded by statute from serving as jurors); *State v. Manuel*, 133 La. 571, 63 So. 174; *State v. Laborde*, 120 La. 136, 45 So. 38.

As to qualifications of jurors, see *infra*, VII, F.

**11. U. S.**—*Martin v. Texas*, 200 U. S. 316, 26 Sup. Ct. 338, 50 L. ed. 497; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667. **Fla.**—*Montgomery v. State*, 53 Fla. 115, 42 So. 894. **Ky.**—*Smith v. Com.*, 17 Ky. L. Rep. 1162, 33 S. W. 825; *Mullins v. Com.*, 3 Ky. L. Rep. 686; *Hicks v. Com.*, 3 Ky. L. Rep. 87. **Mo.**—*State v. Brown*, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200, following *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667. **N. C.**—*State v. Sloan*, 97 N. C. 499, 2 S. E. 666. **Okla.**—*McIntosh v. State*, 8 Okla. Crim. 469, 128 Pac. 735, following *Smith v. State*, 4 Okla. Crim. 328, 111 Pac. 960. **Tenn.**—*Ransom v. State*, 116 Tenn. 355, 96 S. W. 953. **Tex.**—*Williams v. State*, 44 Tex. 34; *Washington v. State*, 51 Tex.

*Crim.* 542, 103 S. W. 879; *Cavitt v. State*, 15 Tex. App. 190. **Va.**—*Lawrence v. Com.*, 81 Va. 484. See *Mitchell v. Com.*, 33 Gratt. (74 Va.) 845.

See also *infra*, VII, E.

**12. U. S.**—*Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667. **Ky.**—*Smith v. Sisters of Good Shepherd*, 27 Ky. L. Rep. 1107, 87 S. W. 1083. **Utah.**—*People v. Hampton*, 4 Utah 258, 9 Pac. 508.

**13. U. S.**—*Thomas v. Texas*, 212 U. S. 278, 29 Sup. Ct. 393, 53 L. ed. 512; *Martin v. Texas*, 200 U. S. 316, 26 Sup. Ct. 338, 50 L. ed. 497; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667. **Fla.**—*Montgomery v. State*, 53 Fla. 115, 42 So. 894. **Ky.**—*Com. v. Johnson*, 78 Ky. 509; *Smith v. Com.*, 17 Ky. L. Rep. 1162, 33 S. W. 825; *Hicks v. Com.*, 3 Ky. L. Rep. 87. **Miss.**—*Farrow v. State*, 91 Miss. 509, 45 So. 619. **Tenn.**—*Ransom v. State*, 116 Tenn. 355, 96 S. W. 953. **Utah.**—*People v. Hampton*, 4 Utah 258, 9 Pac. 508.

As to selection of juror and juries, see *infra*, III and VII.

**Discrimination by failure to put negroes on jury list as ground for challenge to the array**, see *infra*, VII, E.

**14. As to number of grand jury**, see 10 STANDARD PROC. 622.

**Number of judges who must join in hearing and decision**, see 6 STANDARD PROC. 74.

**15. U. S.**—*Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873; *United States v. Bags of Merchandise*, 2 Sprague 85. **Ark.**—*State v. Cox*, 8 Ark. 436. **Ill.**—*Bibel v. People*, 67 Ill. 172. **N. Y.**—*Blair v. McCormack Const. Co.*, 123 App. Div. 30, 107 N. Y. Supp. 750. **N. C.**—*State v. Rogers*, 162 N. C. 656, 78 S. E. 293, Ann. Cas. 1914A, 867, 46 L. R. A. (N. S.) 38. **Ohio.**—*Zanesville*,

ber of the petit or trial jury at the common law.<sup>16</sup> Constitutions preserving and guaranteeing the right of trial by jury have always been construed to mean a jury composed as at common law, of twelve men.<sup>17</sup> But the constitutions often provide for a less number of jurors<sup>18</sup> to

etc. R. Co. *v.* Bolen, 76 Ohio St. 376, 81 N. E. 681, 10 Ann. Cas. 658, 11 L. R. A. (N. S.) 1107; *Lamb v. Lane*, 4 Ohio St. 167. **Wis.**—*May v. Milwaukee & M. Ry. Co.*, 3 Wis. 219; *Norval v. Rice*, 2 Wis. 22.

As to right to waive a jury of twelve, see *infra*, II, F, 4, a, (IV); II, F, 4, b, (VI).

16. **U. S.**—*Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. ed. 1061; *Louisville & N. R. Co. v. Western Union Tel. Co.*, 207 Fed. 1, 124 C. C. A. 573. **Ala.**—*Collins v. State*, 88 Ala. 212, 7 So. 260. **Ariz.**—*Carroll v. Byers*, 4 Ariz. 158, 36 Pac. 499. **Ark.**—*Cairo & Fulton R. Co. v. Trout*, 32 Ark. 17. **Fla.**—*Florida F. Mfg. Co. v. Boswell*, 45 Fla. 301, 34 So. 241; *Gibson v. State*, 16 Fla. 291. **Ill.**—*Harris v. People*, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153. **Ind.**—*Brown v. State*, 16 Ind. 496. **Ind. Ter.**—*Dennet v. McCoy*, 4 Ind. Ter. 233, 69 S. W. 858. **Ia.**—*Eshelman v. Chicago, R. I. & P. Ry. Co.*, 67 Iowa 296, 25 N. W. 251; *Higgins v. Farmers' Ins. Co.*, 60 Iowa 50, 14 N. W. 118. **Mich.**—*McRae v. Grand Rapids, L. & D. R. Co.*, 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750. **Mont.**—*Kleinschmidt v. Dunphy*, 1 Mont. 118. **N. H.**—*In re Opinion of Justices*, 41 N. H. 550. **N. J.**—*State v. McCarthy*, 76 N. J. L. 295, 69 Atl. 1075. **N. Y.**—*People ex rel. Murray v. Justices*, 74 N. Y. 406; *People ex rel. Metropolitan Bd. of Health v. Lane*, 6 Abb. Pr. (N. S.) 105; *People v. Kennedy*, 2 Park. Crim. 312; *People ex rel. Warren v. Brady*, 37 Misc. 126, 74 N. Y. Supp. 973. **N. C.**—*State v. Rogers*, 162 N. C. 656, 78 S. E. 293, Ann. Cas. 1914A, 867, 46 L. R. A. (N. S.) 38. **Okla.**—*Bettge v. Territory*, 17 Okla. 85, 87 Pac. 897. **Pa.**—*Com. v. Byers*, 5 Pa. Co. Ct. 295. **Vt.**—*State v. Peterson*, 41 Vt. 504. **Wis.**—*Jennings v. State*, 134 Wis. 307, 114 N. W. 492, 14 L. R. A. (N. S.) 862; *Bennett v. State*, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26; *Norval v. Rice*, 2 Wis. 22.

17. **U. S.**—*Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. ed. 1061. **Ala.**—*Collins v. State*, 88 Ala.

212, 7 So. 260. **Ariz.**—*Carroll v. Byers*, 4 Ariz. 158, 36 Pac. 499. **Ark.**—*Cairo & Fulton R. Co. v. Trout*, 32 Ark. 17; *State v. Cox*, 8 Ark. 436. **Fla.**—*Jacksonville, T. & K. W. Ry. Co. v. Adams*, 33 Fla. 608, 15 So. 257, 24 L. R. A. 272. **Ga.**—*Downing v. State*, 66 Ga. 110. **Ia.**—*Eshelman v. Chicago, R. I. & P. Ry. Co.*, 67 Iowa 296, 25 N. W. 251. **Mich.**—*McRae v. Grand Rapids, L. & D. R. Co.*, 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750; *People v. Luby*, 56 Mich. 551, 23 N. W. 218. **Minn.**—*Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437; *State v. Everett*, 14 Minn. 439. **Mo.**—*Henning v. Hannibal, etc. R. Co.*, 35 Mo. 408; *Vaughn v. Scade*, 30 Mo. 600. **Mont.**—*Kleinschmidt v. Dunphy*, 1 Mont. 118. **Nev.**—*State v. McMahon*, 17 Nev. 365, 30 Pac. 1000; *State v. McClear*, 11 Nev. 39. **N. M.**—*Territory v. Ortiz*, 8 N. M. 154, 42 Pac. 87. **N. Y.**—*People ex rel. Comaford v. Dutcher*, 83 N. Y. 240; *People ex rel. Murray v. Justices*, 74 N. Y. 406; *People ex rel. Metropolitan Bd. of Health v. Lane*, 6 Abb. Pr. (N. S.) 105; *People v. Kennedy*, 2 Park. Crim. 312; *People ex rel. Warren v. Brady*, 37 Misc. 126, 74 N. Y. Supp. 973. **N. C.**—*State v. Rogers*, 162 N. C. 656, 78 S. E. 293, Ann. Cas. 1914A, 867, 46 L. R. A. (N. S.) 38; *State v. Scruggs*, 115 N. C. 805, 20 S. E. 720. **Okla.**—*Bettge v. Territory*, 17 Okla. 85, 87 Pac. 897. **Pa.**—*Com. v. Byers*, 5 Pa. Co. Ct. 295. **Tex.**—*Jones v. State*, 52 Tex. Crim. 303, 106 S. W. 345, 124 Am. St. Rep. 1097. **Utah.**—*State v. Campbell*, 24 Utah 103, 66 Pac. 771; *State v. Hart*, 19 Utah 438, 57 Pac. 415. **Vt.**—*State v. Peterson*, 41 Vt. 504. **Wash.**—*State v. Ellis*, 22 Wash. 129, 60 Pac. 136. **W. Va.**—*State v. Hudkins*, 35 W. Va. 247, 13 S. E. 367. **Wis.**—*Jennings v. State*, 134 Wis. 307, 114 N. W. 492, 14 L. R. A. (N. S.) 862; *Bennett v. State*, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26; *Norval v. Rice*, 2 Wis. 22.

18. See generally the constitutional provisions, and the following: **U. S.** *Louisville & N. R. Co. v. Western Union*

determine the issues of causes triable in certain courts, or in certain kinds of cases.<sup>19</sup>

**3. Selection From County or District.**—The common law jury was composed of men from the visne or neighborhood where the crime was committed;<sup>20</sup> and this right to a trial by a jury composed of such men is preserved under a general constitutional provision providing that the right of trial by jury shall remain.<sup>21</sup> Constitutional provisions frequently provide, however, that the defendant is entitled to a jury composed of members of the county or district in which the offence is alleged to have been committed;<sup>22</sup> but this right is waived by the defendant obtaining a change of venue.<sup>23</sup>

**C. CONSTITUTIONAL PROVISIONS.**—**1. In General.**—A constitutional provision guaranteeing the right to trial by jury, as a rule,

Tel. Co., 207 Fed. 1, 124 C. C. A. 573. **Ga.**—Downing v. State, 66 Ga. 110. **Ill.** Hermanek v. Guthmann, 179 Ill. 563, 53 N. E. 966; McManus v. McDonough, 107 Ill. 95. **Ind. Ter.**—Dennet v. McCoy, 4 Ind. Ter. 233, 69 S. W. 858. **Ia.** Higgins v. Farmers' Ins. Co., 60 Iowa 50, 14 N. W. 118; State v. Bryan, 4 Iowa 349. **Mich.**—McRae v. Grand Rapids, L. & D. R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750; People v. Luby, 56 Mich. 551, 23 N. W. 218. **Mo.**—Vaughn v. Seade, 30 Mo. 600; State v. Allen, 45 Mo. App. 55. **Neb.** Moise v. Powell, 40 Neb. 671, 59 N. W. 79. **N. Y.**—Knight v. Campbell, 62 Barb. 16; People ex rel. Metropolitan Bd. of Health v. Lane, 6 Abb. Pr. (N. S.) 105; People ex rel. Warren v. Brady, 37 Misc. 126, 74 N. Y. Supp. 973. **Okla.**—Muldrow v. State, 4 Okla. Crim. 324, 111 Pac. 656. **S. C.**—State v. Williams, 40 S. C. 373, 19 S. E. 5; State v. Starling, 15 Rich. L. 120. **Tex.** Jackson v. J. A. Coates & Sons (Tex. Civ. App.), 43 S. W. 24. **Vt.**—State v. Peterson, 41 Vt. 504.

**19. U. S.**—Louisville & N. R. Co. v. Western Union Tel. Co., 207 Fed. 1, 124 C. C. A. 573. **Fla.**—Adams v. State, 56 Fla. 1, 48 So. 219; Florida F. Mfg. Co. v. Boswell, 45 Fla. 301, 34 So. 241; Gibson v. State, 16 Fla. 291. **Mich.**—Robison v. Wayne Circuit Judges, 151 Mich. 315, 115 N. W. 682. **Pa.**—Com. v. Byers, 5 Pa. Co. Ct. 295. **Utah.**—State v. Imlay, 22 Utah 156, 61 Pac. 557; State v. Bates, 14 Utah 293, 47 Pac. 78, 43 L. R. A. 33.

**20. Cal.**—People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75. **Ill.** City of Chicago v. Knobel, 232 Ill. 112, 83 N. E. 459. **Ky.**—Com. v. Jones, 118 Ky. 889, 82 S. W. 643, 4 Ann. Cas.

1192. **Mich.**—Swart v. Kimball, 43 Mich. 443, 5 N. W. 635. **Miss.**—Shaffer v. State, 1 How. 238. **N. C.**—State v. Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130. **R. I.**—Taylor v. Gardiner, 11 R. I. 182.

**21. Cal.**—People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75. **Mich.**—Swart v. Kimball, 43 Mich. 443, 5 N. W. 635. **N. C.**—State v. Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130.

**22.** See generally the constitutions and the following: **Ala.**—Collins v. State, 88 Ala. 212, 7 So. 260. **Ark.** Osborn v. State, 24 Ark. 629. **Colo.** Beery v. United States, 2 Colo. 186. **Ill.**—City of Chicago v. Knobel, 232 Ill. 112, 83 N. E. 459; Buckrice v. People, 110 Ill. 29; Weyrich v. People, 89 Ill. 90. **Ia.**—State v. Arthur, 39 Iowa 631. **Mich.**—Houghton Common Council v. Huron Copper Min. Co., 57 Mich. 547, 24 N. W. 820; People v. Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477. **Minn.**—State v. Robinson, 14 Minn. 447. **Neb.**—Olive v. State, 11 Neb. 1, 7 N. W. 444. **Ohio.**—State v. Voris, 10 Ohio Dec. 451, 8 Ohio N. P. 16. **Tenn.**—Zanone v. State, 97 Tenn. 101, 36 S. W. 711, 35 L. R. A. 556; Ellis v. State, 92 Tenn. 85, 20 S. W. 500; Armstrong v. State, 1 Coldw. 338; Dula v. State, 8 Yerg. 511. **Wash.**—State ex rel. Fugita v. Milroy, 71 Wash. 592, 129 Pac. 384. **Wis.**—Bennett v. State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26; Wheeler v. State, 24 Wis. 52.

**23. Ark.**—Osborn v. State, 24 Ark. 629. **Ill.**—Weyrich v. People, 89 Ill. 90. **R. I.**—Taylor v. Gardiner, 11 R. I. 182. **Tenn.**—Dula v. State, 8 Yerg. 511. **Wis.**—Bennett v. State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

merely preserves such right as it existed at the time of the adoption of the constitution.<sup>24</sup> It does not purport to declare that there must

24. **U. S.**—*Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. ed. 223; *Low v. United States*, 169 Fed. 86, 94 C. C. A. 1; *Motte v. Bennett*, 17 Fed. Cas. No. 9,884. **Ala.**—*State v. Bley*, 162 Ala. 239, 50 So. 263; *Costello v. Feagin*, 162 Ala. 191, 50 So. 134; *Boring v. Williams*, 17 Ala. 510. **Ariz.**—*Brown v. Greer*, 16 Ariz. 215, 141 Pac. 841; *Carroll v. Byers*, 4 Ariz. 158, 36 Pac. 499. **Cal.**—*Grim v. Norris*, 19 Cal. 140, 79 Am. Dec. 206; *Koppikus v. State Capitol Comrs.*, 16 Cal. 248. **Conn.**—*Roy v. Moore*, 85 Conn. 159, 82 Atl. 233. **Fla.**—*Hathorne v. Panama Park Co.*, 44 Fla. 194, 32 So. 812, 103 Am. St. Rep. 138; *Hughes v. Hannah*, 39 Fla. 365, 22 So. 613; *Hunt v. Jacksonville*, 34 Fla. 504, 16 So. 398, 34 Am. St. Rep. 214. **Ga.**—*Harper v. Elberton*, 23 Ga. 566; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248. **Idaho.**—*In re Dawson*, 20 Idaho 178, 117 Pac. 696, 35 L. R. A. (N. S.) 1146. **Ill.**—*Standidge v. Chicago Rys. Co.*, 254 Ill. 524, 98 N. E. 963, Ann. Cas. 1913C, 65, 40 L. R. A. (N. S.) 529; *George v. People*, 167 Ill. 447, 47 N. E. 741; *Whitehurst v. Coleen*, 53 Ill. 247; *Ross v. Irving*, 14 Ill. 171. **Ind.**—*Tomlinson v. Bainaka*, 163 Ind. 112, 70 N. E. 155; *Wright v. Fultz*, 138 Ind. 594, 38 N. E. 175; *Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 613; *Vandalia Coal Co. v. Lawson*, 43 Ind. App. 226, 87 N. E. 47. **Ind. Ter.**—*Luce v. Garrett*, 4 Ind. Ter. 54, 64 S. W. 613. **Ia.**—*Galusha v. Wendt*, 114 Iowa 597, 87 N. W. 512. **Kan.**—*Wheeler v. Caldwell*, 68 Kan. 776, 75 Pac. 1031; *State v. Topeka*, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529. **Ky.**—*Rieger v. Schulte*, 151 Ky. 129, 151 S. W. 395; *Cominger v. Louisville Trust Co.*, 128 Ky. 697, 108 S. W. 950, 111 S. W. 681. **Me.**—*Farnsworth v. Whiting*, 106 Me. 430, 76 Atl. 909. **Md.**—*State v. Glenn*, 54 Md. 572. **Mich.**—*McRae v. Grand Rapids, L. & D. R. Co.*, 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750. **Minn.**—*Morton Brick & Tile Co. v. Sodergren*, 130 Minn. 252, 153 N. W. 527; *State ex rel. Wilcox v. Ryder*, 126 Minn. 95, 147 N. W. 953; *Peters v. City of Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044; *Nordeen v. Buck*, 79 Minn. 352, 82 N. W. 644; *Whallon v. Bancroft*, 4 Minn. 109. **Miss.**—*Aldridge v. Bogue Phalia D. Dist.*, 106 Miss. 626, 64 So. 377. **Mo.**—*State v. Holtcamp*, 235 Mo. 232, 133 S. W. 521; *Berry v. St. Louis & S. F. R. Co.*, 223 Mo. 358, 122 S. W. 1043; *State v. Hamey*, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846; *State v. Bookstruck*, 136 Mo. 335, 38 S. W. 317; *Vaughn v. Scade*, 30 Mo. 600. **Mont.**—*Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554; *State ex rel. Jackson v. Kennie*, 24 Mont. 45, 60 Pac. 559. **Neb.**—*McCormick v. Carey*, 62 Neb. 494, 87 N. W. 172; *Lett v. Hammond*, 59 Neb. 339, 80 N. W. 1042; *Kuhl v. Pierce*, 44 Neb. 584, 62 N. W. 1066. **Nev.**—*State v. McClear*, 11 Nev. 39. **N. H.**—*State v. Almy*, 67 N. H. 274, 28 Atl. 372, 22 L. R. A. 744; *East Kingston v. Towle*, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174. **N. Y.**—*Moot v. Moot*, 214 N. Y. 204, 108 N. E. 424; *Gansberg v. Sagemohl*, 67 App. Div. 554, 73 N. Y. Supp. 984; *Baylis v. Bullock Elec. Mfg. Co.*, 59 App. Div. 576, 69 N. Y. Supp. 693. **N. D.**—*Smith v. Kunert*, 17 N. D. 120, 115 N. W. 76. **Ohio.**—*Hagany v. Cohnen*, 29 Ohio St. 82; *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671. **Okla.**—*In re Byrd*, 31 Okla. 549, 122 Pac. 516; *State ex rel. West v. Cobb*, 24 Okla. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639; *In re Simmons*, 4 Okla. Crim. 662, 112 Pac. 951. **Ore.**—*State v. Sengstacken*, 61 Ore. 455, 122 Pac. 292; *Wong v. Astoria*, 13 Ore. 538, 11 Pac. 295. **Pa.**—*Wynkoop v. Cooch*, 89 Pa. 450; *Rhines v. Clark*, 51 Pa. 96; *Byers v. Com.*, 42 Pa. 89. **R. I.**—*State Board of Health v. Roy*, 22 R. I. 538, 48 Atl. 802; *Merrill v. Bowler*, 20 R. I. 226, 38 Atl. 114. **S. C.**—*Lipscomb v. Littlejohn*, 63 S. C. 38, 40 S. E. 1023; *State v. Williams*, 40 S. C. 373, 19 S. E. 5; *Anderson v. O'Donnell*, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632. **S. D.**—*Grigsby v. Larson*, 24 S. D. 628, 124 N. W. 856; *State v. Mitchell*, 3 S. D. 223, 52 N. W. 1052. **Tenn.**—*State v. Sexton*, 121 Tenn. 35, 114 S. W. 494; *Marler v. Wear*, 117 Tenn. 244, 96 S. W. 447. **Tex.**—*Pittman v. Byars*, 51 Tex. Civ. App. 83, 112 S. W. 102; *English v. State*, 28 Tex. App. 500, 13 S. W. 775. **Utah.**—*State v. Hart*, 26 Utah 229, 72 Pac. 938. **Vt.**

be a trial by jury in all cases,<sup>25</sup> nor does it enlarge the right thereto

*Flimpton v. Somerset*, 33 Vt. 283. *Va.* *Ragsdale v. City of Danville*, 116 Va. 484, 82 S. E. 77. *Wash.*—*State v. McDowell*, 61 Wash. 398, 112 Pac. 521; *State v. Neterer*, 33 Wash. 535, 74 Pac. 668; *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107; *State v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39. *Wis.*—*South Milwaukee Co. v. Murphy*, 112 Wis. 614, 88 N. W. 583; *Mead v. Walker*, 17 Wis. 189.

[a] "The constitution refers to 'the right of trial by jury' as a right well known and commonly understood at the time of its adoption, and it is the right so understood which is secured by it . . . It is entirely clear, therefore, that the right of trial by jury, which is secured by the constitution is the right of trial by jury with which the people who adopted it were familiar, . . ., as defined by the statutes which existed prior to and at the time of the adoption of the constitution." *Barry v. Traux*, 13 N. D. 131, 99 N. W. 769, 112 Am. St. Rep. 602, 65 L. R. A. 762.

[b] *State Constitution.*—The "right of trial by jury secured by the constitutions of the various states is simply the right to a trial by jury constituted substantially and with the same elements and incidents as existed when the constitution was adopted." *Baker v. Newton*, 27 Okla. 436, 112 Pac. 1034.

[c] *Adoption of New Constitution.* The fact that the words "as heretofore used" contained in an older constitution are omitted in a subsequent constitution providing merely that "trial by jury shall remain inviolate" is immaterial as each provision means that trial by jury "must be preserved in the future in all cases in which it was allowed under valid laws existing at the time that the constitution was adopted." *De Lamar v. Dollar*, 1 Ga. App. 687, 57 S. E. 85, 1054.

[d] *As at Common Law.*—A constitutional provision declaring that the right of trial by jury must be preserved inviolate means "that it must be preserved as it existed at common law. The essentials of this right are that there shall be selected, in the presence of the trial judge, by the parties, under provisions giving each a fair opportunity for the selection, a jury of twelve good and lawful men; that

they shall be duly sworn; that to them shall be submitted the issues between the parties, . . .; that the jury shall be charged by the trial judge touching the principles of law applicable to the issues; that the jury . . ., shall render a unanimous verdict upon the issues." *Woods v. State*, 130 Tenn. 100, 169 S. W. 558, L. R. A. 1915F, 531.

[e] *Spirit of Constitution Must Be Considered.*—It is not "easy to define in general terms the 'right of trial by jury,' as guaranteed by the constitution, so that we may readily determine, in all cases, whether or not the legislature has violated this right. But in any event, it is clear that we must look beyond the letter, and give consideration to the spirit of these provisions before we can hope to discover their true meaning. . . . The right of trial by jury must mean that the accused has the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence." *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020, 32 L. R. A. (N. S.) 1216.

*As to number of jurors*, see *supra*, II, B, 2.

25. *Fla.*—*Blanchard v. Raines' Exx.*, 20 Fla. 467. *Kan.*—*Kimball v. Connor*, 3 Kan. 414. *Ohio.*—*Ammon v. Johnson*, 3 Ohio Cir. Ct. 263.

[a] "The provision in our state constitution, that trial by jury, as heretofore used, shall remain inviolate, means that it shall not be taken away, as it existed . . . when that instrument was adopted, and not that there must be a jury in all cases. New forums may be erected, and new remedies provided, accommodated to the ever shifting state of society." *Flint River etc. Co. v. Foster*, 5 Ga. 194.

[b] *Not Applicable to Every Issue.* A constitutional provision guaranteeing trial by jury "does not require every trial to be by jury; nor does it contemplate that every issue, which, by the laws in force at the adoption of the constitution of the state, was triable by jury, should remain irrevocably triable by that tribunal. Trial by jury is guaranteed only in those cases where that right existed at common law. Such is the meaning of the constitutional provision referred to, and in statutory proceedings, proceed-

so as to embrace cases in which it previously did not exist.<sup>26</sup>

Applicable Only to Issues of Fact.—The constitutional right to trial by jury has reference only to issues of fact,<sup>27</sup> and does not alter the mode of trial of issues of law.<sup>28</sup> And in the absence of a dispute as to

ings in chancery, etc., the legislature is fully competent to dispense with the jury." *Kimball v. Connor*, 3 Kan. 414.

26. **Ala.**—*Costello v. Feagin*, 162 Ala. 191, 50 So. 134; *Tims v. State*, 26 Ala. 165; *Boring v. Williams*, 17 Ala. 510. **Ariz.**—*Brown v. Greer*, 16 Ariz. 215, 141 Pac. 841. **Cal.**—*Vallejo & N. R. Co. v. Reed Co.*, 169 Cal. 545, 147 Pac. 238; *Cauhape v. Security Sav. Bank*, 127 Cal. 197, 59 Pac. 589. **Conn.**—*Roy v. Moore*, 85 Conn. 159, 82 Atl. 233. **Fla.**—*Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77; *Hathorne v. Panama Park Co.*, 44 Fla. 194, 32 So. 812, 103 Am. St. Rep. 138; *Blanchard v. Raines' Exx.*, 26 Fla. 467. **Ga.**—*Harper v. Commissioners*, 23 Ga. 566. **Ill.**—*Standidge v. Chicago Rys. Co.*, 254 Ill. 524, 98 N. E. 963, Ann. Cas. 1913C, 65, 40 L. R. A. (N. S.) 529; *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725; *Ross v. Irving*, 14 Ill. 171. **Ind.**—*Allen v. Anderson*, 57 Ind. 388. **Ia.**—*State v. Henderson*, 145 Iowa 657, 124 N. W. 767. **Kan.**—*Kimball v. Connor*, 3 Kan. 414. **Ky.**—*Harris v. Wood*, 6 Mon. 641. **Mich.**—*Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635. **Minn.**—*Morton Brick & Tile Co. v. Sodergren*, 130 Minn. 252, 153 N. W. 527; *State ex rel. Styve v. Kingsley*, 85 Minn. 215, 88 N. W. 742; *Whallon v. Bancroft*, 4 Minn. 109. **Miss.**—*Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300. **Mo.**—*State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317. **Ohio.**—*Ammon v. Johnson*, 3 Ohio Cir. Ct. 263. **Okla.**—*In re Simmons*, 4 Okla. Crim. 662, 112 Pac. 951. **Ore.**—*State v. Sengstacken*, 61 Ore. 455, 122 Pac. 292; *Raymond v. Flavel*, 27 Ore. 219, 40 Pac. 158. **Pa.**—*Smith v. Times Pub. Co.*, 178 Pa. 481, 36 Atl. 296, 35 L. R. A. 819; *Byers v. Com.*, 42 Pa. 89; *Van Swartow v. Com.*, 24 Pa. 131; *Emerick v. Harris*, 1 Binn. 424. **R. I.**—*State Board v. Roy*, 22 R. I. 538, 48 Atl. 802. **S. D.**—*State v. Mitchell*, 3 S. D. 223, 52 N. W. 1052. **Tenn.**—*Trigally v. Mayor of Memphis*, 6 Coldw. 382. **Tex.**—*Pittman v. Byars*, 51 Tex. Civ. App. 83, 112 S. W. 102.

[a] The "constitutional provision does not extend the right, but merely secures it in cases in which it was

matter of right, before the adoption of the constitution." *Pugh v. Bowden*, 54 Fla. 302, 45 So. 499. To the same effect, *Horton v. Old Colony Bill Posting Co.*, 36 R. I. 507, 90 Atl. 822, Ann. Cas. 1916A, 911.

27. **U. S.**—*Low v. United States*, 169 Fed. 86, 94 C. C. A. 1; *In re Martin*, 2 Paine 348, 16 Fed. Cas. No. 9,154. **Cal.**—*Koppikus v. State Capitol Comrs.*, 16 Cal. 248. **Ill.**—*Atkins v. Huston*, 106 Ill. 492. **Ind.**—*Wilson v. Fahnstock*, 44 Ind. App. 35, 86 N. E. 1037. **Kan.**—*Seward v. Seward*, 59 Kan. 387, 53 Pac. 63. **Ky.**—*Smith v. Moberly*, 15 B. Mon. 70. **Minn.**—*Morton Brick & Tile Co. v. Sodergren*, 130 Minn. 252, 153 N. W. 527. **Miss.**—*Scott v. Nichols*, 27 Miss. 94, 61 Am. Dec. 503. **Mo.**—*Kansas City v. Smith*, 238 Mo. 323, 141 S. W. 1103; *Smyth v. Boroff*, 156 Mo. App. 18, 135 S. W. 973. **N. Y.**—*Jones v. Firemen's Fund Ins. Co.*, 51 N. Y. 318; *Perlman v. Brooklyn Heights R. Co.*, 78 Misc. 163, 137 N. Y. Supp. 917. **N. C.**—*Andrews v. Pritchett*, 66 N. C. 387. **Ohio.**—*First Presbyterian Soc. v. Smithers*, 12 Ohio St. 248. **Okla.**—*Wattah-noh-zhe v. Moore*, 36 Okla. 631, 129 Pac. 877. **Pa.**—*Glone v. Arleth*, 162 Pa. 550, 29 Atl. 862. **Tex.**—*Campbell v. Peacock* (Tex. Civ. App.), 176 S. W. 774. **Wash. Ter.**—*Johnson v. Goodtime*, 1 Wash. Ter. 484.

[a] It is "fundamental error for the court to deny the constitutional right of trial by jury where the pleadings and evidence present a controverted issue of fact." *Burnett v. Ft. Worth L. & P. Co.* (Tex. Civ. App.), 117 S. W. 175.

[b] An issue which may be determined by inspection of the record is triable by the court and not by a jury. *State v. Martin*, 38 W. Va. 568, 18 S. E. 748.

28. *In re Martin*, 2 Paine 348, 16 Fed. Cas. No. 9,154; *Koppikus v. State Capitol Comrs.*, 16 Cal. 248.

[a] Where the pleadings raise only strictly legal issues the parties are not entitled to a trial by jury as of right. *Keenan v. Leslie*, 79 S. C. 473, 60 S. E. 1114.

the facts of a case the constitutional guaranty of the right to trial by jury has no application.<sup>29</sup>

**2. Application of Federal Constitution.**—The provisions of the federal constitution relating to trial by jury apply to the organized territories of the United States,<sup>30</sup> and to the District of Columbia.<sup>31</sup> But they are not applicable to territories not incorporated into the United States.<sup>32</sup> The federal constitution guaranteeing the right of trial by jury relates only to the federal courts and does not affect the legislative power of the various states to regulate the mode of trial in their own courts.<sup>33</sup>

**29. Ala.**—*Pope v. Stout*, 1 Stew. 375. **Ga.**—*Stewart v. Sholl*, 99 Ga. 534, 26 S. E. 757. **Mass.**—*Averill v. Chadwick*, 153 Mass. 171, 26 N. E. 441. **Mo.**—*Burnham, etc. Co. v. Tillery & Co.*, 85 Mo. App. 453. **Ore.**—*Shobert v. May*, 40 Ore. 68, 66 Pac. 466, 91 Am. St. Rep. 453, 55 L. R. A. 810. **Pa.**—*Storey v. Lonabaugh*, 247 Pa. 331, 93 Atl. 481; *Scranton School Dist. v. Simpson*, 133 Pa. 202, 19 Atl. 359.

[a] If the pleadings present issues of fact, the parties are *prima facie* "entitled to have a jury determine them; but, if during the course of the trial it becomes apparent that there are no such issues in the evidence the decision falls within the province of the court." *Consolidated G. & S. Min. Co. v. Struthers*, 41 Mont. 565, 111 Pac. 152.

**30. Rasmussen v. United States**, 197 U. S. 516, 25 Sup. Ct. 514, 49 L. ed. 862; *Black v. Jackson*, 177 U. S. 349, 30 Sup. Ct. 648, 44 L. ed. 801; *Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. ed. 1061; *Springville v. Thomas*, 166 U. S. 707, 17 Sup. Ct. 717, 41 L. ed. 1172; *Miller v. State*, 3 Okla. Crim. 457, 106 Pac. 810.

**31. Capital Traction Co. v. Hof**, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873.

**32. Dowdell v. United States**, 221 U. S. 325, 31 Sup. Ct. 590, 55 L. ed. 753; *United States v. Beecham*, 15 Phil. Isl. 272.

[a] "If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, . . . it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the or-

derly administration of justice. . . . To state such a proposition demonstrates the impossibility of carrying it into practice. . . . We conclude that the power to govern territory . . . does not require . . . a system of laws which shall include the right of trial by jury, and that the constitution does not, without legislation, and of its own force, carry such right." *Dorr v. United States*, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. ed. 128.

[b] *In Philippines.*—"Trial by jury was unknown to the law in force in these islands prior to the date of cession, nor has the Philippine Commission passed any law which would give it effect. Such provisions of a constitution as those relating to trial by jury can hardly be regarded as self-executing. It is necessary that there should be some legislation carrying them into effect." *United States v. Dorr*, 2 Phil. Isl. 269.

**33. U. S.**—*Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448, 44 L. ed. 597; *Iowa Cent. Ry. Co. v. Iowa*, 160 U. S. 389, 16 Sup. Ct. 344, 40 L. ed. 467; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487; *Gibson v. Bellingham & N. Ry. Co.*, 213 Fed. 488; *Ex parte Brown*, 140 Fed. 461; *Williams v. Hert*, 110 Fed. 166. **Ala.** *Boring v. Williams*, 17 Ala. 510. **Colo.** *Huston v. Wadsworth*, 5 Colo. 213. **Conn.**—*Colt v. Eves*, 12 Conn. 243. **Ga.** *Tilley v. Cox*, 119 Ga. 867, 47 S. E. 219. **Ill.**—*Keith v. Henkleman*, 173 Ill. 137, 50 N. E. 692. **Ind.**—*Spurgeon v. Rhodes*, 167 Ind. 1, 78 N. E. 228; *Baker v. Gordon*, 23 Ind. 204; *Lake Erie, etc. R. Co. v. Heath*, 69 Ind. 558. **Ia.**—*McLane v. Leicht*, 69 Iowa 401, 29 N. W. 327. **Mont.**—*Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554; *Kleinschmidt v. Dunphy*,

The admission of a territory as a state and the adoption of a state constitution terminate the application of the provisions of the federal constitution in respect to the right of trial by jury.<sup>34</sup> The denial of a trial by jury in a state court is not a denial of a privilege or immunity of citizenship which the states are forbidden to abridge.<sup>35</sup>

Where state courts have jurisdiction of cases under federal statutes they are not bound by the provisions of the federal constitution pertaining to the right of trial by jury, but such right is regulated by the state constitution and statutes.<sup>36</sup> The provision of the United States

1 Mont. 118. **N. Y.**—*People v. Penhollow*, 42 Hun 103. **R. I.**—*State v. Armeno*, 29 R. I. 431, 72 Atl. 216; *Gunn v. Union R. Co.*, 27 R. I. 320, 62 Atl. 118, 2 L. R. A. (N. S.) 362; *In re State House*, 19 R. I. 326, 33 Atl. 448. **Utah.**—*In re Maxwell*, 19 Utah 495, 57 Pac. 412; *In re McKee*, 19 Utah 231, 57 Pac. 23. **Va.**—*Brown v. Epps*, 91 Va. 726, 21 S. E. 119, 27 L. R. A. 676.

[a] "The guaranty of a trial by jury in the sixth and seventh amendments to the constitution of the United States applies only to the Federal courts and is not a restriction on the states, which may provide for the trial of criminal and civil cases in their own courts, with or without jury, as authorized by the state constitution." *State v. Whitaker*, 114 N. C. 818, 19 S. E. 376.

34. *Higgins v. Farmers' Ins. Co.*, 60 Iowa 50, 14 N. W. 118; *Connecticut Mut. L. Ins. Co. v. Cross*, 18 Wis. 109.

35. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678.

[a] "A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the constitution is met, if the trial is had according to the settled course of judicial proceedings." *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678.

36. *Louisville & N. R. Co. v. Stewart's Admx.*, 163 Ky. 823, 174 S. W. 744; *Chesapeake & O. R. Co. v. Carnahan*, 118 Va. 46, 86 S. E. 863.

[a] *Trial in State Court Under Federal Employer's Liability Act.*—"It is said that congress did not have power to confer or commit jurisdiction of cases arising under the Federal Employers' Liability Act to the courts

of any state that does not recognize the binding necessity for a jury of twelve and a unanimous verdict, or that has by its constitution and laws taken from its courts the authority to require a unanimous verdict of such a jury, because under the seventh amendment it is indispensable that every court that hears and determines a common-law case arising under congressional legislation shall have the power to require a jury of twelve and a unanimous verdict, which power is denied to the courts of this state by the constitution and statutes of the state. . . . In as much . . . as state courts, as a matter of right, independent of congressional sanction, have jurisdiction to enforce civil rights and remedies created by congressional legislation unless the right is denied by the legislation, it is difficult to understand upon what ground the assertion can be soundly rested that the seventh amendment controls jury trials in state courts in the face of the often-repeated declaration of the supreme court that this amendment affects only trials in courts of the United States. . . . It therefore seems to us that when state courts are given jurisdiction to hear and determine causes of action created by Federal legislation they may exercise this jurisdiction according to the practice and procedure of the forum and under the jury system adopted subject of course to such conditions as congress may attach to the legislation; and congress did not in the legislation here in question, attempt to attach any conditions to the practice and procedure through which the jurisdiction of state courts of competent jurisdiction might be exercised in the enforcement of rights arising under this act." *Chesapeake & Ohio Ry. Co. v. Kelly's Admx.*, 161 Ky. 653, 171 S. W. 185.

constitution declaring that the trial of all crimes except in cases of impeachment shall be by jury does not apply to petty offenses which at the common law were triable without a jury,<sup>37</sup> but the word "crime" does include such misdemeanors as at common law were triable by jury.<sup>38</sup>

D. EFFECT OF CONSTITUTIONAL PROVISIONS UPON POWER OF LEGISLATURE. — 1. **Generally.** — The constitutional provisions preserving inviolate the right to trial by jury were not designed to restrict the legislative power save as to prohibit the enactment of statutes destroying or materially impairing such right as it previously existed,<sup>39</sup> and legislative acts authorizing summary proceedings for the punishment of small offenses without the intervention of a jury do not violate the constitutional guaranty of the right to trial by jury.<sup>40</sup>

37. *Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. ed. 99.

[a] **Petty "offenses are not 'crimes' within the meaning of the constitution.** It is for that reason that it is now well settled that a defendant may waive a jury when charged only with a petty offense." *Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. ed. 99.

[b] **What Is a Crime.**—"To be a 'crime' within the meaning of . . . the constitution, it is not essential that it shall be of the grave character described as an 'infamous offense' in the fifth amendment, which provides that for such offenses one shall not be required to answer unless upon the presentment or indictment of a grand jury. An offense is 'infamous' not because of its character as respects commonly accepted standards of morality, but because of the character of the punishment which may be inflicted. Thus, without regard to the inherent morality of an offense, it is 'infamous' within the fifth amendment if it involves imprisonment for more than one year, with or without hard labor. . . . Neither is the test as to whether an offense is a 'crime' within the third article determined by the punishment which was ultimately awarded. Thus, a crime is 'infamous' if an infamous punishment might have been inflicted under the charge." *Low v. United States*, 169 Fed. 86, 94 C. C. A. 1.

38. *Low v. United States*, 169 Fed. 86, 94 C. C. A. 1.

[a] And the word "crime" as used in the constitution "is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given

class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the constitution to hold that no prosecution for a misdemeanor is a prosecution for a 'crime' within the meaning of the third article, or a 'criminal prosecution' within the meaning of the sixth amendment." *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. ed. 223.

39. *Colo.*—*Venine v. Archibald*, 3 Colo. 163. *Fla.*—*Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77; *Blanchard v. Raines' Exrx.*, 20 Fla. 467. *Ill.*—*Frost v. People*, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352; *People v. Hill*, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634. *Ky.*—*Harris v. Wood*, 6 Mon. 641. *Mich.*—*Risser v. Hoyt*, 53 Mich. 185, 18 N. W. 611. *Mo.*—*Berry v. St. Louis, etc. R. Co.*, 223 Mo. 358, 122 S. W. 1043. *N. J.*—*Carter v. Camden Dist. Ct.*, 49 N. J. L. 600, 10 Atl. 108. *N. Y.*—*Walter v. People*, 32 N. Y. 147; *Sands v. Kimbark*, 27 N. Y. 147. *N. C.*—*Keddie v. Moore*, 6 N. C. 41, 5 Am. Dec. 518. *Pa.*—*Haines v. Levin*, 51 Pa. 412. *S. C.*—*Frazer v. Beattie*, 26 S. C. 348, 2 S. E. 125. *Vt.*—*Plimpton v. Town of Somerset*, 33 Vt. 283.

40. *Kan.*—*In re Kinsel*, 64 Kan. 1, 67 Pac. 634, 56 L. R. A. 475. *Md.*—*Crichton v. State*, 115 Md. 423, 81 Atl. 36; *State v. Loden*, 117 Md. 373, 83 Atl. 564, 40 L. R. A. (N. S.) 193. *Mo.*—*Marshall v. Standard*, 24 Mo. App.

It is competent for the legislature to extend the right of trial by jury to cases which were not triable by jury prior to the adoption of the constitution,<sup>41</sup> but it cannot without infringing on the constitution abridge such right as to cases in which at common law a trial by jury was a matter of right.<sup>42</sup> Thus, where prior to the adoption of a constitution the right to trial by jury existed only in cases in which the amount in controversy was in excess of a certain sum, the legislature may extend such right to all cases without regard to the amount involved.<sup>43</sup> But a constitutional right applying to all cases without regard to the amount involved cannot be abridged by the legislature.<sup>44</sup>

## 2. Enlargement of Jurisdiction of Equity. — While generally the

192; *Ex parte* Kiburg, 10 Mo. App. 442. **N. J.**—*McGear v. Woodruff*, 33 N. J. L. 213. **Tenn.**—*State v. Sexton*, 121 Tenn. 35, 114 S. W. 494.

As to right to jury trial for petty offenses, see *infra*, II, E, 5, b.

[a] **Particularly Where Jury Trial May Be Had on Appeal.**—*City of Emporia v. Volmer*, 12 Kan. 622. See also *Stahl v. Lee*, 71 Kan. 511, 80 Pac. 983; and *infra*, II, D, 3, b.

[b] **Violation of Game Laws.**—And an act providing for speedy trials before a justice of the peace of persons violating the game, fish or forestry laws and for punishment thereunder without the intervention of a jury is constitutional. *State v. Sexton*, 121 Tenn. 35, 114 S. W. 494.

[c] **Vagrants and Disorderly Persons.**—"There can be no question . . . that trial by jury had, before the constitution, never been used in the disposition of vagrants and disorderly persons and consequently was not intended for such persons, so far as they were defined by then existing legislation. That the legislature have power to enlarge the class of persons to be affected by laws against disorderly persons and to be summarily tried by the magistrates of the state, seems to be well settled." *People v. McCarthy*, 45 How. Pr. (N. Y.) 97.

41. **Ind.**—*Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 613. **Minn.** *Whallon v. Bancroft*, 4 Minn. 109. **N. Y.**—*Ebling Brew. Co. v. Nimphius*, 58 Misc. 545, 109 N. Y. Supp. 808. **Pa.**—*Buffalo Branch Mut. Film Corp. v. State Board*, 23 Pa. Dist. 837.

[a] A juvenile court act providing for a jury of six persons does not violate the constitutional right to trial by a common-law jury, as the proceeding is a statutory one unknown to the

common law. *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E. 892, Ann. Cas. 1914A, 1222, 45 L. R. A. (N. S.) 908. *Compare*, 12 STANDARD PROC. 873, et seq.

42. **Fla.**—*Flint River S. Co. v. Roberts, Allen & Co.*, 2 Fla. 102, 48 Am. Dec. 178. **Ga.**—*Mattox v. State*, 115 Ga. 212, 41 S. E. 709. **Ind.**—*Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 613. **Ia.**—*Reed v. Wright*, 2 G. Gr. 15. **Md.**—*Danner v. State*, 89 Md. 220, 42 Atl. 965. **N. H.**—*East Kingston v. Towle*, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174. **N. J.**—*Raphael v. Lane*, 56 N. J. L. 108, 28 Atl. 421. **N. Y.**—*People v. Pray*, 87 Misc. 464, 150 N. Y. Supp. 1061. **Pa.**—*Rhines v. Clark*, 51 Pa. 96. **S. C.**—*White v. Kendrick*, 1 Brev. 469. **Tex.**—*Cockrill v. Cox*, 65 Tex. 669.

[a] The privilege of a trial by jury "is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance and cannot be frittered away on any plea of state or political necessity." *Ex parte* Milligan, 4 Wall. (U. S.) 2, 18 L. ed. 281.

43. *Whallon v. Bancroft*, 4 Minn. 109.

44. *Mattox v. State*, 115 Ga. 212, 41 S. E. 709.

[a] Under a constitution declaring that the right of trial by jury shall remain inviolate "the General Assembly has no power to deprive a person of the right of trial by jury in any civil case founded upon a cause of action which is purely legal in its nature. . . . Consequently, so much of the act as attempts to take away this right in cases where the principal sum involved does not exceed fifty dollars is unconstitutional." *Mattox v. State*, 115 Ga. 212, 41 S. E. 709.

constitutional provisions do not apply to suits in equity,<sup>45</sup> the legislature may expand the jurisdiction of courts of equity,<sup>46</sup> and provide that equitable issues are triable by a jury as a matter of right.<sup>47</sup> But it cannot, in modifying the jurisdiction of such courts, infringe upon the right to trial by jury as it existed prior to the adoption of the constitution.<sup>48</sup> Hence, the legislature cannot confer upon courts of equity the power to determine purely legal rights,<sup>49</sup> or change the form of an action from one at law to one in equity,<sup>50</sup> unless it at the same time

45. See *infra*, II, E, 4, c.

46. *Donahue v. Meister*, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283.

[a] "It is common knowledge that the powers of the court of chancery have been greatly expanded, not only by legislative enactment, but by the practice of the court. Its professed object in the beginning was to administer justice where the remedies of the common law were inadequate, and the great usefulness of the court consists in the application of its principles to the growth and development of human transactions. While this is true, it cannot be admitted, we think, that, either by the growth and expansion of the court's powers, or by legislation, the guaranties of the constitution can be undermined and swept away." *Hughes v. Hannah*, 39 Fla. 365, 22 So. 613.

47. *Ariz.*—*Brown v. Greer*, 16 Ariz. 215, 141 Pac. 841. *Ga.*—*Hardin v. Foster*, 102 Ga. 180, 29 S. E. 174. *N. Y.*—*Eggers v. Manhattan R. Co.*, 18 N. Y. Supp. 181. *N. C.*—*Taylor v. Person*, 9 N. C. 298.

[a] Such statutes must be restricted to cases as are proper subjects of equitable jurisdiction and the "preliminary question whether there are sufficient grounds for equitable interposition is for the courts, and not for the legislature." *Winton Coal Co. v. Pancoast Coal Co.*, 170 Pa. 437, 33 Atl. 110.

48. *Fla.*—*Hughes v. Hannah*, 39 Fla. 365, 22 So. 613. *Ill.*—*Ward v. Farwell*, 97 Ill. 593. *Md.*—*Capron v. Devries*, 83 Md. 220, 34 Atl. 251; *McCoy v. Johnson*, 70 Md. 490, 17 Atl. 387. *Mich.*—*Tabor v. Cook*, 15 Mich. 322. *Pa.*—*Haines' Appeal*, 73 Pa. 169; *North Penn. Coal Co. v. Snowden*, 42 Pa. 488, 82 Am. Dec. 530. *Tenn.*—*State Bank v. Cooper*, 2 Yerg. 599. *W. Va.*—*Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557.

[a] The "legislature has no power to confer on courts of equity the juris-

diction to determine legal rights, in regard to which courts of law exercise exclusive jurisdiction. In such cases the constitution guarantees to suitors the right of trial by jury, and this right the legislature cannot abridge or take away." *McCoy v. Johnson*, 70 Md. 490, 17 Atl. 387.

49. *Haines' Appeal*, 73 Pa. 169; *Appeal of Norris*, 64 Pa. 275.

[a] "The right of trial by jury in respect to matters wherein such right existed at the time the constitution was adopted cannot be taken away, directly or indirectly, by transferring the jurisdiction to try purely legal cases to a court of chancery, where, according to the usual practice, juries are not demandable as a matter of right." *Turnes v. Brenckle*, 249 Ill. 394, 94 N. E. 495.

[b] "If the legislature can transfer a part, they can the whole of the jurisdiction in civil cases to courts of equity, and thus practically abolish trial by jury entirely in these cases. . . . We do not hold these acts to be unconstitutional. It is not necessary to do so. We are bound to give them such a construction as will not conflict with the constitution; and that must necessarily be that they are confined in their true intentment to cases which are properly the subject of equitable jurisdiction. That jurisdiction must first be shown to exist, before the remedial provisions . . . can apply." *Norris's Appeal*, 64 Pa. 275.

50. *Ala.*—*Montgomery & F. Ry. Co. v. McKenzie*, 85 Ala. 546, 5 So. 322. *Mass.*—*Stockbridge v. Mixer*, 215 Mass. 415, 102 N. E. 646; *Merchants' Nat. Bank v. Moulton*, 143 Mass. 543, 10 N. E. 251; *Powers v. Raymond*, 137 Mass. 483. *Wis.*—*State ex rel. Schumacher v. Markham*, 160 Wis. 431, 152 N. W. 161.

[a] "It is quite clear that the legislature, by the mere device of

expressly provides for a trial by jury,<sup>51</sup> or unless the case is one of an equitable nature.<sup>52</sup>

The fact that the distinction between the form of legal and equitable actions is abolished by the legislature does not of itself change the mode of trial of equitable actions,<sup>53</sup> except where it is expressly provided by statute that all issues of fact at law as well as in equity are triable by a jury.<sup>54</sup>

adding new cases to those of a class to which former equitable remedies were applicable, cannot encroach upon that provision of the state constitution which says that 'the right to trial by jury shall be secured to all, and remain inviolate.' . . . If that were so, the legislature, by providing new remedies and new kinds of judgments and decrees in form equitable, could in all cases dispense with juries, and thus entirely defeat the constitutional provision on the subject." *Donahue v. Meister*, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283.

[b] **Satisfaction of Debt Out of Property Fraudulently Conveyed.**—Where plaintiff seeks to establish a debt and to have it paid out of property fraudulently transferred to a third person, the rights sought to be determined are essentially legal as distinguished from equitable rights and though the statute has changed the mode of procedure "it would be trifling with the constitution to hold that, by changing the forms of procedure, the substantial rights declared by it can be taken away. In all controversies which are within the purview of that article of the Declaration of Rights, the 'method of procedure' of a trial by jury must be held sacred, whatever the other forms of procedure may be." *Powers v. Raymond*, 137 Mass. 483.

51. Ill.—See *Gage v. Ewing*, 107 Ill. 11. Mass.—*Charles River Bridge v. Warren Bridge*, 6 Pick. 376. Mich.—*Tabor v. Cook*, 15 Mich. 322. W. Va.—*McKinsey v. Squires*, 32 W. Va. 41, 9 S. E. 55. Wis.—*Wakeley v. Mohr*, 15 Wis. 609.

[a] "The objection that the statute infringes the right of trial by jury is sufficiently answered by the following quotation from the statute itself: 'An issue of fact in any such action, properly triable by jury, may be tried by jury with like effect as in other cases.' This doubtless means that the verdict shall have the same effect as a verdict

in a common-law action." *Janesville Cotton Mfg. Co. v. Ford*, 55 Wis. 197, 12 N. W. 377.

52. *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725, where it is said on page 558: "Where a new class of cases is directed by the legislature to be tried in chancery, and it appears, when tested by the general principles of equity, that they are of an equitable nature and can be more appropriately tried in a court of equity than a court of law, the chancellor will have the right as in other cases in chancery, to determine all questions of fact without submitting them to a jury. . . . The constitutional provision . . . introduced no new rule of law, but merely preserved the right already existing. It does not apply to suits in equity or to any statutory proceeding to be had in courts of equity." "

53. U. S.—*Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. ed. 113. Cal.—*Smith v. Rowe*, 4 Cal. 6. Colo.—*Rice v. Goodwin*, 2 Colo. App. 267, 30 Pac. 330. Minn.—*Berkey v. Judd*, 14 Minn. 394. Mont.—*Gallagher v. Basey*, 1 Mont. 457. N. Y.—*Toplitz v. Bauer*, 26 App. Div. 125, 49 N. Y. Supp. 840. S. C.—*Southern Ry. v. Howell*, 89 S. C. 391, 71 S. E. 972; *Price v. Brown*, 4 S. C. 144. Wis.—*Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

[a] It is "the settled rule that, while under the Code of Procedure, both legal and equitable issues may be tried in the same case, yet, 'at the trial, the legal and the equitable issues must be distinguished and decided by the court in the exercise of its distinct functions as a court of law and a court of equity and only those should be determined by a jury which are properly triable by a jury, while those which would formerly have been triable in equity must be determined by the judge in the exercise of his chancery powers.'" *Holliday v. Hughes*, 54 S. C. 155, 31 S. E. 867.

54. Ariz.—*Brown v. Greer*, 16 Ariz. 215, 141 Pac. 841. Ark.—*Ringgold v.*

**3. Enlargement of Jurisdiction of Inferior Courts.**—a. *Generally.*—The legislature is not prevented by the constitutional guaranty of the right to trial by jury from enlarging the jurisdiction of courts of inferior jurisdiction,<sup>55</sup> provided that the statute secures the right to a trial by jury on appeal,<sup>56</sup> and does not impose unreasonable restrictions upon the right to such appeal.<sup>57</sup>

Patterson, 15 Ark. 209. **Ga.**—Hardin v. Foster, 102 Ga. 180, 29 S. E. 174. **Ia.**—Wadsworth v. Wadsworth, 40 Iowa 448. **Me.**—Call v. Perkins, 65 Me. 439. **N. C.**—Ely v. Early, 94 N. C. 1; Taylor v. Person, 9 N. C. 298.

**55. Conn.**—Guile v. Brown, 38 Conn. 237. **Mass.**—Hapgood v. Doherty, 8 Gray 373. **N. Y.**—Knight v. Campbell, 62 Barb. 16.

[a] "There is nothing in the constitution which prohibits the legislature from enlarging the jurisdictions of justices' courts in the mode contemplated by the act. Such increase of jurisdiction is not obnoxious to the constitutional provision . . . by reason of the circumstance that it transfers a class of cases from courts of record where juries are composed of twelve men, to justices' courts in which they consist of six. The right of trial by jury remains unimpaired in such court." Dawson v. Horan, 51 Barb. (N. Y.) 459.

**56. U. S.**—Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873. **Colo.**—McInerney v. Denver, 17 Colo. 302, 29 Pac. 516. **Conn.**—Beers v. Beers, 4 Conn. 535, 10 Am. Dec. 186. **Ga.**—Flint River S. Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248. **Ia.**—Tharp v. Witham, 65 Iowa 566, 22 N. W. 677. **Kan.**—*In re Jahn*, 55 Kan. 694, 41 Pac. 956. **Mass.**—Hapgood v. Doherty, 8 Gray 373. **Mo.**—State v. Allen, 45 Mo. App. 551. **N. H.**—Copp v. Henniker, 55 N. H. 179, 20 Am. Rep. 194. **N. C.**—Keddie v. Moore, 6 N. C. 41, 5 Am. Dec. 518. **Ohio.**—Norton v. McLeary, 8 Ohio St. 205. **Pa.**—Haines v. Levin, 51 Pa. 412; Biddle v. Com., 13 Serg. & R. 405. **Tenn.**—Pryor v. Hays, 9 Yerg. 416; Morford v. Barnes, 8 Yerg. 444.

As to right of jury trial in petty cases, see *infra*, II, E, 5, c.

[a] "The liberty of appeal . . . preserves the right of trial by jury inviolate, within the words and fair intendment of the constitution; and that no such unreasonable hardship is

put . . . by the bond required for the prosecution of the appeal, as to justify the assertion, that the right of trial by jury is, in any manner, impaired." Beers v. Beers, 4 Conn. 535.

[b] And a statute authorizing a trial in a justices' court by six jurors is not unconstitutional where it provides that a party may before trial remove the action to a court where he can have a trial by jury of twelve men upon executing an undertaking securing the payment of any judgment which might be rendered in the action. *People ex rel. Metropolitan Bd. of Health v. Lane*, 6 Abb. Pr. N. S. (N. Y.) 105.

[c] Where no appeal is provided, a statute empowering a court to declare a turnpike road abandoned and vacated as a toll is in conflict with the constitutional guaranty of the right to trial by jury. "At common law the want of reparation of highways, when visited with fine, penalty and forfeiture, was the subject of inquiry by a jury." *Turnpike Co. v. Parks*, 50 Ohio St. 568, 35 N. E. 304.

**57. U. S.**—Greene v. Briggs, 1 Curt. 311, 10 Fed. Cas. No. 5,764. **Ala.**—Reeves v. State, 96 Ala. 33, 11 So. 296. **Me.**—State v. Gurney, 37 Me. 156, 58 Am. Dec. 782. **Minn.**—State v. Everett, 14 Minn. 439. **R. I.**—*In re Liquors of McSoley*, 15 R. I. 608, 10 Atl. 659; *Littlefield v. Peckham*, 1 R. I. 500. **Vt.**—State v. Peterson, 41 Vt. 504.

[a] **Limitation on Right To Appeal.** A statute providing for a jury trial on appeal only where the amount of the judgment exceeds a certain sum, is unconstitutional. *McGinty v. Carter*, 48 N. J. L. 113, 3 Atl. 78.

[b] **Where Dependent Upon Amount in Controversy.**—Where the constitution makes the right of trial by jury on appeal depend upon the amount in controversy, a statute which makes the right of an appeal depend upon the amount of the judgment, is unconstitutional. *Lucé v. Garrett*, 4 Ind. Ter. 54, 64 S. W. 613. To the same effect,

The constitutional right of trial by jury in civil actions is not infringed by a statute which sets the pecuniary limit of the jurisdiction of justices of the peace in actions at law higher than it was when the particular constitution was adopted and allows a trial by jury for the first time upon appeal.<sup>58</sup>

b. *Restriction Upon Right of Appeal.*—The requirements of a statute to furnish a bond or undertaking on appeal,<sup>59</sup> or to pay the costs,<sup>60</sup> or to make oath that the appeal is not prosecuted for the purpose of delay,<sup>61</sup> are not unreasonable restrictions upon the right of appeal. But a statute providing for payment of counsel fees by the appellant is unconstitutional.<sup>62</sup>

The rule that the legislature may enlarge the jurisdiction of courts of inferior jurisdiction and provide for an appeal without unreasonable restrictions applies also to criminal cases,<sup>63</sup> but in some cases it

Missouri, *K. & T. Ry. Co. v. Phelps*, 4 Ind. Ter. 706, 76 S. W. 285; *Dennee v. McCoy*, 4 Ind. Ter. 233, 69 S. W. 858.

58. **U. S.**—*Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873. **Conn.**—*Curtis v. Gill*, 34 Conn. 49; *Beers v. Beers*, 4 Conn. 535, 10 Am. Dec. 186. **Md.**—*Steuart v. Baltimore*, 7 Md. 500. **Tenn.**—*Morford v. Barnes*, 8 Yerg. 444.

[a] "When the convention declared that the ancient mode of trial by jury should be preserved, no restriction was thereby laid on the legislature as to erecting or organizing judicial tribunals in such manner as might be most conducive to the public convenience and interest. . . . It is true, that the legislature cannot impose any provisions substantially restrictive of the trial by jury: they may give existence to new forums; they may modify the powers and jurisdiction of former courts in such instances as are not interdicted by the constitution, from which their legitimate power is derived; but still the sacred right of every citizen, of having a trial by jury, must be preserved. . . . So long as the trial by jury is preserved through an appeal, the preliminary mode of obtaining it may be varied at the will and pleasure of the legislature." *Keddie v. Moore*, 6 N. C. 41.

[b] And it "cannot be said . . . that the constitution, even by implication, fixes the limit at any definite sum. On the contrary, it seems more reasonable and more in harmony with the purposes and spirit of that instrument to interpret it as saying, in ef-

fect, that the legislature may, in conformity to established usage, to a certain extent change from time to time, as the business interests of the state may require, the limit below which the state shall not be required to provide for a jury trial. . . . On the whole it will hardly do to say that increasing the final jurisdiction to fifteen dollars is so unjust and unreasonable as to require us to adjudge the law void. It has been suggested that, if the jurisdiction may be extended at all, there is no limit to the power of the legislature, and that the right of trial by jury may be seriously impaired, if not ultimately destroyed. . . . A sufficient answer to this argument is found in the fact, that the constitution . . . does not . . . contain any such limitation." *Guile v. Brown*, 38 Conn. 237.

59. *Reckner v. Warner*, 22 Ohio St. 275.

[a] **Bond To Pay Judgment.**—*Beers v. Beers*, 4 Conn. 535, 10 Am. Dec. 186; *People ex rel. Metropolitan Bd. of Health v. Lane*, 6 Abb. Pr. N. S. (N. Y.) 105.

60. *McDonald v. Schell*, 6 Serg. & R. (Pa.) 240.

61. *Biddle v. Com.*, 13 Serg. & R. (Pa.) 405.

62. *St. Louis, I. M. & S. Ry. Co. v. Williams*, 49 Ark. 492, 5 S. W. 883.

63. **Conn.**—*State v. Brennan's Liquors*, 25 Conn. 278. **Ia.**—*Zelle v. McHenry*, 51 Iowa 572, 2 N. W. 264. **Me.**—*Sprague v. Androsoggin County*, 104 Me. 352, 71 Atl. 1090; *State v. Craig*, 80 Me. 85, 13 Atl. 129; *Johnson's Case*, 1 Greenl. 230. **Mass.**—*Jones*

is held that the fact that a statute confers the right to trial by jury on appeal does not satisfy the requirements of the constitution securing the right to trial by jury.<sup>64</sup> Where the statute provides that the defendant appealing from a judgment of a court of limited jurisdiction shall furnish bail,<sup>65</sup> a bond or recognizance,<sup>66</sup> procure copies of the appeal,<sup>67</sup> or pay the costs<sup>68</sup> and fees,<sup>69</sup> his right to an appeal is not

*v. Robbins*, 8 Gray 329. N. C.—*State v. Tate*, 169 N. C. 373, 85 S. E. 383; *State v. Dunlap*, 159 N. C. 491, 74 S. E. 626; *State v. Lytle*, 138 N. C. 738, 51 S. E. 66; *State v. Whitaker*, 114 N. C. 818, 19 S. E. 376; *State v. Crook*, 91 N. C. 536. Va.—*Brown v. Epps*, 91 Va. 726, 21 S. E. 119, 27 L. R. A. 676. W. Va.—*Beasley v. Beckley*, 28 W. Va. 81; *Moundsville v. Fountain*, 27 W. Va. 182. Wis.—*State v. Smith*, 65 Wis. 93, 26 N. W. 258.

[a] **Effect of Power To Amend on Appeal.**—And a statute conferring upon the superior court the power to amend proceedings before a justice of the peace upon appeal is not unreasonable. "The exercise of such power of amendment in the superior court is essential to render the jurisdiction of justices of the peace practically effectual in criminal matters wherein appeals shall be taken." *State v. Crook*, 91 N. C. 536.

[b] **No Jury on Appeal.**—But where a statute provides for the trial of misdemeanors by a jury of only eight persons instead of twelve and authorizes an appeal upon conviction directly to the supreme court only, it deprives the defendant of his constitutional right of trial by jury, as the jury contemplated by the constitution is a jury of twelve men and there is no jury in the supreme court. *Collins v. State*, 88 Ala. 212, 7 So. 260.

64. Ala.—*Alford v. State*, 170 Ala. 178, 54 So. 213, Ann. Cas. 1912C, 1093. See *Reeves v. State*, 96 Ala. 33, 11 So. 296. Md.—*Danner v. State*, 89 Md. 220, 42 Atl. 965. Okla.—*Bettge v. Territory*, 17 Okla. 85, 87 Pac. 897.

[a] "If because of his poverty, or because he is a stranger in a strange land, or for other reason, he is unable to obtain sufficient sureties, or to pay the required fees, the accused has no appeal and no jury trial. If he secures his appeal, but is unable or for any cause fails to enter and prosecute it, not only is the sentence of the police court affirmed, but he is charged

with additional costs and his recognizance is forfeited. In other words, for taking and failing to pursue his appeal he is subjected not only to the original sentence, but also to the penalty of paying costs and the amount of his recognizance. . . . The obligation to appeal is . . . a burden unwarranted by the constitution." *State v. Gerry*, 68 N. H. 495, 38 Atl. 272, 38 L. R. A. 228.

[b] "Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial for the offense charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury in an appellate court, after he has been once fully tried, otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the constitution." *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. ed. 223.

65. *Stevens v. Anderson*, 145 Ind. 304, 44 N. E. 460; *Jones v. Robbins*, 8 Gray (Mass.) 329.

66. Conn.—*State v. Brennan's Liquors*, 25 Conn. 278. Mass.—*Com. v. Whitney*, 108 Mass. 5. R. I.—*Littlefield v. Peckham*, 1 R. I. 500. W. Va. *Jelly v. Dils*, 27 W. Va. 267.

67. *In re Marron*, 60 Vt. 199, 12 Atl. 523.

68. *Littlefield v. Peckham*, 1 R. I. 500. *Contra*, *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516.

69. *State v. Griffin*, 66 N. H. 326, 29 Atl. 414.

unreasonably restricted thereby; but in some jurisdictions statutes exacting of the defendant in a criminal case as condition precedent to an appeal a bond for the payment of the fine and costs have been held unconstitutional.<sup>70</sup>

A statute requiring appellant to furnish a bond as security against any infraction of the law during the pendency of the appeal is unconstitutional.<sup>71</sup> And a statute providing that where defendant upon appeal is convicted he shall suffer double the amount of the penalty, likewise violates the constitutional guaranty of the right to trial by jury.<sup>72</sup>

**4. Regulations Affecting the Right.**—*a. In General.*—The object of the constitutional provision guaranteeing the right to trial by jury is to preserve the substance of such right rather than to prescribe the methods by which it shall be exercised.<sup>73</sup> The legislature therefore may prescribe the mode and manner in which this constitutional right

**70. U. S.**—*Greene v. Briggs*, 1 Curt. 311, 10 Fed. Cas. No. 5,764. **Ia.**—*State v. Beneke*, 9 Iowa 203. **Kan.**—*In re Jahn*, 55 Kan. 694, 41 Pac. 956.

See also *Reeves v. State*, 96 Ala. 33, 11 So. 296.

**[a] Bond Conditioned To Pay Judgment and Costs.**—A statute requiring a defendant appealing from a sentence of the police court to furnish a bond conditioned not merely for his appearance in the appellate court but also for payment of any judgment on appeal and likewise to pay all costs accrued in the police court, is unconstitutional. *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516.

**[b] When "the appeal affords the only trial which accords with the constitution . . . it must be given without any condition that the landowner may not be able to comply with. . . . An appeal that can be taken only upon the condition of giving a bond . . . with two sureties . . . conditioned for the payment of the fees of the commissioners and the costs of appeal, provided the award of the jury is not 'increased twenty dollars' to each party appealing, is not a reasonable regulation of procedure. . . . He may not be able to comply with the condition upon which an appeal is allowed. . . . An appeal, burdened with such a condition, is not a constitutional method of ascertaining the damages." *People ex rel. Eckerson v. Board of Trustees*, 151 N. Y. 75, 45 N. E. 384.**

**71. Saco v. Woodsum**, 39 Me. 258; *Saco v. Wentworth*, 37 Me. 165, 58 Am. Dec. 786.

**[a] Security To Keep Peace.**—Where the appeal is made dependent upon furnishing a recognizance with one or more sureties conditioned to appear before the court and abide the judgment therein and in the meantime keep the peace, the constitutional right to trial by jury is violated thereby. The court says: "If this right of appeal is so absolute, unqualified and unfettered that it, together with the right of trial by jury, is secured to every man who demands an appeal, we are of opinion that the requirement of the constitution is satisfied. But these rights must be secured. They must not be made to depend upon a condition with which the party prosecuted may or may not be able to comply." *State v. Everett*, 14 Minn. 439.

**72. State v. Gurney**, 37 Me. 156, 58 Am. Dec. 782. See also *Greene v. Briggs*, 1 Curt. 311, 10 Fed. Cas. No. 5,764.

**73. U. S.**—*Walker v. New Mexico & S. Pac. R. Co.*, 165 U. S. 593, 17 Sup. Ct. 421, 41 L. ed. 837. **N. H.** *Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194. **N. Y.**—*Smith v. Western Pac. Ry. Co.*, 203 N. Y. 499, 96 N. E. 1106, Ann. Cas. 1913B, 264, 40 L. R. A. (N. S.) 137.

**[a]** And a statute is within the reasonable intendment of the constitution "if the trial by jury be not impaired, although it may be subjected to new modes, and even rendered more expensive, if the public interest demand such alteration." *Beers v. Beers*, 4 Conn. 535.

is to be enforced,<sup>74</sup> although it cannot take away any of the essential and substantial elements of trial by jury as existing under the common law.<sup>75</sup>

74. Cal.—*Conneau v. Geis*, 73 Cal. 176, 14 Pac. 580, 2 Am. St. Rep. 785. Colo.—*Venine v. Archibald*, 3 Colo. 163. Conn.—*McKay v. Fair Haven & W. R. Co.*, 75 Conn. 608, 54 Atl. 923; *Beers v. Beers*, 4 Conn. 535, 10 Am. Dec. 186. D. C.—*Simmons v. Morrison*, 13 App. Cas. 161. Fla.—*Blanchard v. Raines*, Exrx., 20 Fla. 467. Ga.—*Flint River S. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248. Haw.—*Bannister v. Lucas*, 21 Hawaii 222. Md.—*Knee v. Baltimore City Pass. Ry. Co.*, 87 Md. 623, 40 Atl. 890, 42 L. R. A. 363. Mass. *Foster v. Morse*, 132 Mass. 354, 42 Am. Rep. 438; *Com. v. Whitney*, 108 Mass. 5. N. H.—*State v. Griffin*, 66 N. H. 326, 29 Atl. 414; *Davis v. School District*, 44 N. H. 398. N. J.—*Edwards v. Elliott*, 36 N. J. L. 449, 13 Am. Rep. 463. N. Y.—*Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492; *Walter v. People*, 32 N. Y. 147; *People ex rel. Staudacher v. Webb*, 16 Hun 42. N. C. *Keddie v. Moore*, 6 N. C. 41, 5 Am. Dec. 518. Ohio.—*Norton v. McLeary*, 8 Ohio St. 205. Pa.—*Smith v. Times Pub. Co.*, 178 Pa. 481, 36 Atl. 296, 35 L. R. A. 819; *Haines v. Levin*, 51 Pa. 412. R. I.—*Mathews v. Tripp*, 12 R. I. 256. S. C.—*State v. Wyse*, 32 S. C. 45, 10 S. E. 612. Tenn.—*Garrison v. Hollins, Burton & Co.*, 2 Lea 684. Vt. *In re Marron*, 60 Vt. 199, 12 Atl. 523.

[a] **Denial and Regulation Distinguished.**—The “denial of a right is one thing, and the regulation by rules of procedure, which guaranty the right, is quite a different thing. . . . And, moreover, the legislature is expressly authorized to enact such regulations; . . . and so long as in the enactment of laws regulating procedure in the courts they do not deny to defendants any constitutional right, but merely regulate that right in a reasonable manner, by rules of procedure adopted to prevent confusion and delay, and to secure a fair and impartial trial, just so long will their enactments withstand the test of judicial criticism and defy annulments by the courts.” *Johnson v. State*, 42 Tex. Crim. 103, 58 S. W. 69.

[b] “The constitution merely guar-

antees the right and leaves to the legislature the duty of providing the means and methods by which it is to be enjoyed. The time and place of the trial, the qualifications of jurors and the manner in which twelve shall be selected for the trial of a case, including all the steps from the venire to the challenge are subjects of legislation subject to the limitation that the substance of the jury trial . . . is preserved.” *Copp v. Henniker*, 55 N. H. 179.

[c] The legislature may vary the terms and conditions under which a trial by jury may be had according to the changing exigencies of different cases. *Mathewson v. Ham*, 21 R. I. 311, 43 Atl. 848.

75. Mich.—*Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635. N. H.—*East Kingston v. Towle*, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174. Ohio. *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671.

[a] “The essential and substantive attributes or elements of jury trial are and always have been number, impartiality, and unanimity. The jury must consist of twelve; they must be impartial and indifferent between the parties; and their verdict must be unanimous.” *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437.

[b] “If an act requires conditions for the purpose of preventing a trial by jury, the spirit of such a provision is at war with the spirit of the constitution, and so far as it deprives one of this means of protection, it is void.” *Saco v. Wentworth*, 37 Me. 165, 58 Am. Dec. 786.

[c] “The general rule of construction in reference to . . . the constitution is, that any act which destroys or materially impairs the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury, is unconstitutional.” *Plimpton v. Town of Somers*, 33 Vt. 283.

[d] **Act Forbidding Waiver.**—Under a constitutional provision declaring that the parties may dispense with a

b. *As to Number and Concurrence of Jurors.*—The legislature ordinarily cannot reduce the number of jurors in cases which come within the constitutional provision guaranteeing the right to trial by jury,<sup>76</sup> but obviously it may authorize a trial by a jury consisting of any number of jurors in cases in which a jury was not required under the common law.<sup>77</sup> Generally it is not competent for the legislature to declare that a concurrence of less than the whole number of jurors is sufficient to a verdict,<sup>78</sup> though it has been held that a statute providing for a verdict upon a concurrence of nine jurors in civil cases, is constitutional.<sup>79</sup>

trial by jury an attempt of the legislature to except from such provision persons acting in fiduciary capacity is unconstitutional. *Campbell v. Fayette County*, 6 Pa. Co. Ct. 132.

76. *Mo.*—*Vaughn v. Scade*, 30 Mo. 600. *N. H.*—*In re Opinion of Justices*, 41 N. H. 550. *Ohio*.—*Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671. *Pa. Com. v. Saal*, 10 Phila. 496. *Wash. Ter.* *Thomas v. Hilton*, 3 Wash. Ter. 365, 17 Pac. 882.

*As to number of jurors required by constitution*, see *supra*, II, B, 2; II, D, 4, b.

[a] "The number of jurors cannot be diminished, or a verdict authorized short of a unanimous concurrence of all the jurors. It follows that the act under which this conviction was obtained, in so far as it provides for a jury of six only, and authorizes a conviction upon their finding, is unconstitutional and void. *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671.

[b] *Jury of Eight for Misdemeanors.*—A statute providing for trial of misdemeanors by a jury of eight men is unconstitutional. "The vital objection . . . to the act is, that it expressly provides for the trial of such cases by a jury of only eight persons, instead of twelve, and authorizes an appeal upon conviction directly to the supreme court only, thus depriving the defendant of his constitutional right of trial by jury." *Collins v. State*, 88 Ala. 212, 7 So. 260.

77. *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671; *Collier v. Territory*, 2 Okla. 444, 37 Pac. 819.

[a] *Inquisition of Lunacy.*—Where at the time of the adoption of the constitution it was the practice to summon at least twelve and not more than twenty-four jurors to serve at lunacy inquisitions and a concurrence

of twelve jurors was deemed sufficient to the rendition of a verdict, although the remainder of the jurors summoned refused to assent to it, a statute providing for a jury of twelve in lunacy proceedings does not violate the constitutional provision securing the right to trial by jury. *In re Lindsley's Case*, 46 N. J. Eq. 358, 19 Atl. 726.

78. *Ariz.*—*Carroll v. Byers*, 4 Ariz. 158, 36 Pac. 499. *Fla.*—*Jacksonville, T. & K. W. Ry. Co. v. Adams*, 33 Fla. 608, 15 So. 257, 24 L. R. A. 272. *Mont.* *Kleinschmidt v. Dunphy*, 1 Mont. 118. *N. H.*—*In re Opinion of Justices*, 41 N. H. 550. *Okla.*—*Bradford v. Territory*, 1 Okla. 366, 34 Pac. 66.

[a] From "the earliest period down to the time of the adoption of the constitution, unanimity of twelve jurors alone has constituted a legal verdict. If the legislative assembly could dispense with one attribute or essential of a verdict, it could as well destroy the other, or repeal the right altogether. It can do neither." *Kleinschmidt v. Dunphy*, 1 Mont. 118.

[b] *Sickness or Disability of Juror.* A statute authorizing a verdict of a jury by less than twelve men in case of sickness or disability of any juror is unconstitutional. *Kelsh v. Town of Dyersville*, 68 Iowa 137, 26 N. W. 38; *Eshleman v. Chicago, B. & Q. R. Co.*, 67 Iowa 296, 25 N. W. 251.

*As to number who must concur in verdict*, see the title "Verdict."

79. *Pratt v. Parsons*, 13 Utah 31, 43 Pac. 620; *Leedom v. Earls Furniture & Carpet Co.*, 12 Utah 172, 42 Pac. 208; *Riley v. Salt Lake R. T. Co.*, 10 Utah 428, 37 Pac. 681.

[a] Such statute "is general in its application; it is fair and just to all. . . . All litigants could waive in civil trials at common law and under our constitution this unanimity of ver-

c. *Selection of Jury From Vicinage.*—It is within the power of the legislature, as a rule, to regulate the mode of selecting jurors,<sup>80</sup> to designate the person or persons by whom,<sup>81</sup> and the manner in which<sup>82</sup> the selection of jurors is to be made. So too, the legislature may de-

dict. If they could waive it, then it was not one of the requisites which must be preserved in order to preserve a jury trial in civil actions. For these reasons, because society progresses, and modes and legal procedure must change with that progress, because this enactment is a 'just and reasonable expression of the public will,' because it is calculated to be a great benefit to all classes of litigants, because it reaches justly and fairly and impartially all classes of men, because it is claimed only to be an infringement of a broad and general statement in the constitution which ought not to be so narrowly construed as to be a bulwark against progress, we hold that this law was a rightful subject of legislation." *Hess v. White*, 9 Utah 61, 33 Pac. 243, 24 L. R. A. 277.

80. *Ga.*—*Conyers v. Graham*, 81 Ga. 615, 8 S. E. 521. *Ky.*—*Wendling v. Com.*, 143 Ky. 587, 137 S. W. 205; *Beatty v. Com.*, 91 Ky. 313, 15 S. W. 856. *Mich.*—*Saginaw v. Campau*, 102 Mich. 594, 61 N. W. 65; *Hewitt v. Gage*, 71 Mich. 287, 39 N. W. 56. *Mo.*—*Eckrich v. St. Louis Transit Co.*, 176 Mo. 621, 75 S. W. 755, 98 Am. St. Rep. 517, 62 L. R. A. 911; *State v. Slover*, 134 Mo. 607, 36 S. W. 50. *N. H.*—*Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 104; *State v. Wilson*, 48 N. H. 398. *N. J.*—*Brown v. State*, 62 N. J. L. 666, 42 Atl. 811. *N. Y.*—*Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492. *S. C.*—*State v. Boatwright*, 10 Rich. L. 407. *Wis.*—*Perry v. State*, 9 Wis. 19.

[a] "The statutes for selecting jurors, drawing and summoning them, form no part of a system to procure an impartial jury to parties." *Rafe v. State*, 20 Ga. 60.

[b] "The mode of selecting the jury is only a means to an end, and only goes to the question of impartiality. No court ever held or intimated that, in order to preserve the right of trial by jury 'inviolable,' it is necessary to continue the particular method of selecting jurors in force at the time of the adoption of the constitution. On the contrary, it has always been held

that the method of selection is entirely within the control of the legislature, provided only that the fundamental requisite of impartiality is not violated." *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437. To the same effect, *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492.

81. *Ky.*—*Smith v. Com.*, 17 Ky. L. Rep. 1162, 33 S. W. 825. *Mich.*—*Hewitt v. Gage*, 71 Mich. 287, 39 N. W. 56. *Wis.*—*Perry v. State*, 9 Wis. 19.

[a] "Neither does the fact that the sheriff in the county or the jury commissioners in the large cities have the power to select the special jury, and that they are not drawn, by lot, as the regular panel is, make the law unconstitutional. Such matters depend wholly upon the legislative will. The power of selection must be lodged somewhere, in one or more persons, and it is for the legislative wisdom to provide whether the power shall be vested in the sheriff, . . . or in a jury commissioner, . . . or in a body composed of more than one." *Eckrich v. St. Louis Transit Co.*, 176 Mo. 621, 75 S. W. 755, 98 Am. St. Rep. 517, 62 L. R. A. 911.

[b] "The manner of the selection, and the person or persons by whom the selection was to be made, was often the subject of change by the legislative power, both in England and America, but it was never supposed that this was an infringement of the right of jury trial, so long as the selection was made by an impartial person, acting free from bias or corruption." *People v. Harding*, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95.

82. *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437; *Eckrich v. St. Louis Transit Co.*, 176 Mo. 621, 75 S. W. 755, 98 Am. St. Rep. 517, 62 L. R. A. 911.

[a] *Drawn by Lot Not Essential.* *Eckrich v. St. Louis Transit Co.*, 176 Mo. 621, 75 S. W. 755, 98 Am. St. Rep. 517, 62 L. R. A. 911; *Perry v. State*, 9 Wis. 19.

crease or increase the panel from which a jury is to be selected,<sup>83</sup> and prescribe the mode of selecting special or struck juries.<sup>84</sup> But the right to a trial by a jury of the vicinage cannot be abridged by the legislature,<sup>85</sup> unless the constitution empowers the legislature to determine the venue.<sup>86</sup>

Where the constitution expressly provides that a defendant in a criminal action is entitled to a trial by a jury of the county or district in which the crime has been committed, a statute authorizing the court to remove a criminal cause to another county, is unconstitutional.<sup>87</sup> It has been held, however, that in the absence of a constitutional provision expressly requiring a trial by jury in the vicinage, a statute authorizing the court to remove a cause for trial to another county does not violate the constitutional guaranty of the right to trial by jury.<sup>88</sup>

83. *Mattox v. State*, 115 Ga. 212, 41 S. E. 709.

[a] A statute authorizing a panel of eighteen in a city court is constitutional, as there "is no limitation to the power of the legislature to prescribe how the twelve shall be selected. The legislature may increase or may decrease, if it sees proper, the panel from which the twelve are to be selected, . . . and so long as a jury of twelve remains for the trial of the case . . . it is sufficient under the constitution." *Conyers v. Graham*, 81 Ga. 615, 8 S. E. 521.

84. *Minn.*—*Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437. *Mo.*—*State v. Lehman*, 182 Mo. 424, 81 S. W. 1118, 103 Am. St. Rep. 670, 66 L. R. A. 490; *Eckrich v. St. Louis Transit Co.*, 176 Mo. 621, 75 S. W. 755, 98 Am. St. Rep. 517, 62 L. R. A. 911; *State v. Slover*, 134 Mo. 607, 36 S. W. 50. *N. J.*—*Brown v. State*, 62 N. J. L. 666, 42 Atl. 811; *Fowler v. State*, 58 N. J. L. 423, 34 Atl. 682. *N. Y.*—*People v. Conklin*, 175 N. Y. 333, 67 N. E. 624; *People v. Hall*, 169 N. Y. 184, 62 N. E. 170; *People v. Dunn*, 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247.

85. *Mich.*—*Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635. *N. H.*—*State v. Jackson*, 77 N. H. 287, 90 Atl. 791; *State v. Moore*, 69 N. H. 102, 40 Atl. 702. *N. C.*—*State v. Cutshall*, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130.

[a] *Jury District*.—"It is doubtless a legitimate inference from . . . the word 'district' without in terms affixing to it any definite territorial limits,

that the legislature may, in their discretion, by a general law create trial districts which shall include more territory than a single county. But to be effective under this provision of the constitution such law must be accompanied by one under which jurors can be called from the whole body, and not from a portion merely, of such district. In other words, the trial district and the jury district must be the same." *Olive v. State*, 11 Neb. 1, 7 N. W. 444.

86. *Matter of McDonald*, 20 Cal. App. 641, 129 Pac. 957.

87. *Osborn v. State*, 24 Ark. 629.

[a] "The right of the accused to be tried in the county in which the offense is alleged to have been committed, is a right secured to him by the constitution, and of which he cannot, in any case, be deprived without his consent given in open court." *State v. Denton*, 6 Coldw. (Tenn.) 539.

[b] A "statute purporting to authorize a change of venue on the motion of the prosecution, against the objection of the accused, is in conflict with the constitution, and void." *Wheeler v. State*, 24 Wis. 52. To the same effect, *People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.

88. *Glinnan v. Judge of Recorder's Court*, 173 Mich. 674, 140 N. W. 87.

[a] "Juries were originally selected from the vicinage, because being so selected they were more likely to know about the matter for trial. That reason no longer operates. The principal reason for trial in the vicinage now is the convenience of parties and witnesses. . . . Trial in the vicinage,

A statute declaring that where an offense shall be committed within a certain distance of the county line, the trial may be in either county divided by such line, is unconstitutional,<sup>89</sup> except where the constitution permits the jury to be drawn from a judicial district, which includes the territory within the limits specified in the statute,<sup>90</sup> or where previous to the adoption of the constitution such a statute was already in force.<sup>91</sup> But the statute may provide that, if a mortal wound is inflicted in one county and death ensues therefrom in another county, the offense may be prosecuted in either county.<sup>92</sup> In some cases it is held that the legislature may provide for the selection of jurors from a designated part of a county.<sup>93</sup>

d. *Qualifications of Jurors.*—The constitutional provisions securing the right to trial by jury do not limit the legislative power to define the qualifications of jurors, provided that the substantial elements of such right are preserved.<sup>94</sup> Thus, the legislature may provide that

especially if the action, like the action in the case at bar, is transitory, is not an essential incident to the right of trial by jury. Indeed, the one requisite of a judicial trial, paramount to all others, is impartiality or freedom from prejudice, and if this cannot be found in the proper county it should be sought elsewhere." Taylor v. Gardiner, 11 R. I. 182.

89. *Armstrong v. State*, 1 Coldw. (Tenn.) 338.

[a] The "right of trial by jury included that of being tried by jurors selected from the county in which the offense is alleged to have been committed. . . . It was the settled common-law doctrine that jurors in one county were not competent to pass upon the guilt or innocence of a party in regard to a crime alleged to have been committed by him in another county. . . . It would seem too plain to admit of argument, the constitution is violated by authorizing parties committing offenses wholly in one county to be indicted and tried therefor in another county. If this may be done as to one hundred rods of territory, why may it not be done as to one mile? And if it may be done as to one mile, why may it not be done as to the entire county?" Buckrice v. People, 110 Ill. 29.

90. *State v. Stewart*, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388.

91. *State v. Pugsley*, 75 Iowa 742, 38 N. W. 498.

92. *Com. v. Parker*, 2 Pick. (Mass.) 550; *State v. Pauley*, 12 Wis. 537.

93. *State v. Kemp*, 34 Minn. 61, 24 N. W. 349; *Ellis v. State*, 92 Tenn. 85, 20 S. W. 500.

[a] A city charter providing that jurors for the city courts should be taken from the freeholders of the city instead of the county is not unconstitutional. The "common law required merely that the jury should come from the vicinage. . . . Were this, however, an innovation upon the common law, it would not follow that the trial by jury was not preserved inviolate. It never could have been intended to tie up the hands of the legislature so that no regulations of the trial by jury could be made. . . . Again, this mode of forming a city jury had existed . . . , when the constitution was adopted. That instrument declares, that the right of trial by jury shall be preserved inviolate; and it is contended, that this instrument so carefully securing the existing rights of trial by jury, necessarily destroys the right as it then existed in our cities? The court cannot accede to this construction." *Colt v. Eves*, 12 Conn. 243.

94. *Ky.*—*Wendling v. Com.*, 143 Ky. 587, 137 S. W. 205. *Mich.*—*City of Saginaw v. Campau*, 102 Mich. 594, 61 N. W. 65. *Miss.*—*Cooper v. State*, 59 Miss. 267. *Mo.*—*State v. Slover*, 134 Mo. 607, 36 S. W. 50; *State v. Welsor*, 117 Mo. 570, 21 S. W. 443; *Vaughn v. Seade*, 30 Mo. 600. *N. H.*—*Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194. *N. J.*—*Brown v. State*, 62 N. J. L. 666, 42 Atl. 811. *Wash.*—*State v. McDowell*, 61 Wash. 398, 112 Pac. 521,

jurors must be taxpayers,<sup>95</sup> or possess certain property qualifications.<sup>96</sup> So too, a statute disqualifying persons from serving as jurors because of their inability to read and write the English language is constitutional.<sup>97</sup> And a statute providing that a person who has formed an opinion in a criminal case is not disqualified to serve as a juror if he declares upon oath his belief, that he can impartially render a verdict in the case, is not unconstitutional.<sup>98</sup> And the same is true as to a

Ann. Cas. 1912C, 782, 32 L. R. A. (N. S.) 414.

[a] The method of securing the right to trial by jury "in respect of selecting men who are deemed qualified to act as jurors, is one of legislative cognizance which is subject to any change that does not trench upon the fundamental right." *People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967.

[b] **Inhabitant of Interested Town.** The legislature is not restricted by the constitution in its authority to provide that mere inhabitancy in a town or county shall not disqualify from sitting as a juror in a cause in which such town or county is interested. *Com. v. Brown*, 150 Mass. 334, 23 N. E. 98; *McClure v. Red Wing*, 28 Minn. 186, 9 N. W. 767.

[c] **But where the constitution declares** that the legislature shall provide for the selection of "upright and intelligent persons" to serve as jurors, a statute directing to draw the jurors from a box selected from all the citizens without regard to their qualifications is repugnant to the constitution. *Moses v. State*, 60 Ga. 138.

[d] **Political Test Unconstitutional.** And a statute declaring that it shall be good ground for the challenge of a juror that he is not a qualified voter of the state is unconstitutional. "If a legislature may restrict the qualification to a political test, it may to a religious one, and declare that none save members of a particular denomination shall be competent; it may restrict it to the farmer, the mechanic, the merchant or to any other one class of the callings in life." *Gibbs v. State*, 3 Heisk. (Tenn.) 72.

95. *State v. McDowell*, 61 Wash. 398, 112 Pac. 521, Ann. Cas. 1912C, 782, 32 L. R. A. (N. S.) 414. But see *contra*, *Reece v. Knott*, 3 Utah 451, 24 Pac. 757, where the court says: "When the framers of the constitution used the word 'jury' they used

it with reference to its signification at common law, which was a jury of twelve men and householders. Then has the legislature the right under this constitutional provision to restrict or impair the right of trial by jury, by prescribing any terms different from those that constitute a legal jury at common law? If they have a right to say he shall pay taxes before being eligible, have they not the same right to say that he shall possess any amount of property which they may deem proper, and thus virtually have the effect to exclude many good citizens from a seat in the jury box?"

96. *People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967. But see *Cooper v. State*, 59 Miss. 267, where it is said: "It is left to the legislature to prescribe the qualifications of jurors, subject to the prohibition of a property qualification."

97. *City of Saginaw v. Campau*, 102 Mich. 594, 61 N. W. 65.

[a] "The legislature had the same right to provide that one who cannot read and write the English language shall not be a qualified juror, as it had to say, that lawyers, doctors, clergymen and persons of different trades, occupations and stations in life should not be qualified to sit on juries." *State v. Welsor*, 117 Mo. 570, 21 S. W. 443.

98. *U. S.—Ex parte Spies*, 123 U. S. 131, 8 Sup. Ct. 21, 31 L. ed. 80. *Ga.* See *Rafe v. State*, 20 Ga. 60. *Ill.* *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320. *Mont.—Territory v. Bryson*, 9 Mont. 32, 22 Pac. 147. *Ohio.—McHugh v. State*, 42 Ohio St. 154. *Utah.—People v. Thielde*, 11 Utah 241, 39 Pac. 837.

[a] But see *contra* *Eason v. State*, 6 Baxt. (Tenn.) 466, where it is said on pp. 476, 477, 478: "It is little else than a mockery to try the competency of a juror by asking if he has formed and expressed his opinion of the guilt

statute which provides that a pre-existing opinion shall not disqualify a juror if the court shall be satisfied from his examination or other evidence that he will render an impartial verdict in the cause.<sup>99</sup> The legislature may likewise provide that if the offense charged be punishable with death, any person entertaining such conscientious opinions as would preclude him from voting for such penalty, shall be disqualified to serve as a juror in such case.<sup>1</sup>

e. *Impaneling Jury and Challenges.*—It is competent for the legislature to point out the mode of impaneling juries, and the proceedings of the common law in procuring a jury may be changed by and are subject to statutory regulations.<sup>2</sup> Hence, statutes regulating the exercise of the right of peremptory challenges are not unconstitutional.<sup>3</sup> The legislature may diminish the number of peremptory challenges allowed a defendant in criminal cases.<sup>4</sup> And a statute conferring upon the state the right to the same number of peremptory challenges as

or innocence of the accused, and when he answers that he has upon having heard or read the facts, then to take him as an impartial juror, upon his belief that he can divest himself of his convictions and render a fair and impartial verdict. A prisoner whose life or liberty is submitted to a jury composed of such men, cannot be said to have a fair trial by an impartial jury. We hold that an impartial juror is one who enters the box indifferent between the parties, indifferent in feeling and in opinion."

99. *Colo.*—*Jones v. People*, 2 *Colo.* 351. *Ind.*—*Stout v. State*, 90 *Ind.* 1. *N. Y.*—*Stokes v. People*, 53 *N. Y.* 164, 13 *Am. Rep.* 492. *Ohio.*—*Cooper v. State*, 16 *Ohio St.* 328.

[a] A statute taking away the challenge for implied bias on the ground that a juror has formed or expressed an opinion as to the guilt of the accused is not unconstitutional. *People v. Ah Lee Doon*, 97 *Cal.* 171, 31 *Pac.* 933.

1. *Greenley v. State*, 60 *Ind.* 141.

[a] And a constitutional provision which gives the jury the discretion, in cases of capital felonies, of substituting imprisonment for life for the penalty of death, does not abrogate the statute which makes conscientious scruples as to the death penalty a disqualification in a juror. *Caldwell v. State*, 41 *Tex.* 86.

2. *State v. McClear*, 11 *Nev.* 39.

[a] While "the constitution must be construed to have adopted the generous privilege of the common law trial by jury in its essential elements, it

reasonably follows, that whatever was an accidental and not an absolute part of that institution, the mere superfluous forms and complicated proceedings of the English courts, is not necessarily included to have been guaranteed in the right, by . . . the constitution. It was therefore competent for legislation to point out the mode of impaneling juries, . . . , so long as it did not intermeddle with the constituents of those bodies." *Dowling v. State*, 5 *Smed. & M. (Miss.)* 664.

3. *U. S.*—*Kohl v. Lehlback*, 160 *U. S.* 293, 16 *Sup. Ct.* 304, 40 *L. ed.* 432. *Cal.*—*People v. Ah Lee Doon*, 97 *Cal.* 171, 31 *Pac.* 933. *Ga.*—*Boon v. State*, 1 *Ga.* 618.

4. *State v. Wyse*, 32 *S. C.* 45, 10 *S. E.* 612.

[a] A statute limiting the number of peremptory challenges in capital cases to twelve is not unconstitutional even though at common law, in capital cases, the prisoner could challenge thirty-five peremptorily. "The jurors should be as impartial and independent as the lot of humanity will admit, and be allowed to judge upon the matter submitted to them freely and without fear or favor. Such is the trial by jury, guaranteed by the constitution, and originally secured by the magna charta of England. Any legislation, therefore, which merely points out the mode of arriving at this object, but does not rob it of any of its essential ingredients, cannot be considered an infringement of the right." *Dowling v. State*, 5 *Smed. & M. (Miss.)* 664.

allowed to defendant is not in conflict with the constitutional provision securing to the accused a trial by jury.<sup>5</sup> But it is not within the power of the legislature to deprive a person accused of crime of the right to challenge a juror for actual bias.<sup>6</sup>

f. *Statutes as to Demand and Waiver.*—The legislature may constitutionally prescribe when<sup>7</sup> and how<sup>8</sup> a trial by jury may be demanded. The legislature likewise may provide that a jury fee shall be deposited by the party demanding a trial by jury,<sup>9</sup> and that such fee shall be taxed as costs.<sup>10</sup> And a statute requiring of a defendant

5. *State v. Wilson*, 48 N. H. 398; *Hartzell v. Com.*, 40 Pa. 462.

[a] "A very different question would be presented by a statute allowing the state so many peremptory challenges as to give the state an unfair advantage . . . , or to make it very difficult to obtain a jury at all. The obvious purpose and tendency of the present statute is to secure a fair trial to both parties. Whatever tends to this end and no more 'surely takes away no right.'" *State v. Wilson*, 48 N. H. 398.

6. *State v. McClear*, 11 Nev. 39.

7. *Ward v. Lemon & McCabe*, 3 Ariz. 219, 73 Pac. 443; *Nichols v. Cherry*, 22 Utah 1, 60 Pac. 1103. See *infra*, II, F, 2, b.

8. *Travis v. Louisville & N. R. R. Co.*, 9 Lea (Tenn.) 231. See *infra*, II, F, 2.

[a] "The 'question as to how, when, and where such demand shall be made are within the province of the legislature to determine, because upon any subject as to which there is no constitutional restraint, or, as to which the paramount law does not speak, the legislature may legislate.'" *State ex rel. Nichols v. Cherry*, 22 Utah 1, 60 Pac. 1103.

[b] And the requirement of notice does not deprive a party "of his right to a trial by jury, but regulates the mode in which this right shall be enjoyed and used. It requires a party to use reasonable diligence in electing whether he will exercise his right to have a trial by jury. If he fails to file a notice of his desire to insist upon this right, he waives the right." *Foster v. Morse*, 132 Mass. 354, 42 Am. Rep. 438.

9. *Cal.*—*Lassen County Bank v. Sherer*, 108 Cal. 513, 41 Pac. 415; *Connean v. Geis*, 73 Cal. 176, 14 Pac. 580, 2 Am. St. Rep. 785. *Colo.*—*Venine*

*v. Archibald*, 3 Colo. 163. *Conn.*—*Beers v. Beers*, 4 Conn. 535, 10 Am. Dec. 186. *Ia.*—*Little v. McGuire*, 43 Iowa 447; *Adae & Co. v. Zangs*, 41 Iowa 536. *Me.*—*Randall v. Kehlor*, 60 Me. 37, 11 Am. Rep. 169. *Minn.*—*Adams v. Corriston*, 7 Minn. 456. *Mo.*—*Vierling v. Stifel Brewing Co.*, 15 Mo. App. 125. *N. J.*—*Humphrey v. Eakley*, 72 N. J. L. 424, 60 Atl. 1097. *Wash.* *State v. Neterer*, 33 Wash. 535, 74 Pac. 668.

[a] "The constitution does not guarantee to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy in the law, or impede the due administration of justice. And that a party who demands a trial by jury, should be required to advance a small jury fee, whether it is considered as a tax on litigation, or as a part of the expense which is necessarily incurred in his behalf, seems no more liable to a constitutional objection, than is the requirement that the fees of the clerk, sheriff, and other officers, shall be paid in advance when demanded. If the clause in the constitution means that we shall be permitted to litigate literally 'without price,' there is an end to all fees, from the issuing of the summons to the entry of satisfaction of the judgment." *Adams v. Corriston*, 7 Minn. 456.

[b] A statute providing for a trial by a jury of six, unless one of the parties demands a jury of twelve, in which event such party must deposit with the clerk an amount sufficient to pay the additional expenses caused thereby, is not in conflict with the constitution. *Connors v. Burlington, C. R. & N. Ry. Co.*, 74 Iowa 383, 37 N. W. 966.

10. *Little v. McGuire*, 43 Iowa 447;

demanding a trial by jury to furnish bail for his appearance on such trial is not unconstitutional.<sup>11</sup>

The legislature may provide that in certain cases a jury may be waived,<sup>12</sup> and prescribe the mode of waiving trial by jury.<sup>13</sup> And even in a criminal case the legislature may constitutionally require the accused to exercise his option to be tried with or without a jury,<sup>14</sup> though it has been held to the contrary, that a statute requiring a demand by the accused to prevent a waiver is unconstitutional.<sup>15</sup>

*Adae & Co. v. Zangs*, 41 Iowa 536; *Randall v. Kehler*, 60 Me. 37, 11 Am. Rep. 169.

[a] *Compare Neely v. State*, 4 Baxt. (Tenn.) 174, holding that a statute taxing the fees of jurors as costs on the losing party is unconstitutional. It is said there: "If they (jurors) find for the solvent party, their compensation is taxed against the insolvent man and is lost, except when the suit is brought in forma pauperis. . . . Can it be said that the right of trial by jury remains inviolate in such cases? And yet such is the condition in which the rights of parties are placed by the provisions of the statute." And see also to the same effect, *Gribble v. Wilson*, 101 Tenn. 612, 49 S. W. 736.

[b] A statute requiring a bond with surety, to pay the costs, is constitutional. *Miller v. Lampson*, 66 Conn. 432, 34 Atl. 79; *Barkwell v. Chatterton*, 4 Wyo. 307, 33 Pac. 940.

11. *In re Kinsel*, 64 Kan. 1, 67 Pac. 634, 56 L. R. A. 475. See *infra*, II, F, 2.

[a] Under such statute, if "a defendant demands a jury but is unable to give bail for his appearance at the ensuing jury term he stands committed, but is none the less entitled to be tried by a jury in accordance with his demand when such jury term is held." *Howard v. State*, 128 Ala. 43, 29 So. 580.

12. **U. S.**—*Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. ed. 99. **Ala.**—*Connelly v. State*, 60 Ala. 89, 31 Am. Rep. 34; *Ireland v. State*, 11 Ala. App. 155, 65 So. 443. **Ark.**—*Warwick v. State*, 47 Ark. 568, 2 S. W. 335. **Conn.**—*State v. Worden*, 46 Conn. 349, 33 Am. Rep. 27. **Ga.**—*Moore v. State*, 124 Ga. 30, 52 S. E. 81. **Ill.**—*Brewster v. People*, 183 Ill. 143, 55 N. E. 640. **Ind.**—*Murphy v. State*, 97 Ind. 579. **Kan.**—*State v. Wells*, 69 Kan. 792, 77 Pac. 547. **La.**—*State v. Robinson*, 43 La. Ann. 383, 8 So. 937. **Mich.**

*Ward v. People*, 30 Mich. 116. **N. H.**—*State v. Almy*, 67 N. H. 274, 28 Atl. 372, 22 L. R. A. 744. **N. J.**—*Edwards v. State*, 45 N. J. L. 419. **P. R.**—*People v. Sutton*, 17 Porto Rico 327. **Tex.**—*Otto v. State* (Tex. Crim.), 87 S. W. 698. **Wis.**—*In re Staff*, 63 Wis. 285, 23 N. W. 587, 53 Am. Rep. 285.

As to waiver, see *infra*, II, F, 4.

13. **Mass.**—*Foster v. Morse*, 132 Mass. 354, 42 Am. Rep. 438. **N. Y.**—*Moot v. Moot*, 214 N. Y. 204, 108 N. E. 424. **Ohio.**—*Springfield R. Co. v. Western Constr. Co.*, 49 Ohio St. 681, 32 N. E. 961. **Tenn.**—*Garrison v. Hollins, Burton & Co.*, 2 Lea 684.

As to mode of waiver, see *infra*, II, F, 4, b.

14. *Dillingham v. State*, 5 Ohio St. 280.

As to waiver in criminal cases by failure to demand, see *infra*, II, F, 4, b, (II).

[a] "The provision of the constitution was intended to limit the power of the legislature . . . and prohibit it from depriving the accused of the right to have a jury of twelve impartial men to pass on his guilt or innocence. That right still exists; all he has to do is to demand a jury trial, and the law awards it to him; but if he will not demand such trial, then the law authorizes the judge to try the issue. . . . The accused does not demand a jury, but submits to be tried by the court; and after trial, and after he is found guilty, says, 'I have been deprived of my right of jury trial.' But who deprived him of that right? Surely, not the court nor the statute; he has clearly waived his right, and then claims that the law is unconstitutional and void because it permitted him to do so. We are of opinion that the statute deprived him of none of his constitutional rights, and is therefore not unconstitutional." *Dailey v. State*, 4 Ohio St. 57.

15. *Mansfield's Case*, 22 Pa. Super. 224.

g. *Regulating Pleading.*—The legislature may make the verification of a pleading a condition precedent to the right of demanding a trial by jury.<sup>16</sup> The constitutional guaranty does not secure the defendant in a criminal action a trial upon such pleadings as were in use at the time of the adoption of the constitution, but the legislature may prescribe the mode of pleading certain defenses.<sup>17</sup> And a statute declaring that a failure of defendant to plead shall be deemed equivalent to a plea of guilty is not unconstitutional.<sup>18</sup>

h. *Rules of Evidence.*—The constitutional guaranty of the right to trial by jury generally does not restrict the legislature in prescribing rules of evidence,<sup>19</sup> and the legislature has the power to declare what shall be presumptive evidence of any fact.<sup>20</sup> But in some jurisdictions

16. *D. C.*—National Metropolitan Bank *v. Hitz*, 1 McArthur & M. 198. *Ga.*—Dortie *v. Lockwood*, 61 Ga. 293. *Miss.*—Thigpen *v. Mississippi Cent. R. Co.*, 32 Miss. 347. *Pa.*—Lawrance *v. Borm*, 86 Pa. 225, affidavit of defense.

17. *Bennett v. State*, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

[a] A statute requiring the accused to plead insanity as a separate defense is not unconstitutional, although at common law and according to the practice at the time of the adoption of the constitution a defendant under a plea of not guilty might give in evidence any fact tending to establish his innocence. *Bennett v. State*, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

18. *People v. King*, 28 Cal. 265.

[a] "It is within the constitutional power of the legislature to provide that the court shall enter a plea for the defendant when he stands mute, or that such standing mute shall be taken as a confession of the truth of the indictment. . . . Such a provision in no way deprives the defendant or tends to deprive him of his constitutional right to a trial by jury. If . . . the defendant is adjudged guilty without the verdict of a jury to that effect, and punished, such result is not attributable to the law, but to the wilful obstinacy of the defendant." *People v. King*, 28 Cal. 265.

19. *Holmes v. Hunt*, 122 Mass. 505, 23 Am. Rep. 381; *Floeck v. State*, 34 Tex. Crim. 314, 30 S. W. 794.

[a] "The general power of the legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. A

law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would substantially deprive him of due process of law. . . . But so long as the legislature, in prescribing rules of evidence, in either civil or criminal cases, leaves a party a fair opportunity to make his defense and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds." *Board of Comrs. v. Merchant*, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705.

[b] A statute providing what effect may be given to certain evidence in fixing responsibility for injurious results of intoxication does not impair the right of trial by jury. *Pleuler v. State*, 11 Neb. 547, 10 N. W. 481.

20. *Me.*—*State v. Hurley*, 54 Me. 562. *Mass.*—*Holmes v. Hunt*, 122 Mass. 505, 23 Am. Rep. 381; *Com. v. Williams*, 6 Gray 1. *Mo.*—*State v. Buck*, 120 Mo. 479, 25 S. W. 573. *N. Y.*—*Howard v. Moot*, 64 N. Y. 262.

[a] "It cannot be true that a declaration by the legislature . . . that proof of certain facts is prima facie or presumptive evidence of one ingredient of an offense—as, of guilty intent—is an invasion of the peculiar province of the jury, or an impairment of the defendant's sacred right of jury trial. In every case the defendant is entitled to trial by an impartial jury, and to the benefit of a presumption of innocence, but that right and that presumption can no more preclude a presumption of guilty intent from sufficient proof adduced than they can preclude the introduction of proof altogether." *State v. Yardley*,

statutes making an auditor's report prima facie evidence of the facts established thereby have been held unconstitutional.<sup>21</sup>

i. *Compulsory Reference.*—The constitutional guaranty of the right to trial by jury does not prohibit the enactment of a statute providing for a compulsory reference in cases where such right existed before, and such statute does not contravene a constitutional provision preserving inviolate the right of trial by jury,<sup>22</sup> but where the right of

95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656.

[b] A statute providing that the drinking of liquors upon the premises of the person charged with illegal sale of liquors shall be prima facie evidence of such sale is not unconstitutional. Board of Comrs. v. Merchant, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705.

[c] And a statute providing that the keeping of intoxicating liquors shall be prima facie evidence that they are kept for sale contrary to law does not violate the constitutional guaranty of trial by jury. *Ex parte Woodward*, 181 Ala. 97, 61 So. 295.

[d] A statute making the report of the Interstate Commerce Commission prima facie evidence of the facts therein stated is not inconsistent with the constitutional right of trial by jury. "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents." *Meeker Co. v. Lehigh Valley R. R.*, 236 U. S. 412, 35 Sup. Ct. 328, 59 L. ed. 644.

21. *Plimpton v. Town of Somerset*, 33 Vt. 283. See also *King v. Hopkins*, 57 N. H. 334, holding that a statute providing that "the report of the referee shall be evidence of all the facts stated therein, subject to be impeached" is unconstitutional and void.

[a] In *Francis v. Baker*, 11 R. I. 103, 23 Am. Rep. 424, the court said on p. 109: "The question is, whether the right of trial by jury under the act is the same as it was prior to the act—whether it remains inviolate. The right of trial by jury is the right to have a jury hear and decide upon evidence the issues of fact which they are empaneled to try. Is not this

right impaired if the jury is required to decide, without hearing the evidence, it may be, according to the report of an auditor; or, in case the evidence is submitted, is still required to decide according to such report, unless the evidence against it is clear enough to convince them that it is probably erroneous, and even though, independently of such report, it might decide the case another way? We are constrained to the conclusion that the right is impaired or violated when the minds of the jury are or may be so trammelled and controlled."

22. *Mo.*—*Tinsley v. Kemry*, 170 Mo. 310, 70 S. W. 691; *Creve Cœur Co. v. Tamm*, 138 Mo. 385, 39 S. W. 791. *N. Y.*—*Steck v. Colorado F. & I. Co.*, 142 N. Y. 236, 73 N. E. 1, 25 L. R. A. 67; *Lee v. Tillotson*, 24 Wend. 337. *N. D.*—*Smith v. Kunert*, 17 N. D. 120, 115 N. W. 76. *Ore.*—*Salem Traction Co. v. Anson*, 41 Ore. 562, 67 Pac. 1015, 69 Pac. 675; *McDonald v. American Mortg. Co.*, 17 Ore. 626, 21 Pac. 883; *Tribou v. Strowbridge*, 7 Ore. 156. *Wis.*—*County Board of Supervisors v. Dunning*, 20 Wis. 210; *Mead v. Walker*, 17 Wis. 189.

[a] "It is contended that the constitution provides that the right of trial by jury shall forever remain inviolate, and that this action being an action at law, the defendant had the right to have the questions of fact involved therein tried by a jury; that if our statute providing for the reference of cases is to be construed to include actions at law, the statute itself would be unconstitutional and void. Our statute provides that the court in which a cause is pending, may on the application of either party, direct a reference where the trial of an issue of fact shall require the examination of a long account. . . . This statute has been in force in this state for at least thirty years, twenty years before the adoption of our present constitution. It is not to be pre-

compulsory reference did not exist prior to the adoption of the constitution a statute providing for such reference violates the constitutional guaranty of trial by jury.<sup>23</sup>

j. *Trial of Separate Issues.*—A statute permitting separate trials of separate issues before different juries does not impair the constitutional right of trial by jury.<sup>24</sup> Nor does a statute providing for separate verdicts upon the separate issues required to be made on the pleadings impair the right to trial by jury.<sup>25</sup>

k. *Nonsuit.*—So too, statutes authorizing the trial court to nonsuit the plaintiff do not violate the constitutional guaranty of the right to trial by jury.<sup>26</sup>

sumed that the provision of the constitution relied on, was intended to change the law as it then existed and had been practiced on in the state for a quarter of a century; the object of the framers of the constitution must have been to preserve the right of trial by jury, as it then existed and had been practiced in the state and not to establish a new rule of practice on that subject." *Edwardson v. Garnhart*, 56 Mo. 81.

In accounting cases, see *infra*, II, E, 4, j.

23. **Cal.**—*Grim v. Norris*, 19 Cal. 140, 79 Am. Dec. 206. **Fla.**—*McMillan v. Wiley*, 45 Fla. 487, 33 So. 993. **Minn.**—*Nordeen v. Buck*, 79 Minn. 352, 82 N. W. 644; *St. Paul & S. C. R. Co. v. Gardner*, 19 Minn. 132, 18 Am. Rep. 334. **Vt.**—*Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366; *Plimpton v. Town of Somerset*, 33 Vt. 283.

[a] **In Actions Involving Long Accounts.**—(1) Where at the time of the adoption of the constitution the power to order a compulsory reference was confined to cases founded on contract involving the examination of long accounts, the statute cannot confer such right in any other causes. *Townsend v. Hendricks*, 40 How. Pr. (N. Y.) 143. Compare *Grim v. Norris*, 19 Cal. 140, 79 Am. Dec. 206. (2) A statute authorizing a reference without the consent of the parties in any case where the examination of a long account is necessary "must be construed as applying only to those cases in which a trial by jury is not secured to the parties, in order to avoid a conflict with that provision of the constitution guaranteeing that right." *Smith Co. v. Bryce*, 17 S. C. 538.

24. *Smith v. Western Pac. Ry. Co.*,

203 N. Y. 499, 96 N. E. 1106, Ann. Cas. 1913B, 264, 40 L. R. A. (N. S.) 137.

[a] "Every issue is submitted to the verdict of a jury. This is the substance of the right. As a matter of convenience the court may order some issues to be tried before others are taken up. This is a matter of procedure and detail. The constitution does not provide, and there should not be interpolated into it a provision, that all of the issues, even though completely separate and distinct, must be tried at one and the same time." *Smith v. Western Pac. Ry. Co.*, 203 N. Y. 499, 96 N. E. 1106, Ann. Cas. 1913B, 264, 40 L. R. A. (N. S.) 137.

25. *Schissler v. State*, 122 Wis. 365, 99 N. W. 593.

[a] **Plea of Insanity Tried First.** A statute requiring the jury to first dispose of a plea of insanity does not impair the right of trial by jury. *Bennett v. State*, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

26. **Ga.**—*Price v. Central Ry. Co.*, 124 Ga. 899, 53 S. E. 455; *Tilley v. Cox*, 119 Ga. 867, 47 S. E. 219. **Ill.**—*Mallen v. Langworthy*, 70 Ill. App. 376. **Ky.**—*Morris' Admr. v. Louisville & N. R. Co.*, 22 Ky. L. Rep. 1593, 61 S. W. 41. **Me.**—*Perley v. Little*, 3 Me. 97. **Pa.**—*Munn v. Mayor of Pittsburgh*, 40 Pa. 364. **Tenn.**—*Hopkins v. Nashville, C. & St. L. R. R.*, 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354.

[a] **Not applicable to Questions of Law.**—"The clause in the constitution, which provides that the trial by jury shall remain inviolate, presents no obstacle to this legislation. Its object is simply to preserve a jury trial in questions of fact, and it does not relate to questions of law with the court. . . . If all the facts, claimed

1. *Firing Punishment*.—The legislature may authorize the court to fix the punishment even though at the time of the adoption of the constitution the punishment was assessed by the jury.<sup>27</sup> And a statute authorizing the court to determine the degree of crime upon a plea of guilty does not violate the constitutional right of trial by jury.<sup>28</sup> Nor does a statute providing for increased punishment of habitual criminals impair the right to trial by jury.<sup>29</sup>

m. *Setting Aside Verdicts*.—Statutes authorizing courts to set aside verdicts and grant new trials do not violate the constitutional guaranty of trial by jury.<sup>30</sup> And the legislature may empower an appellate court to affirm a judgment under the condition that the parties consent to a reduction of the amount awarded by the verdict.<sup>31</sup> So too, it is within the legislative power to provide that not more than two new trials shall be granted to any party upon trial by jury.<sup>32</sup> In some jurisdictions it is held to be competent for the legislature to provide for an entry of judgment by an appellate court in favor of the

to be proved by the evidence of the plaintiff, cannot, if true, make a prima facie case for him, it would be worse than idle to proceed further with the trial; since no verdict could be rendered in his favor, which could be retained. It is no uncommon thing to raise a question of the sufficiency of evidence upon demurrer to evidence, wherever the court will give its consent, as the readiest way to end the trial, and this is not a violation of the constitution. . . . Besides, this mode of trying a question of law, had always been practiced at the common law, and was familiarly known to the men who framed our constitution; and it is not to be believed, that they meant, by this clause in the constitution, to restrict the courts and the legislature itself, in relation to this ancient practice." *Naugatuck R. Co. v. Waterbury Co.*, 24 Conn. 468.

27. *George v. People*, 167 Ill. 447, 47 N. E. 741; *State v. Hamey*, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846.

[a] "Our statute, it is true, . . . has heretofore provided that the jury shall in their verdict name the punishment to be inflicted. But the constitution makes no such requirement; and that which the statute has done the statute may undo, provided it remain within the bounds fixed by the constitution." *Skelton v. State*, 149 Ind. 641, 49 N. E. 901.

28. *Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. 105, 36 L. ed. 986; *People v. Chew Lan Ong*, 141 Cal. 550, 75 Pac. 189, 99 Am. St. Rep. 88; *Peo-*

*ple v. Lennox*, 67 Cal. 113, 7 Pac. 260.

[a] "The proceeding to determine the degree of the crime of murder after a plea of guilty is not a trial. No issue was joined upon which there could be a trial. There is no provision of the constitution . . . which prevents a defendant from pleading guilty instead of having a trial by jury. If he elects to plead guilty to the indictment, the provision of the statute for determining the degree of the guilt, for the purpose of fixing the punishment, does not deprive him of any right of trial by jury." *People v. Noll*, 20 Cal. 164.

29. U. S.—*McDonald v. Massachusetts*, 180 U. S. 311, 21 Sup. Ct. 389, 45 L. ed. 542. N. Y.—*People v. McCarthy*, 45 How. Pr. 97. R. I.—*State v. Flynn*, 16 R. I. 10, 11 Atl. 170. Wash.—*State v. Le Pitre*, 54 Wash. 166, 103 Pac. 27.

30. Cal.—*In re Bainbridge's Estate*, 169 Cal. 166, 146 Pac. 427; *Ingraham v. Weidler*, 139 Cal. 588, 73 Pac. 415. Mass.—*Pierson v. Boston Elev. Ry. Co.*, 191 Mass. 223, 77 N. E. 769. N. Y.—*Serwer v. Serwer*, 71 App. Div. 415, 75 N. Y. Supp. 842. Pa.—*Smith v. Times Pub. Co.*, 178 Pa. 481, 36 Atl. 296, 35 L. R. A. 819.

31. *Ex parte Steverson*, 177 Ala. 384, 58 So. 992; *Texas & N. O. R. Co. v. Syfan*, 91 Tex. 562, 44 S. W. 1064.

32. *Mathews v. Tripp*, 12 R. I. 256; *East Tennessee, V. & G. Ry. Co. v. Mahoney*, 89 Tenn. 311, 15 S. W. 652.

party against whom the verdict was rendered,<sup>33</sup> but a different view is maintained by the federal courts.<sup>34</sup>

**E. EXTENT OF RIGHT.—1. Persons Entitled Thereto.**—The constitutional guaranty of the right to trial by jury applying to all parties to an action includes intervenors.<sup>35</sup> It does not, however, extend to the state,<sup>36</sup> nor to municipal corporations,<sup>37</sup> though it may be extended to them by express statute.<sup>38</sup>

**2. As Dependent Upon Amount in Controversy.**—The right to trial by jury generally is preserved inviolate by the constitution in all actions in which it theretofore existed, without regard to the amount

33. *Amer W. & V. Co. v. Fayette L. Co.*, 57 Pa. Super. 608.

[a] "The statute simply permits that to be done by this court which ought to have been done at the trial. . . . It does not disturb the plain boundary between fact which a jury must determine and law which the court must rule. It permits the right ruling to be given at a time later than that at which it should have been made." *Bothwell v. Boston El. R. Co.*, 215 Mass. 467, 102 N. E. 665, Ann. Cas. 1914D, 275.

34. *Union Pac. R. Co. v. United States*, 219 Fed. 427, 134 C. C. A. 325.

[a] "When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before. Disregarding those rules, the circuit court of appeals itself determined the facts, without a new trial. Thus, it assumed a power it did not possess, and cut off the plaintiff's right to have the facts settled by the verdict of a jury." *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 33 Sup. Ct. 717, 57 L. ed. 879, Ann. Cas. 1914D, 1029.

[b] And although the error committed by the trial court may consist solely in its refusal to direct a verdict in favor of one party, yet after a verdict wrongly rendered in favor of the adverse party, the only method of correcting such error is to order a new trial. *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. ed. 879.

35. *Cal.—McNeil v. Morgan*, 157 Cal. 373, 108 Pac. 69. **Ill.**—*South Park*

*Comrs. v. Phillips*, 27 Ill. App. 380. **La.**—*Lacroix v. Menard*, 3 Mart. (N. S.) 339, 15 Am. Dec. 161.

36. *Harris v. Wood*, 6 Mon. (Ky.) 641; *In re State House, etc.*, 19 R. I. 326, 33 Atl. 448.

[a] In *Wooster v. Plymouth*, 62 N. H. 193, 195, 200, it is said in regard thereto: "Its entire legal significance is the immunity which every subject finds for his property, liberty and person in the unanimous verdict of twelve of his neighbors and equals. The defense of the public rights of the sovereign or the government is no part of the protection which this constitutional bulwark was intended to afford."

[b] The constitutional provision securing trial by jury does not extend to suits against the government as they are not suits at common law. *Auffmordt v. Hedden*, 137 U. S. 310, 11 Sup. Ct. 103, 34 L. ed. 674; *McElrath v. United States*, 12 Ct. Cl. (U. S.) 312.

37. **Mass.**—*Stone v. Charlestown*, 114 Mass. 214. **N. H.**—*Wooster v. Plymouth*, 62 N. H. 193. **N. Y.**—*Darlington v. New York*, 31 N. Y. 164. **Pa.**—*In re Dunmore's Appeal*, 52 Pa. 374.

[a] "Municipal corporations, being creatures of the legislative power and subordinate parts of the government of the state, are subject to the legislative will to the extent that it may provide for the appointment of a tribunal for the adjustment of claims against them without a jury trial." *Cleveland v. Board of Jersey City*, 38 N. J. L. 259.

38. **Ia.**—*Kelsh v. Dyersville*, 68 Iowa 137, 26 N. W. 38. **N. H.**—*Wooster v. Plymouth*, 62 N. H. 193. **R. I.** *In re State House, etc.*, 19 R. I. 326, 33 Atl. 448.

in controversy,<sup>39</sup> but by the federal,<sup>40</sup> and some state constitutions,<sup>41</sup> the right to trial by jury is made dependent upon the amount in controversy.<sup>42</sup>

**3. Courts in Which May Be Exercised.**—a. *Generally.*—A constitutional provision securing the right to trial by jury applies only to courts of record proceeding in accordance with the common law.<sup>43</sup> The constitutional guaranty of trial by jury is not applicable to trials by courts-martial,<sup>44</sup> though a proclamation of martial law by a governor does not authorize the conviction of civilians for crime without a jury.<sup>45</sup> Nor does the constitutional provision securing the right to trial by jury, as a rule, apply to cases of maritime jurisdiction.<sup>46</sup>

b. *In Justice Courts.*—The right to jury trial in justice courts is treated elsewhere in this work.<sup>47</sup>

c. *In Probate Courts and Proceedings.*—The right to trial by jury in probate courts and proceedings is treated elsewhere in this work.<sup>48</sup>

**4. As Dependent Upon Character of Action and Issues.**—a. *In General.*—The right to trial by jury depends upon the character of the action and the nature of the issues raised by the pleadings.<sup>49</sup> Where

39. Ill.—Whitehurst v. Coleen, 53 Ill. 247. Minn.—Whallon v. Bancroft, 4 Minn. 109. Wis.—Mead v. Walker, 17 Wis. 189.

40. Parsons v. Bedford, 3 Pet. (U. S.) 423, 7 L. ed. 732; Motte v. Bennett, 17 Fed. Cas. No. 9,884; Miles v. James, Hempst. 98, 17 Fed. Cas. No. 9,543a.

41. Ala.—Lehman v. Hudmon, 79 Ala. 532; Witherington v. Brantley, 18 Ala. 197. Md.—Capron v. Devries, 83 Md. 220, 34 Atl. 251. Mass.—Trees v. Rushworth, 9 Gray 47. N. H.—Lee v. Dow, 71 N. H. 326, 51 Atl. 1072. N. J. Raphael v. Lane, 56 N. J. L. 108, 28 Atl. 421. S. C.—Charleston v. Stelges, 10 Rich. L. 438. Tex.—Davis v. Davis, 34 Tex. 15.

[a] **Interest as Affecting Amount in Controversy.**—Where the original claim of plaintiff was for a less sum than required by the constitution in order to be entitled to trial by jury, such trial nevertheless is proper, where the interest during the pendency of the appeal increased the amount to above the sum prescribed by the constitution. McGrew v. Adams, 2 Stew. (Ala.) 502.

42. **As to how amount in controversy is determined generally,** see the titles "Jurisdiction;" "United States Courts."

43. Ill.—Ward v. Farwell, 97 Ill. 593. Mo.—Vaughn v. Seade, 30 Mo.

600. S. C.—Comrs. of New Town Cut v. Seabrook, 2 Strobb. 560, 563.

**Only in cases in which the right existed at common law,** see *supra*, II, A; II, C, 1.

**As to actions in equity,** see *infra*, II, E, 4, c.

44. See 6 STANDARD PROC. 116.

45. *In re McDonald*, 49 Mont. 454, 143 Pac. 947, Ann. Cas. 1916A, 1166, L. R. A. 1915B, 988; *Ex parte Jones*, 71 W. Va. 567, 77 S. E. 1029, Ann. Cas. 1914C, 31, 45 L. R. A. (N. S.) 1030.

46. **As to right to trial by jury in admiralty,** see 1 STANDARD PROC. 538.

47. See the title "Justices of the Peace."

**As to enlarging jurisdiction of justice's court to include cases triable by jury,** see *supra*, II, D, 3.

48. See the title "Probate Courts."

49. Cal.—Davis v. Judson, 159 Cal. 121, 113 Pac. 147. Ind.—Martin v. Martin, 118 Ind. 227, 20 N. E. 763. Kan.—Boam v. Cohen, 94 Kan. 42, 145 Pac. 559. Minn.—Hasey v. McMullen, 109 Minn. 332, 123 N. W. 1078. Mo. Minor v. Burton, 228 Mo. 558, 128 S. W. 964. Neb.—Gandy v. Wiltse, 79 Neb. 280, 112 N. W. 569. N. Y. Schwartz v. Klar, 144 App. Div. 37, 128 N. Y. Supp. 830.

[a] **The character of the suit is "dependent upon the issues raised by the pleadings. If the issues thus raised are such as, at the adoption of our**

no issues of fact are made up by the pleadings, the right to trial by jury does not obtain.<sup>49½</sup>

b. *In Actions at Law Generally.*—So far as the nature of the action is concerned a constitutional provision preserving inviolate the right to trial by jury, generally confirms such right in all civil actions which were cognizable in the courts of law and in which a jury trial was a matter of right.<sup>50</sup>

constitution, were triable before a jury, then the parties . . . are entitled to a jury, but if the issues raised by the pleadings were not triable before a jury prior to the adoption of the constitution then the parties are not entitled to a jury." *Minor v. Burton*, 228 Mo. 558, 128 S. W. 964.

[b] And it "is not the label affixed by the pleader, but the nature and character of the controversy, that determines whether or not the action is legal or equitable. . . . The prayer for relief is not conclusive." *Morton B. & T. Co. v. Sodergren*, 130 Minn. 252, 153 N. W. 527.

[c] "The complaint alone does not necessarily determine the character of the issues, whether they are legal or equitable, or the mode of trial to which the parties are entitled. Those are questions which must be determined from an examination of all the pleadings in the case." *Southern Ry. v. Howell*, 89 S. C. 391, 71 S. E. 972, Ann. Cas. 1913A, 1070.

[d] *Prayer Not Considered.*—Where the pleadings show an action at law and the only feature of the pleadings indicating that equitable relief was sought is the prayer of the complaint, it is unnecessary to consider the prayer in determining the nature of the action, as long as there is no ambiguity in the body of the pleading. *Gandy v. Wiltse*, 79 Neb. 280, 112 N. W. 569.

49½. *Ga.*—*Terry v. Drew*, 143 Ga. 473, 85 S. E. 314; *Stewart v. Sholl*, 99 Ga. 534, 26 S. E. 757; *Stansell v. Corley*, 81 Ga. 453, 8 S. E. 868; *Mehring v. Charles*, 58 Ga. 377; *Lester v. Piedmont & Arlington Ins. Co.*, 55 Ga. 475; *Erambert v. Scarborough*, 46 Ga. 398; *Davidson v. Carter & Ritch*, 9 Ga. 501. *Ia.*—*Mann v. Howe*, 9 Iowa 546. *Mo.* *Burnham & Co. v. Tillery*, 85 Mo. App. 453. *N. Y.*—*Wurster v. Armfield*, 98 App. Div. 298, 90 N. Y. Supp. 699. *N. C.*—*Hockoday v. Lawrence*, 156 N. C. 319, 72 S. E. 387. *R. I.*—*Cambio v.*

*Ibello*, 32 R. I. 307, 79 Atl. 789. *S. C.* *State ex rel. Lyon v. Palmetto Bowling Club*, 80 S. C. 114, 61 S. E. 209.

[a] Defendants are "not entitled to trial by jury except upon a plea presenting issuable facts for the determination of a jury. If the plea . . . presented no meritorious defense to the plaintiff's action, there would be no right which could be preserved by the jury trial, and therefore no right to such trial." *Jester v. Bainbridge State Bank*, 4 Ga. App. 469, 61 S. E. 926.

[b] The question whether or not a foreign corporation upon which service of process was made is doing business in a state, "is not such an issue of fact as entitles the plaintiff to a jury trial thereof as a matter of right under the constitution and the statute." *Peper Auto Co. v. American Sales Co.*, 180 Fed. 245.

50. *U. S.*—*Childs v. Missouri Ry. Co.*, 221 Fed. 219, 135 C. C. A. 629; *Low v. United States*, 169 Fed. 86, 94 C. C. A. 1. *Ark.*—*Louisiana, etc. R. Co. v. State*, 75 Ark. 435, 88 S. W. 559; *Ashley v. Little Rock*, 56 Ark. 391, 19 S. W. 1058. *Cal.*—*Gillespie v. Gouly*, 120 Cal. 515, 52 Pac. 816; *Clough v. All Persons*, 27 Cal. App. 268, 149 Pac. 778. *Colo.*—*Johnson v. First Nat. Bank*, 24 Colo. App. 23, 131 Pac. 284. *Conn.*—*Roy v. Moore*, 85 Conn. 159, 82 Atl. 233. *Fla.*—*Hughes v. Hannah*, 39 Fla. 365, 22 So. 613. *Ga.*—*Howard v. Wellham*, 114 Ga. 934, 41 S. E. 62; *Thornton v. Mutual B. & L. Assn.*, 113 Ga. 1141, 39 S. E. 481; *Rodgers v. Caldwell*, 112 Ga. 635, 37 S. E. 865; *Moore & Jester v. Smith Mach. Co.*, 4 Ga. App. 151, 60 S. E. 1035. *Idaho.* *Stevens v. Home Sav. & L. Assn.*, 5 Idaho 741, 51 Pac. 779. *Ind.*—*Harmon v. Pohle*, 46 Ind. App. 369, 92 N. E. 119. *Ia.*—*Hanan v. Messenger*, 168 Iowa 507, 150 N. W. 673. *Kan.*—*Atkinson v. Crowe C. & M. Co.*, 80 Kan. 161, 102 Pac. 59, 106 Pac. 1052, 39 L. R. A. (N. S.) 31. *Ky.*—*Carder v. Weisenburg*, 95 Ky. 135, 23 S. W. 964.

c. *Suits in Equity Generally.*—The constitutional provision securing the right to trial by jury does not generally apply to actions and proceedings which at common law are deemed of equitable cognizance,<sup>51</sup>

**Mass.**—Weeks v. Brooks, 205 Mass. 458, 92 N. E. 45. **Mich.**—Tabor v. Cook, 15 Mich. 322. **Minn.**—Blackman v. Wheaton, 13 Minn. 326. **Miss.**—Wofford v. Bailey, 57 Miss. 239. **Neb.**—Olsen v. Marquis, 88 Neb. 610, 130 N. W. 267; Yeiser v. Broadwell, 80 Neb. 718, 115 N. W. 293; Lett v. Hammond, 59 Neb. 339, 80 N. W. 1042. **N. J.**—Edwards v. Elliott, 36 N. J. L. 449, 13 Am. Rep. 463. **N. Y.**—King v. Ross, 28 App. Div. 371, 51 N. Y. Supp. 138. **Ohio.**—Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736. **Okla.**—Success Realty Co. v. Trowbridge, 150 Pac. 898; Wah-tah-noh-zhe v. Moore, 36 Okla. 631, 129 Pac. 877. **Pa.**—*In re Haines' Appeal*, 73 Pa. 169. **S. D.**—Nelson v. Jordeth, 15 S. D. 46, 87 N. W. 140. **Va.**—Moorman v. City of Lynchburg, 113 Va. 90, 73 S. E. 987. **Wis.**—Dilger v. Estate of McQuade, 158 Wis. 328, 148 N. W. 1085.

51. **U. S.**—Luria v. United States, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. ed. 101; *In re Plant*, 148 Fed. 37; Home Ins. Co. v. Virginia-Carolina Chemical Co., 109 Fed. 681; Ross, etc. Co. v. Southern M. Iron Co., 72 Fed. 957; Buford v. Holley, 28 Fed. 680. **Ala.**—Fulton v. State, 171 Ala. 572, 54 So. 688; Alexander v. Alexander, 5 Ala. 517. **Ariz.**—Cole v. Bean, 1 Ariz. 377, 25 Pac. 538. **Ark.**—Goodrum v. Merchants, etc. Bank, 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914A, 511; Ashley v. Little Rock, 56 Ark. 391, 19 S. W. 1058; State v. Churchill, 48 Ark. 426, 3 S. W. 352. **Cal.**—Ashton v. Heggerty, 130 Cal. 516, 62 Pac. 934; Grim v. Norris, 19 Cal. 140, 79 Am. Dec. 206; Cahoon v. Levy, 5 Cal. 294. **Colo.**—Koch v. Story, 47 Colo. 335, 107 Pac. 1093. **Conn.**—Roy v. Moore, 85 Conn. 159, 82 Atl. 233; Meriden Sav. Bank v. McCormack, 79 Conn. 260, 64 Atl. 338. **Fla.**—Smith v. Croom, 7 Fla. 180. **Ga.**—Mitecham v. Georgia Cotton Oil Co., 139 Ga. 519, 77 S. E. 627; Lamar v. Allen, 108 Ga. 158, 33 S. E. 958; Bemis v. Armour Packing Co., 105 Ga. 293, 31 S. E. 173; Isaacs v. Tinley, 58 Ga. 457. **Idaho.**—Christensen v. Hollingsworth, 6 Idaho 87, 53 Pac. 211, 96 Am. St. Rep. 256. **Ill.**—Standdidge v. Chicago Rys. Co., 254 Ill. 524, 98

N. E. 963, Ann. Cas. 1913C, 65, 40 L. R. A. (N. S.) 529; Shedd v. Seefeld, 230 Ill. 118, 82 N. E. 580, 120 Am. St. Rep. 269, 13 L. R. A. (N. S.) 709; Keith v. Henkleman, 173 Ill. 137, 50 N. E. 692; Ward v. Farwell, 97 Ill. 593; Garvy v. Baldino, 189 Ill. App. 466. **Ind.**—McBride v. Stradley, 103 Ind. 465, 2 N. E. 358; Helm v. First Nat. Bank, 91 Ind. 44; Small v. Binford, 41 Ind. App. 440, 83 N. E. 507, 84 N. E. 19. **Ia.**—Littleton v. Fritz, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19. **Kan.**—Appling v. Jacobs, 91 Kan. 793, 139 Pac. 374; Hockett v. Earl, 89 Kan. 733, 133 Pac. 852; Kimball v. Connor, 3 Kan. 414. **Ky.**—Cornett v. Combs, 21 Ky. L. Rep. 837, 53 S. W. 32; Bailey v. Nichols, 8 Ky. L. Rep. 64. **Me.**—Farnsworth v. Whiting, 106 Me. 430, 76 Atl. 909. **Md.**—Chase v. Winans, 59 Md. 475. **Mass.**—Lascelles v. Clark, 204 Mass. 362, 90 N. E. 875; Shapira v. D'Arcy, 180 Mass. 377, 62 N. E. 412; Parker v. Simpson, 180 Mass. 334, 62 N. E. 401; Dole v. Wooldredge, 142 Mass. 161, 7 N. E. 832; Ross v. New England Mut. Ins. Co., 120 Mass. 113; Charles River Bridge v. Warren Bridge, 7 Pick. 344. **Mich.**—Cole v. Cole Realty Co., 169 Mich. 347, 135 N. W. 329; Detroit Bank v. Blodgett, 115 Mich. 160, 73 N. W. 120, 885. **Minn.**—State ex rel. Wilcox v. Ryder, 126 Minn. 95, 147 N. W. 953; Morton B. & T. Co. v. Sodergren, 130 Minn. 252, 153 N. W. 527; Shipley v. Beldue, 93 Minn. 414, 101 N. W. 952; Judd v. Dike, 30 Minn. 380, 15 N. W. 672; Jordan v. White, 20 Minn. 91. **Miss.**—State v. Marshall, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434. **Mo.**—Conway v. Robinson, 178 S. W. 154; Collins v. Harrell, 219 Mo. 279, 118 S. W. 432; Ely v. Coontz, 167 Mo. 371, 67 S. W. 299; Magnuson v. Continental Cas. Co., 125 Mo. App. 206, 101 S. W. 1125. **Mont.**—Missoula, etc. Bank v. Iman, 50 Mont. 355, 146 Pac. 941. **Neb.**—Sharmer v. McIntosh, 43 Neb. 509, 61 N. W. 727. **N. H.**—Bellows v. Bellows, 58 N. H. 60. **N. Y.**—Rathbun v. Rathbun, 3 How. Pr. 139; Allen v. Gray, 139 App. Div. 428, 124 N. Y. Supp. 137; Vollkommer v. Frank, 107 App. Div.

except where at the adoption of the constitution a jury was a matter of right in such actions,<sup>52</sup> or where the right to trial by jury is given by statute in such cases.<sup>53</sup>

594, 95 N. Y. Supp. 324; *Evans v. Nat. Bank*, 88 App. Div. 549, 85 N. Y. Supp. 101; *Gersmann v. Walpole*, 79 Misc. 49, 139 N. Y. Supp. 1. N. D.—*Herrmann v. Minnesota Elev. Co.*, 27 N. D. 231, 235, 145 N. W. 821; *Avery Mfg. Co. v. Crumb*, 14 N. D. 57, 103 N. W. 410. Ohio.—*Carlisle v. Foster*, 10 Ohio St. 198. Ore.—*Raymond v. Flavel*, 27 Ore. 219, 40 Pac. 158. S. C.—*Southern Ry. v. Howell*, 89 S. C. 391, 71 S. E. 972, Ann. Cas. 1913A, 1070; *Lawrence v. Lawrence*, 82 S. C. 150, 63 S. E. 600; *Brock v. Kirkpatrick*, 69 S. C. 231, 48 S. E. 72; *McGee v. Wells*, 52 S. C. 472, 30 S. E. 602. S. D.—*Lounsberry v. Kelly*, 32 S. D. 456, 143 N. W. 369; *Grigsby v. Larson*, 24 S. D. 628, 124 N. W. 856. Va.—*Moorman v. City of Lynchburg*, 113 Va. 90, 73 S. E. 987; *Pairo v. Bethell*, 75 Va. 825. Wash. *Maher & Co. v. Farnandis*, 70 Wash. 250, 126 Pac. 542; *Maggs v. Morgan*, 30 Wash. 604, 71 Pac. 188; *Wintermute v. Carner*, 8 Wash. 585, 36 Pac. 490. W. Va.—*Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557. Wis. *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909; *Stilwell v. Kellogg*, 14 Wis. 461.

[a] "The guaranty of trial by jury . . . has no reference to equitable causes coming within the proper sphere of the court of chancery, whether pertaining to the original or concurrent jurisdiction of that court. . . . It may be safely stated that in all those cases in which a court of equity prior to the adoption of the constitution guaranteeing a trial by jury, and by virtue of its general or concurrent jurisdiction for one purpose, had proceeded to a complete adjudication of the entire case, even to the settlement of legal rights which otherwise would be beyond its powers, it cannot be successfully claimed that the guaranty of trial by jury exists as to the legal right." *Hughes v. Hannah*, 39 Fla. 365, 22 So. 613.

[b] And the "right of a court of equity to pass upon questions . . . does not depend upon the fact that the cause of action was one of equitable cognizance prior to the adoption

of the existing constitution. It is sufficient if it is one in fact, without regard to when it became so, or was first recognized by the courts as such. It is a fact well understood by all who are familiar with the history of courts of equity, that their jurisdiction, from the earliest times to the present, has been of a gradual and constant growth." *Ward v. Farwell*, 97 Ill. 593.

[c] An action to have a deed declared a mortgage and to redeem therefrom is equitable in character, and neither party is entitled to a jury as a matter of right. *Hockett v. Earl*, 89 Kan. 733, 133 Pac. 852.

[d] The constitution of Texas provides that "in the trial of all causes in equity in the district court, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury," and under such constitution it has been held that it "is only upon the application of a party, that the court is required to impanel a jury, in cases of equitable cognizance." *Faulk v. Faulk*, 23 Tex. 653.

52. Fla.—*Hathorne v. Panama Park Co.*, 44 Fla. 194, 32 So. 812, 103 Am. St. Rep. 138. Ill.—*Maynard v. Richards*, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. Rep. 145. Ky.—*Rieger v. Schulte & Eicher*, 151 Ky. 129, 151 S. W. 395. Md.—*Chase v. Winans*, 59 Md. 475. Mass.—*Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401. N. Y. *Hudson v. Caryl*, 44 N. Y. 553. N. C. *Taylor v. Person*, 9 N. C. 298. Ore. *Raymond v. Flavel*, 27 Ore. 219, 40 Pac. 158.

53. Ariz.—*Brown v. Greer*, 16 Ariz. 215, 141 Pac. 841. Ark.—*Ringgold v. Patterson*, 15 Ark. 209. Me.—*Call v. Perkins*, 65 Me. 439. Ohio.—*Gunsaulus v. Pettit*, 46 Ohio St. 27, 17 N. E. 231.

[a] *Adultery in Divorce Case.*—(1) Under the code of New York the issue of adultery in a divorce is triable by jury. *Tietzel v. Tietzel*, 122 App. Div. 873, 107 N. Y. Supp. 878. (2) While an action for a divorce is an action in equity by which the equitable power of the court is necessarily exercised

d. *Special Proceedings Generally.*—The constitutional provision securing the right to trial by jury likewise does not apply to special proceedings triable at common law without a jury,<sup>54</sup> unless such right is expressly conferred by statute upon the parties.<sup>55</sup>

in the final judgment, the New York statute provides that the issue of adultery is triable by jury, if demanded by either party. *Cohen v. Cohen*, 160 App. Div. 240, 145 N. Y. Supp. 652.

54. **U. S.**—*Interstate Com. Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. ed. 1047; *Merchants' S. & G. Co. v. Board of Trade*, 201 Fed. 20, 120 C. C. A. 582. **Ala.**—*Taliaferro v. Lee*, 97 Ala. 92, 13 So. 125. **Ark.**—*Wheat v. Smith*, 50 Ark. 266, 7 S. W. 161; *Wise v. Martin*, 36 Ark. 305; *Govan v. Jackson*, 32 Ark. 553. **Cal.**—*Vallejo, etc. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238; *In re Coburn*, 165 Cal. 202, 131 Pac. 352. **Colo.**—*People v. Tool*, 35 Colo. 225, 86 Pac. 224, 117 Am. St. Rep. 198, 6 L. R. A. (N. S.) 822. **Conn.**—*State v. Lewis*, 51 Conn. 113. **Fla.**—*Ex parte Seudamore*, 55 Fla. 211, 46 So. 279. **Ga.**—*Lippitt v. City of Albany*, 131 Ga. 629, 63 S. E. 33; *Stokes v. Stokes*, 126 Ga. 804, 55 S. E. 1023; *Freeman v. State*, 72 Ga. 812. **Idaho.**—*Toneray v. Budge*, 14 Idaho 621, 95 Pac. 26. **Ill.**—*Quartier v. Dowiat*, 219 Ill. 326, 76 N. E. 371; *Frost v. People*, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352. **Ind.**—*Gordon v. Corning*, 174 Ind. 337, 92 N. E. 59; *Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700; *Corey v. Lugar*, 62 Ind. 60. **Ia.**—*In re Buck*, 140 Iowa 355, 118 N. W. 530; *Richardson v. City of Centerville*, 137 Iowa 253, 114 N. W. 1071. **Kan.**—*State v. Johnston*, 78 Kan. 615, 97 Pac. 790; *State v. Thomas*, 74 Kan. 360, 86 Pac. 499; *State v. Durein*, 46 Kan. 695, 27 Pac. 148. **Ky.**—*Underhill v. Murphy*, 117 Ky. 640, 78 S. W. 482, 111 Am. St. Rep. 262; *Arnold v. Com.*, 80 Ky. 300, 44 Am. Rep. 480. **Mich.**—*Loomis v. Hartz*, 165 Mich. 662, 131 N. W. 85. **Minn.**—*Newton v. Newell*, 26 Minn. 529, 6 N. W. 346; *Ford v. Wright*, 13 Minn. 518. **Miss.**—*O'Flynn v. State*, 89 Miss. 850, 43 So. 82, 119 Am. St. Rep. 727, 9 L. R. A. (N. S.) 1119. **Mo.**—*Conway v. Robinson*, 178 S. W. 154; *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; *State v. Towns*, 153 Mo. 91, 54 S. W. 552. **Mont.**

*Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554. **Neb.**—*Gandy v. State*, 13 Neb. 445, 14 N. W. 143. **N. H.**—*State v. Matthews*, 37 N. H. 450. **N. J.**—*State v. Doty*, 32 N. J. L. 403, 90 Am. Dec. 671. **N. Y.**—*Wurster v. Armfield*, 98 App. Div. 298, 90 N. Y. Supp. 699; *People ex rel. Thaw v. Griefenhagen*, 154 N. Y. Supp. 965. **N. C.**—*Baker v. Cordon*, 86 N. C. 116, 41 Am. Rep. 448. **Ohio.**—*Ammon v. Johnson*, 3 Ohio Cir. Ct. 263, 2 Ohio Cir. Dec. 149. **Ore.**—*Breding v. Williams*, 33 Ore. 391, 54 Pac. 206; *Hughes v. Holman*, 23 Ore. 481, 32 Pac. 298. **Pa.**—*Ewing v. Filley*, 43 Pa. 384. **S. D.**—*State v. Mitchell*, 3 S. D. 223, 52 N. W. 1052. **Tenn.**—*Taylor v. Carr*, 125 Tenn. 235, 141 S. W. 745, Ann. Cas. 1913C, 155; *Shields v. McMahan*, 112 Tenn. 1, 81 S. W. 597. **Tex.**—*Hammond v. Ashe*, 103 Tex. 503, 131 S. W. 539; *Ex parte Roper*, 61 Tex. Crim. 68, 134 S. W. 334; *McCormick v. Jester*, 53 Tex. Civ. App. 306, 115 S. W. 278. **Wash.**—*State v. North Shore B. & D. Co.*, 67 Wash. 317, 121 Pac. 467, Ann. Cas. 1913D, 456. **W. Va.**—*State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257.

[a] "The fact . . . that property and rights of property may be involved in the disposition of a particular case or proceeding does not determine the right to a trial by jury. There must be an action at law as contradistinguished from a suit in equity and from a special proceeding or a criminal action and an issue of fact joined therein upon the pleadings, before a jury trial can be claimed as a constitutional right." *Koppikus v. State Capitol Comrs.*, 16 Cal. 248.

55. **Ill.**—*People v. Kipley*, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775. **Ky.**—*Richardson v. Com.*, 141 Ky. 497, 133 S. W. 213; *Underhill v. Murphy*, 117 Ky. 640, 78 S. W. 482, 111 Am. St. Rep. 262; *Arnold v. Com.*, 80 Ky. 300, 44 Am. Rep. 480. **La.**—*Gauthier v. Lapeyrouse*, 122 La. 35, 47 So. 367. **Mo.**—*State v. Baird*, 47 Mo. 301. **Utah.**—*Law v. Smith*, 34 Utah 394, 98 Pac. 300.

c. *Actions Involving Both Legal and Equitable Considerations.*

(I.) Generally.—Where legal as well as equitable issues are involved in a cause the right to trial by jury depends upon the nature of the main issue.<sup>56</sup> An action at law is not triable by the court without a jury because of the fact that equitable issues incidental to the main issue are involved in the cause.<sup>57</sup> And where the right to relief in equity depends upon the decision of the legal issues involved in the case, a trial by jury of the whole cause is a matter of right.<sup>58</sup> On the other hand, where the essential issue of a cause is of equitable cognizance, the right to trial by jury does not obtain even though legal issues are incidentally involved in the cause,<sup>59</sup> and a court of equity having jur-

56. **Cal.**—*Hughes v. Dunlap*, 91 Cal. 385, 27 Pac. 642. **Ill.**—*Shedd v. Seefeld*, 230 Ill. 118, 82 N. E. 580, 120 Am. St. Rep. 269, 13 L. R. A. (N. S.) 709. **Mo.**—*Mullaney v. McReynolds*, 170 Mo. App. 406, 155 S. W. 485. **N. Y.**—*Hunter v. Ramsay*, 168 App. Div. 953, 153 N. Y. Supp. 408. **Ohio.**—*Bradley v. Herron*, 20 Ohio Cir. Ct. (N. S.) 282. **S. C.**—*Atlantic, etc. R. Co. v. Victor Co.*, 79 S. C. 266, 60 S. E. 675. **S. D.**—*Leisch v. Baer*, 24 S. D. 184, 123 N. W. 719. **Wash.**—*Faben v. Mui*, 77 Wash. 460, 137 Pac. 1042; *Carlisle P. Co. v. Deming*, 62 Wash. 455, 114 Pac. 172.

57. **Conn.**—*Spencer v. New York, etc. R. Co.*, 62 Conn. 242, 25 Atl. 350. **Fla.**—*McMillan v. Wiley*, 45 Fla. 487, 33 So. 993. **Ind.**—*Robertson v. McPherson*, 4 Ind. App. 595, 31 N. E. 478. **Minn.**—*Koeper v. Town of Louisville*, 109 Minn. 519, 124 N. W. 218. **Mo.**—*Mullaney v. McReynolds*, 170 Mo. App. 406, 155 S. W. 485. **Mont.**—*Chessman v. Hale*, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410. **Neb.**—*Alter v. Skiles*, 93 Neb. 597, 141 N. W. 187; *Litt v. Hammond*, 59 Neb. 339, 80 N. W. 1042; *Yager v. Exchange Nat. Bank*, 52 Neb. 321, 72 N. W. 211. **N. Y.**—*McNulty v. Mt. Morris Elec. L. Co.*, 172 N. Y. 410, 65 N. E. 196; *Hunter v. Ramsay*, 168 App. Div. 953, 153 N. Y. Supp. 408. **Ohio.**—*Brundridge v. Goodlove*, 30 Ohio St. 374; *Bradley v. Herron*, 20 Ohio Cir. Ct. (N. S.) 282. **Tenn.**—*King v. Baker*, 1 Yerg. 450.

[a] Where a complaint consists of several counts presenting issues which are triable by a jury and one of the counts is equitable in character but is incidental and auxiliary to the other counts, the whole cause is triable by a jury as a matter of right. *Minor v. Burton*, 228 Mo. 558, 128 S. W. 964.

[b] Where the main issue made by the pleadings is whether there was a contract, and if so, what the terms of the contract were, the case is triable by jury as of right, even though an accounting is required to establish the amount of recovery. *Carlisle Packing Co. v. Deming*, 62 Wash. 455, 114 Pac. 172.

[c] But where the parties inject equitable matters into the pleadings and trial of a case they cannot be heard to complain that the court tried the case as one in equity. *Mullaney v. McReynolds*, 170 Mo. App. 406, 155 S. W. 485.

58. *Carder v. Weisenburg*, 95 Ky. 135, 23 S. W. 964; *Meek v. McCall*, 80 Ky. 371; *Sallady v. Webb*, 2 Ohio Cir. Ct. 553.

[a] Where plaintiff is entitled to no relief whatever of an equitable nature until he has established his primary cause of action which is one at law, the whole cause is triable by jury. *American Creosote Works v. Lembcke & Co.*, 165 Fed. 809.

59. **Cal.**—*McLaughlin v. Del Re*, 64 Cal. 472, 2 Pac. 244. **Colo.**—*Haver v. Collins*, 21 Colo. App. 440, 122 Pac. 72. **Ill.**—*Keith v. Henkleman*, 68 Ill. App. 623. **Ind.**—*Martin v. Martin*, 118 Ind. 227, 20 N. E. 763; *Towns v. Smith*, 115 Ind. 480, 16 N. E. 811; *McKinley v. Britton*, 55 Ind. App. 21, 103 N. E. 349. **Ky.**—*Semon v. Freitag*, 16 Ky. L. Rep. 524, 29 S. W. 320; *Baltzell v. Hall's Heirs*, 1 Litt. 97. **Mich.**—*Rhoades v. McNamara*, 135 Mich. 644, 98 N. W. 392. **N. Y.**—*Lynch v. Metropolitan El. Ry. Co.*, 129 N. Y. 274, 29 N. E. 315, 26 Am. St. Rep. 523, 15 L. R. A. 287; *Allen v. Gray*, 139 App. Div. 428, 124 N. Y. Supp. 137. **Ohio.**—*Converse v. Hawkins*, 31 Ohio St. 209. **S. C.**—*Atlantic, etc. R.*

isdiction over the cause for the purpose of granting the necessary equitable relief will adjudicate all issues of the cause without a jury.<sup>60</sup> Where legal and equitable issues are blended in an action the right to trial by jury of the whole cause does not obtain,<sup>61</sup> but the legal issues are triable by a jury and the equitable issues by the court.<sup>62</sup>

(II.) As Affected by Plaintiff's Pleadings.—A plaintiff cannot bring an action at law in the form of an equitable suit and thereby defeat

Co. v. Victor Mfg. Co., 79 S. C. 266, 60 S. E. 675. Wash.—Murray v. Okanogan, etc. Co., 12 Wash. 259, 40 Pac. 942; Wintermute v. Carner, 8 Wash. 585, 36 Pac. 490.

60. U. S.—American Creosote Works v. Lembecke & Co., 165 Fed. 809. Cal. Noble v. Learned, 153 Cal. 245, 94 Pac. 1047; Bodley v. Ferguson, 30 Cal. 511; Weber v. Marshall, 19 Cal. 447. Colo.—Cree v. Lewis, 49 Colo. 186, 112 Pac. 326; Weiss v. Ahrens, 24 Colo. App. 531, 135 Pac. 987. Ind.—Martin v. Martin, 118 Ind. 227, 20 N. E. 763. Minn.—Koeper v. Town of Louisville, 109 Minn. 519, 124 N. W. 218. Mo. Shelton v. Harrison, 182 Mo. App. 404, 167 S. W. 634. Neb.—Morrissey v. Broomal, 37 Neb. 766, 56 N. W. 383. N. D.—Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037. Okla.—Hartsog v. Berry, 45 Okla. 277, 145 Pac. 328. S. C.—Atlantic, etc. R. Co. v. Victor Mfg. Co., 79 S. C. 266, 60 S. E. 675. Wash.—Maher & Co. v. Farnandis, 70 Wash. 250, 126 Pac. 542; Installment Bldg. & L. Co. v. Wentworth, 1 Wash. 467, 25 Pac. 298.

[a] Incidental Legal Relief.—There are many cases of equitable jurisdiction, in which as an incident to the main controversy matters "arise in which the parties would be entitled to a jury if the same matter should arise as a distinct transaction in a court of law. In bills to foreclose mortgages, for an accounting and relating to partnership affairs and in many others, matters frequently arise for determination which, if they stood alone and disconnected with other circumstances which give a court of equity jurisdiction, would be properly cognizable in a court of law and triable by a jury. But it is the constant practice of courts of chancery to adjust all questions arising between the parties relating to the subject-matter of the litigation which are brought into issue by the pleadings, regardless of whether such matter is legal or equitable in

its character." Shedd v. Seefeld, 230 Ill. 118, 82 N. E. 580, 120 Am. St. Rep. 269, 13 L. R. A. (N. S.) 709.

61. Kan.—Woodman v. Davis, 32 Kan. 344, 4 Pac. 262. Minn.—Hasey v. McMullen, 109 Minn. 332, 123 N. W. 1078. Mo.—Kortjohn v. Seimers, 29 Mo. App. 271. N. Y.—Cogswell v. New York, N. H. & H. R. Co., 105 N. Y. 319, 11 N. E. 518; Bergman v. Manhattan Ry. Co., 14 N. Y. Supp. 384. Ohio.—Buckner v. Mear, 26 Ohio St. 514. S. C.—City Council of Greenville v. Ormand, 44 S. C. 119, 21 S. E. 642. Va.—Hull v. Watts, 95 Va. 10, 27 S. E. 829. Wash.—Murray v. Okanogan, etc. Co., 12 Wash. 259, 40 Pac. 942.

62. Cal.—Estudillo v. Security Loan & Tr. Co., 158 Cal. 66, 109 Pac. 884. Conn.—Roy v. Moore, 85 Conn. 159, 82 Atl. 233. Ind.—Watt v. Barnes, 41 Ind. App. 466, 84 N. E. 158. Kan.—Gordon v. Munn, 83 Kan. 242, 111 Pac. 177. Mass.—Stockbridge v. Mixer, 215 Mass. 415, 102 N. E. 646. Minn.—Morton B. & T. Co. v. Sodergren, 130 Minn. 252, 153 N. W. 527; Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254. Mo.—Magnuson v. Continental Cas. Co., 125 Mo. App. 206, 101 S. W. 1125. N. Y.—People v. Equitable Life Assur. Soc., 124 App. Div. 714, 109 N. Y. Supp. 453. Okla.—Maas v. Dunmyer, 21 Okla. 434, 96 Pac. 591. S. C.—Mitchell v. Hamilton, 98 S. C. 289, 82 S. E. 425; Holliday v. Hughes, 54 S. C. 155, 31 S. E. 867.

[a] Equitable "issues must be tried by the chancellor and not by the jury. Therefore, when one raises an equitable issue by his pleadings, the proper practice is to have the judge sitting as chancellor pass thereon and not seek to have such issues submitted to a jury as matter of right. In this way both legal and equitable issues may be tried in the same action before an appropriate tribunal without turning the party out of court." Keenan v. Leslie, 79 S. C. 473, 60 S. E. 1114.

defendant's constitutional right to trial by jury.<sup>63</sup> And where a court of law can afford complete relief the plaintiff cannot evade a trial by jury through resorting to equity.<sup>64</sup> Nor can a party having availed himself of a legal remedy thereafter claim that the cause presents one of equitable cognizance.<sup>65</sup> Where plaintiff seeking both legal and equitable relief fails to establish his right to equitable relief,<sup>66</sup> or waives his right thereto,<sup>67</sup> the right to trial by jury obtains as if no equitable relief was sought in the cause.

(III.) **As Affected by Defendant's Pleadings.**—(A.) **LEGAL DEFENSE TO EQUITABLE ACTION.**—A defense raising legal issues in an action of equitable cognizance ordinarily does not render the cause triable by jury as of right.<sup>68</sup> Thus, pleas of payment and statute of limitations in-

63. *Cal.*—Haggin v. Kelly, 136 Cal. 481, 69 Pac. 140; Angus v. Craven, 132 Cal. 691, 64 Pac. 1091; Newman v. Duane, 89 Cal. 597, 27 Pac. 66; Donahue v. Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283. *Ind.*—Boonville Nat. Bank v. Blakey, 166 Ind. 427, 76 N. E. 529. *Ky.*—Newsome v. Hamilton, 142 Ky. 5, 133 S. W. 952. *Mich.*—Chandler v. Graham, 123 Mich. 327, 82 N. W. 814. *N. Y.*—Brinckerhoff v. Bostwick, 105 N. Y. 567, 12 N. E. 58. *S. C.*—Marshall v. Pitts, 39 S. C. 390, 17 S. E. 831. *S. D.*—Leisch v. Baer, 24 S. D. 184, 123 N. W. 719. *Wis.*—Harley v. Harley, 140 Wis. 282, 122 N. W. 761.

64. *Boonville Nat. Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529; *Allen v. Gray*, 201 N. Y. 504, 94 N. E. 652; *Stern v. Mayer*, 99 App. Div. 427, 91 N. Y. Supp. 292.

[a] **Fraud.**—While it is true that courts of equity have jurisdiction in cases of fraud, "the doctrine has its limitation in that the fraud is not remediable by an action at law. A man may acquire another's property by fraudulent misrepresentations; but if the latter may obtain complete relief in an action at law, as by a judgment for damages or for the recovery of the property by an action of replevin, he cannot resort to a suit in equity. . . . We see nothing in the fact that this is a controversy arising in the course of bankruptcy proceedings which should take it out of the general rule. It is a suit, and must be such, and not a summary proceeding in bankruptcy." *Warmath v. O'Daniel*, 159 Fed. 87, 86 C. C. A. 277, 16 L. R. A. (N. S.) 414.

65. *Daley v. Kennett*, 75 N. H. 536, 78 Atl. 123, 39 L. R. A. (N. S.) 45.

[a] **Election by Plaintiff.**—Where plaintiff instead of proceeding in chancery elects to bring an action for conversion he cannot complain that the defendant thereby obtained the right to trial by jury. *Daley v. Kennett*, 75 N. H. 536, 78 Atl. 123, 39 L. R. A. (N. S.) 45.

66. *Sternberger v. McGovern*, 56 N. Y. 12; *Schwartz v. Klar*, 144 App. Div. 37, 128 N. Y. Supp. 830.

67. *Daley v. Kennett*, 75 N. H. 536, 78 Atl. 123, 39 L. R. A. (N. S.) 45.

[a] A plaintiff "by voluntarily parting with his right to any equitable relief, clearly cannot claim that his legal action should be tried by a court of equity and the defendants had a right, as soon as that fact appeared, to demand a jury trial, which was granted to them by the constitution. It is true that, by the entry upon the trial of a legal action before the court without a jury, the right to a jury trial was deemed to be waived. But where the action upon its face is an equitable one, and it appears that the plaintiff has, by his own act, deprived himself of all right to equitable relief, it is clear that he has no right in a court of equity to recover an incident to the equitable cause of action set out in his complaint." *Saxton v. New York El. Ry. Co.*, 42 N. Y. Supp. 508.

68. *Cal.*—Fuller v. Kelly, 28 Cal. App. 160, 151 Pac. 749. *Idaho.*—Penninger L. Co. v. Clark, 22 Idaho 397, 126 Pac. 524. *Ind.*—Reichert v. Krass, 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835. *Ia.*—Bennett Sav. Bank v. Smith, 171 Iowa 405, 152 N. W. 717; *Ryman v. Lynch*, 76 Iowa 587, 41 N. W. 320, 328. *Minn.*—Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118, Ann. Cas. 1914C, 850; *Sumner v.*

terposed to an action in equity do not entitle defendant to trial by jury.<sup>69</sup> Where defendant interposes a counterclaim or cross-complaint to an equitable action and raises legal issues therein, he generally is not entitled as of right to a trial by jury,<sup>70</sup> unless the equitable right asserted by plaintiff depends upon the determination of the legal issues raised in the counterclaim,<sup>71</sup> or the right to trial by jury is conferred by statute in such cases.<sup>72</sup>

(B.) **EQUITABLE DEFENSE TO LEGAL ACTION.**—A defense to an action at law raising equitable issues without asking for affirmative equitable relief does not affect the right to trial by jury of the whole cause,<sup>73</sup>

Jones, 27 Minn. 312, 7 N. W. 265. N. D.—Gresens v. Martin, 27 N. D. 231, 145 N. W. 823. Wash.—Maber & Co. v. Farnandis, 70 Wash. 250, 126 Pac. 542; Installment B. & L. Co. v. Wentworth, 1 Wash. 467, 25 Pac. 298.

[a] A party who injects a legal claim into an equitable action cannot complain that he was deprived of a trial by jury. Slaughter v. McManigal, 138 Iowa 643, 116 N. W. 726.

[b] Where the answer to an equitable proceeding raises a legal issue and the case is treated by the parties as an equitable case throughout and the right of the court to pass upon the legal as well as the equitable issues is not questioned until after verdict, it cannot be claimed that the finding of the jury was binding upon the court, as the trial by jury was not a matter of right and the verdict therefore was merely advisory. Costello v. Scott, 30 Nev. 43, 93 Pac. 1, 94 Pac. 222.

69. Leach v. Kundson, 97 Iowa 643, 66 N. W. 913; Gregory v. Perry, 66 S. C. 455, 45 S. E. 4.

70. Cal.—McNeil v. Morgan, 157 Cal. 373, 108 Pac. 69; Fuller v. Kelly, 28 Cal. App. 160, 151 Pac. 749. Ia. Gatch v. Garretson, 100 Iowa 252, 69 N. W. 550. Kan.—Sigel, etc. Co. v. Haston, 81 Kan. 656, 106 Pac. 1096; Larkin v. Wilson, 28 Kan. 513. Minn. Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118, Ann. Cas. 1914C, 850; Johnson v. Peterson, 90 Minn. 503, 97 N. W. 384; Sumner v. Jones, 27 Minn. 312, 7 N. W. 265. Neb.—Morrisey v. Broomal, 37 Neb. 766, 56 N. W. 383. N. Y.—Mackellar v. Rogers, 109 N. Y. 468, 17 N. E. 350; Gersmann v. Walpole, 79 Misc. 49, 139 N. Y. Supp. 1. Okla.—Hartsog v. Berry, 45 Okla. 277, 145 Pac. 328. S. C.—Mobley Co. v. McLucas, 99 S. C. 99, 82 S. E. 986; Gibbes Machinery Co. v.

Hamilton, 89 S. C. 438, 71 S. E. 1029; McLaurin v. Hodges, 43 S. C. 187, 20 S. E. 991.

[a] **Cross-Bill for Ejectment.**—Where plaintiff alleges the ownership and possession of land and that defendant claims title thereto under forged deeds and prays for a cancellation of such deeds and that defendant be restrained from claiming thereunder and the defendant files a cross-bill in the nature of ejectment, the equitable nature of the action is not changed by the cross-bill and the defendant is not entitled to a jury trial. Angus v. Craven, 132 Cal. 691, 64 Pac. 1091.

71. Sandstrom v. Smith, 12 Idaho 446, 86 Pac. 416; Carder v. Weisenburg, 95 Ky. 135, 23 S. W. 964.

[a] **Title to Land.**—Where a complaint for an injunction shows that the plaintiff is the owner of land upon which the defendant is alleged to have committed trespass and it is alleged in the answer that defendant has a prior title to such land, the "issue presented by the pleadings as to which of the parties was the owner of the land . . . was a legal issue and upon its determination depended all the other questions in the case. It was therefore proper for the court to submit, under proper instructions, this issue to the jury. In fact, either of the parties had the right to demand a jury trial." Kountze v. Hatfield, 30 Ky. L. Rep. 589, 99 S. W. 262.

72. Mackellar v. Rogers, 109 N. Y. 468, 17 N. E. 350; Ettlinger v. Trustees of Sailors' Snug Harbor, 122 App. Div. 681, 107 N. Y. Supp. 779; Arnot v. Nevins, 44 App. Div. 61, 60 N. Y. Supp. 401. But see Smith v. Fleischman, 23 App. Div. 355, 48 N. Y. Supp. 234.

73. Pierce v. Maetzold, 126 Minn. 445, 148 N. W. 302; Pitts v. Pitts, 201

but where the answer seeks affirmative equitable relief, the equitable issues are triable by the court without a jury, while the legal issues are to be tried in the same manner as if no equitable defense had been interposed.<sup>74</sup> Where defendant though not expressly asking for affirmative equitable relief invokes equitable defenses which in effect constitute a request for an adjudication of the equities pleaded, the issues thus raised by such defense likewise are triable by the court without a jury.<sup>75</sup> In order to entitle defendant, however, to a determination of the issues raised in the answer by the court without a jury, the defense must be an equitable one in the strict sense of the term,<sup>76</sup> and where the allegations of the answer are provable under a general denial,<sup>77</sup> or defendant has an adequate remedy at law to enforce his defense,<sup>78</sup> the whole cause is triable by a jury as a matter of right. Where

Mo. 356, 100 S. W. 1047; Hall v. Small, 178 Mo. 629, 77 S. W. 733.

[a] An "answer setting up a defense in equity will not convert a law case into one in equity, so as to require a trial by a chancellor unless affirmative relief is asked and is necessary to sustaining or ascertaining defendant's rights." *Thompson v. National Bank*, 132 Mo. App. 225, 110 S. W. 681.

74. Mo.—*Pitts v. Pitts*, 201 Mo. 356, 100 S. W. 1047; *Thompson v. National Bank*, 132 Mo. App. 225, 110 S. W. 681. Neb.—*Card v. Deans*, 84 Neb. 4, 120 N. W. 440. Ohio.—*Gill v. Pelkey*, 54 Ohio St. 348, 43 N. E. 991; *Buckner v. Mear*, 26 Ohio St. 514. Wis. *Lombard v. Cowham*, 34 Wis. 486.

[a] Where "an equitable defense is pleaded to a law action, while that issue may be tried by the court, the right of plaintiff to a jury trial on the case he presents is not affected." *Tufts v. Norris*, 115 Iowa 250, 88 N. W. 367.

[b] And by "making an equitable defense . . . the defendant does not, . . . lose any right which he would otherwise have to have the issues of law tried by a jury, nor does the court, . . . acquire the right to pass upon all the issues in the case without a jury." *Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119.

[c] The answer presenting a defense calling for equitable relief "is in the nature of a bill in equity. . . . The defendant . . . becomes an actor with respect to the matter alleged by him, and his defense must be of such a character as may be ripened by the decree of the court into a legal right

. . . as will estop the prosecution of the action of the plaintiff. . . . Upon the determination of the court upon the relief prayed by the answer, the necessity of proceeding with the action at law will depend. When it does proceed, the legal title will control its result." *Estrada v. Murphy*, 19 Cal. 248.

75. *Hauser v. Murray*, 256 Mo. 58, 165 S. W. 376; *Keenan v. Leslie*, 79 S. C. 473, 60 S. E. 1114.

[a] In *Cooper v. Smith*, 16 S. C. 331, the action was brought to recover possession of land under a deed and defendant admitting the execution of such deed alleged that he was in possession of the land under an agreement to purchase made prior to the deed. It was held there that the defense being such as could only be heard in a court of equity "must be tried by the judge, either personally or through the aid of a jury acting under his order and for his enlightenment."

76. *Weaver v. Arkansas Nat. Bank*, 73 Ark. 462, 84 S. W. 510.

[a] A denial of the contract which is set out in the complaint without prayer for its reformation or claim of rescission raises a legal and not an equitable issue and is therefore triable by a jury. *Sloan v. Courtenay*, 54 S. C. 314, 32 S. E. 431.

77. *Locke v. Moulton*, 108 Cal. 49, 41 Pac. 28; *Heston v. Dougan*, 52 Ind. App. 40, 96 N. E. 614.

78. *Fludd v. Equitable L. Assur. Soc.*, 75 S. C. 315, 55 S. E. 762.

[a] **Cancellation of Policy.**—In an action on an insurance policy all "the rights which the insurance company

defendant files an equitable counterclaim or cross-complaint to an action at law the issues thus raised by him are triable by the court,<sup>79</sup> and ordinarily should be tried first.<sup>80</sup>

could maintain in an action for cancellation on the ground of false representation are available as a defense alleging forfeiture in a suit on the instrument. It was, therefore, perfectly proper to deny the equitable relief sought inasmuch as defendant had a complete and adequate remedy at law." *Fludd v. Equitable L. Assur. Soc.*, 75 S. C. 315, 55 S. E. 762.

[b] **Cancellation of Note.**—And where the defense interposed to an action on a promissory note in legal effect is a plea of payment, although defendant asks for cancellation of the note, such defense does not convert the case into an equitable action and the plaintiff is entitled to a trial of the whole case by a jury. "It is one of the established rules of equity jurisdiction that equity will not lend its aid to a party who has an adequate remedy at law . . . and had the issue been tried at law, before a jury, and a verdict found in defendant's favor, and judgment rendered thereon, it would have afforded defendant as effective relief as could be granted by a decree in equity cancelling the note." *Stalter v. Stalter*, 151 Mo. App. 66, 131 S. W. 747. See also *White v. Shonts*, 154 App. Div. 428, 139 N. Y. Supp. 169.

79. **Cal.**—*Crocker v. Carpenter*, 98 Cal. 418, 33 Pac. 271; *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454. **Ind.**—*Peden v. Cavins*, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276. **Ia.**—*Marquis v. Illsley*, 99 Iowa 135, 68 N. W. 589; *Marling v. Burlington, etc. Ry. Co.*, 67 Iowa 331, 25 N. W. 268. **Mo.**—*Hauser v. Murray*, 256 Mo. 58, 165 S. W. 376; *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, 74 S. W. 1007. **Neb.**—*Card v. Deans*, 84 Neb. 4, 120 N. W. 440; *Jewett v. Black*, 60 Neb. 173, 82 N. W. 375; *Hotaling v. Tecumseh Nat. Bank*, 55 Neb. 5, 75 N. W. 242. **Ohio.**—*Buckner v. Mear*, 26 Ohio St. 514. **Okla.**—*Maas v. Dunmyer*, 21 Okla. 434, 96 Pac. 591. **Wash.**—*Nolan v. Pacific Warehouse Co.*, 67 Wash. 173, 121 Pac. 451, Ann. Cas. 1913D, 167; *Lindley v. McGlauffin*, 57 Wash. 581, 107 Pac. 355.

[a] **Separating Legal and Equitable**

**Issues.**—While under code procedure both legal and equitable issues may be tried in the same case, yet "at the trial, the legal and equitable issues must be distinguished and decided by the court in the exercise of its distinct functions as a court of law and a court of equity, and only those should be determined by a jury which are properly triable by a jury, while those which would formerly have been triable in equity must be determined by the judge in the exercise of his chancery powers." *Holliday v. Hughes*, 54 S. C. 155, 31 S. E. 867.

[b] **Although Defendant Admits Part of Claim.**—*Gantz v. Gease*, 82 Ohio St. 34, 91 N. E. 872.

[c] **Practice in New York.**—"Where the defendant has pleaded an equitable counterclaim, if he wishes a trial of the issues arising thereupon at special term, the proper practice is to move for an order directing separate trials in the appropriate forum of the separate issues and the order thereof. . . . The court may then determine whether the issues should be tried separately." *Wasserman v. Taubin*, 129 App. Div. 691, 114 N. Y. Supp. 447.

80. **Cal.**—*Fish v. Benson*, 71 Cal. 428, 12 Pac. 454; *Martin v. Zellerbach*, 33 Cal. 300, 99 Am. Dec. 365. **Idaho.**—*Penninger Lateral Co. v. Clark*, 22 Idaho 397, 126 Pac. 524. **N. D.**—*Gresens v. Martin*, 27 N. D. 231, 145 N. W. 823. **Utah.**—*Steele v. Boley*, 7 Utah 64, 24 Pac. 755. **Wis.**—*Cornelius v. Kessel*, 58 Wis. 237, 16 N. W. 550.

[a] It is the duty of the court, where an equitable defense is set up in a cross-complaint "to first determine the issues involved under the cross-complaint, for the reason that if the defendants succeeded on these issues it would defeat the right of plaintiffs to recover in their action at law, however perfect their legal right." *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454.

[b] *Compare Du Pont v. Davis*, 35 Wis. 631, where it is said: "It would have been more correct practice to have first tried the equitable issue on the defendant's counterclaim, before

If the plaintiff dismisses his complaint leaving only the equitable issues made in the answer, his right of trial by jury ceases.<sup>81</sup>

(C.) JOINDER OF LEGAL AND EQUITABLE DEFENSES. — Where defendant interposes legal as well as equitable defenses, the issues thus raised must be tried separately, the former by a jury and the latter by the court,<sup>82</sup> and the equitable issues must be disposed of first.<sup>83</sup>

(IV.) As Affected by Intervention and Interpleader. — The general rules regulating the right to trial by jury as dependent upon the issues raised, apply to intervenors.<sup>84</sup> Thus, an intervenor in an equity suit is not entitled to a trial by jury as of right, even though the issue raised by him sounds in tort.<sup>85</sup>

Where a suit in interpleader is filed no right to trial by jury obtains,<sup>86</sup> and where by an order of interpleader an action at law becomes of equitable character, it is triable by the court without a jury.<sup>87</sup>

the court; and after, the legal issue by a jury. But this rests somewhat in the discretion of the court. And the reverse order of trial, in cases like the present, where it works no prejudice, cannot be regarded as error."

81. *Johnson v. Johnson*, 115 Ind. 112, 17 N. E. 111.

82. *Cal.*—*Bodley v. Ferguson*, 30 Cal. 511; *Weber v. Marshall*, 19 Cal. 457. *Mo.*—*Grayson v. Weddle*, 80 Mo. 39. *N. Y.*—*Guaranty Trust Co. v. Robinson*, 31 Misc. 277, 64 N. Y. Supp. 366.

[a] "Where . . . both legal and equitable defenses are relied upon, the former should be tried by a jury and the court may also submit to the jury for its decision such matters of fact as are involved in the equitable issue; . . . but the finding of the jury in relation to the facts involved in the equitable issue should be special, to enable the court to render such a judgment thereon as might be equitable and proper between the parties." *Petty v. Malier*, 15 B. Mon. (Ky.) 591.

83. *Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119; *Peterson v. Philadelphia Mrtg. & Tr. Co.*, 33 Wash. 464, 74 Pac. 585.

[a] **Equitable Issue Tried First.** Where the answer to an action for the recovery of damages sustained by an alleged breach of contract not only denies the breach on the part of the defendant but alleging a breach by the plaintiff asks for the foreclosure of a trust deed given as security for such breach, it is the duty of the court to try the equitable defense first, as a finding that plaintiff had broken

the contract destroys plaintiff's case. *Nolan v. Pacific Warehouse Co.*, 67 Wash. 173, 121 Pac. 451, Ann. Cas. 1913D, 167.

84. *U. S.*—*Luria v. United States*, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. ed. 101. *Cal.*—*McNeil v. Morgan*, 157 Cal. 373, 108 Pac. 69. *Ill.*—*South Park Comrs. v. Phillips*, 27 Ill. App. 380. *La.*—*LaCroix v. Menard*, 3 Mart. N. S. 339, 15 Am. Dec. 161.

As to intervention generally, see 14 STANDARD PROC. 285, et seq.

85. *Nashville Ry. & L. Co. v. Bunn*, 168 Fed. 862, 94 C. C. A. 274.

86. *Mo.*—*Grand Lodge v. Elsner*, 26 Mo. App. 108. *Mont.*—*Missoula T. & S. Bank v. Iman*, 50 Mont. 355, 146 Pac. 941. *N. Y.*—*Gleason v. Bush*, 166 App. Div. 865, 152 N. Y. Supp. 54; *Voss v. Smith*, 87 App. Div. 395, 84 N. Y. Supp. 471.

See also 14 STANDARD PROC. 216.

[a] "The statutory proceeding of interpleader, where applicable, provides substantially the remedy formerly obtained by a bill of interpleader in equity. Where, upon the issues framed, it is apparent . . . that the right of one person to participate in the fund involved is not necessarily exclusive of the rights of others there-in and that the facts may require an equitable distribution of the fund, a proper case is presented for trial by the court and neither side is entitled, as a matter of right, to a jury trial." *Burkee v. Matson*, 114 Minn. 233, 130 N. W. 1025, 34 L. R. A. (N. S.) 924.

87. *Schreiber v. Dry Dock Sav. Instit.*, 59 Misc. 408, 112 N. Y. Supp. 360.

f. *Actions for Recovery of Money or Property.*—Generally in actions for the recovery of money,<sup>88</sup> or specific property,<sup>89</sup> the parties are entitled to trial by jury as a matter of right. Thus, suits in replevin<sup>90</sup> and ejectment<sup>91</sup> are triable by jury.

Where equitable issues are involved in actions for the recovery of money and property, the general rule that the right to a trial by jury depends upon the nature of the main issue applies.<sup>92</sup> Thus, where the action is brought primarily for the recovery of money it is triable by jury as of right, although plaintiff seeks also equitable relief.<sup>93</sup> So too, an action to recover real property from a tenant is triable by jury as of right notwithstanding the fact that plaintiff also asks for a cancellation of

88. **U. S.**—*Brown v. Fletcher*, 206 Fed. 461, 124 C. C. A. 367. **Cal.**—*Newman v. Duane*, 89 Cal. 597, 27 Pac. 66. **Kan.**—*Seward v. Seward*, 59 Kan. 387, 53 Pac. 63; *Myers v. Knabe*, 4 Kan. App. 484, 46 Pac. 472. **Ky.**—*Smith v. Moberly*, 15 B. Mon. 70. **Minn.**—*Tripp v. Northwestern Nat. Bank*, 45 Minn. 383, 48 N. W. 4. **Mo.**—*Benoist v. Thomas*, 121 Mo. 660, 27 S. W. 609; *Fehrenbaeh, etc. Co. v. Atchison, T. & S. F. Ry. Co.*, 182 Mo. App. 1, 167 S. W. 631; *Baum v. Stephenson*, 133 Mo. App. 187, 113 S. W. 225. **Neb.**—*Kuhl v. Pierce County*, 44 Neb. 584, 62 N. W. 1066. **N. Y.**—*Glenn v. Lancaster*, 109 N. Y. 641, 16 N. E. 484; *Bowery Bank v. Martin*, 61 Hun 625, 16 N. Y. Supp. 73; *Clark v. Blumenthal*, 20 Jones & S. 355. **N. D.**—*Avery Mfg. Co. v. Crumb*, 14 N. D. 57, 103 N. W. 410. **Ohio.**—*Gunsaulus v. Pettit*, 46 Ohio St. 27, 17 N. E. 231; *Averill, etc. Co. v. Verner*, 22 Ohio St. 372; *Riddle v. McBeth*, 2 Ohio Dec. (Reprint) 606. **Okla.**—*Sherman v. Randolph*, 13 Okla. 224, 74 Pac. 102. **S. C.**—*Osborne v. Osborne*, 41 S. C. 195, 19 S. E. 494. **Wyo.**—*Friend v. Ogshaw*, 3 Wyo. 59, 31 Pac. 1047.

[a] "If an action is brought for recovery of the amount due on a written instrument for the payment of money, the fact that the instrument was lost would not make the action an equitable one, and . . . the mere fact that the alleged contract could only be established by parol because the writings had been lost does not change the form of action from one at law to one in equity." *Dilger v. Estate of McQuade*, 158 Wis. 328, 148 N. W. 1085.

[b] *Notwithstanding a Prayer for Full Discovery.*—Where an action is brought for the recovery of a sum of

money obtained by defendants through a conspiracy to cheat and defraud, either party is entitled to a jury trial notwithstanding a prayer for a full discovery. *Chapman v. Lee*, 45 Ohio St. 356, 13 N. E. 736.

[c] *Action To Recover Money Paid Under Misrepresentations.*—Where the action is brought to recover a money judgment based upon misrepresentations as to the number of acres in a tract of land sold by defendants to the plaintiff and there is no allegation of mistake or right to rescind, the defendants are entitled to a jury trial upon the issues presented. *Hanan v. Messenger*, 168 Iowa 507, 150 N. W. 673.

[d] *But a proceeding to recover the refund of excess charges from a corporation is not one wherein a trial by jury is a matter of right.* *Pioneer T. & T. Co. v. State*, 40 Okla. 417, 138 Pac. 1033.

89. **Cal.**—*Davis v. Judson*, 159 Cal. 121, 113 Pac. 147; *Newman v. Duane*, 89 Cal. 597, 27 Pac. 66. **Ind.**—*Harmon v. Pohle*, 46 Ind. App. 369, 92 N. E. 119. **Mo.**—*Benoist v. Thomas*, 121 Mo. 660, 27 S. W. 609. **Okla.**—*Wah-tah-noh-zhe v. Moore*, 36 Okla. 631, 129 Pac. 877. **S. C.**—*Capell v. Moses*, 36 S. C. 559, 15 S. E. 711.

90. *Stark v. Couch*, 109 Ark. 534, 160 S. W. 853; *Blackman v. Wheaton*, 13 Minn. 326.

91. **Ind.**—*Heston v. Dougan*, 52 Ind. App. 40, 96 N. E. 614. **Mo.**—*Hall v. Small*, 178 Mo. 629, 77 S. W. 733. **Wis.**—*Harley v. Harley*, 140 Wis. 282, 122 N. W. 761; *Lombard v. Cowham*, 34 Wis. 486.

92. See *supra*, II, E, 4, e.

93. *Bradley v. Herron*, 20 Ohio Cir. Ct. (N. S.) 282.

the lease.<sup>94</sup> On the other hand, where the main issue is of equitable cognizance, the right to trial by jury of the case does not obtain even though the plaintiff seeks also to recover money in the action.<sup>95</sup> And where plaintiff seeking to recover money invokes also the aid of equity, the equitable issues are triable by the court, while the issue relating to the recovery of money is triable by jury as of right.<sup>96</sup> So too, where defendant in an action brought for the recovery of specific real property, in his answer asks for affirmative equitable relief, the equitable issues thus raised are triable by the court.<sup>97</sup>

*g. Determination of Title to Real Property.* — (I.) Generally. — Generally actions brought to determine title to real property are triable

94. *Harmon v. Pohle*, 46 Ind. App. 369, 92 N. E. 119.

95. *Allen v. Gray*, 139 App. Div. 428, 124 N. Y. Supp. 137.

[a] Even though the plaintiff demands judgment for a sum of money, the action is of equitable cognizance, where in order to render such judgment it is necessary to adjudicate that the defendant transferred property in fraud of his creditors, and hence the action is not triable by jury as a matter of right. *Allen v. Gray*, 139 App. Div. 428, 124 N. Y. Supp. 137.

[b] If "an issue of fact relates to or involves a trust which the party tendering it is attempting to establish, it is triable to the court. . . . The fact that plaintiff asked for a money judgment is by no means decisive that the action was one at law. If he established the trust upon which he relied, then he was entitled to recover from the defendant the money which he had received on account of the trust." *Cree v. Lewis*, 49 Colo. 186, 112 Pac. 326.

[c] Where the main purpose of the action is to compel an accounting and settlement and issues of fact as to fraud and value of property are but incidental to the main purpose of the action, the chancellor has exclusive jurisdiction thereof and such jurisdiction carries with it the power to decide all issues raised, without intervention of a jury. *Cominger v. Louisville Trust Co.*, 128 Ky. 697, 108 S. W. 950, 111 S. W. 681, 129 Am. St. Rep. 322. See *infra*, II, E, 4, j.

96. See *supra*, II, E, 4, e.

[a] Where plaintiff under a statute seeks to establish an indebtedness of defendants to him and in the same proceeding endeavors to reach in pay-

ment of such debt an interest owing to defendants from a third person which cannot be seized in an action at law, "the defendants are entitled to trial by jury respecting the debt alleged to be due from them to the plaintiff. They are not entitled to a trial by jury respecting the other branches of the case which relate to remedy and which are purely equitable in their nature." *Stockbridge v. Mixer*, 215 Mass. 415, 102 N. E. 646.

97. *Gill v. Pelkey*, 54 Ohio St. 348, 43 N. E. 991. See *supra*, II, E, 4, e.

[a] **Equitable Defense.**—Where in an action to recover real property the defendant sets up a parol contract to purchase it, his defense is equitable and not a matter to be determined by the jury. *Keenan v. Leslie*, 79 S. C. 473, 60 S. E. 1114.

[b] **No Affirmative Relief Asked.** (1) But where the complaint states a cause of action in ejectment and the answer attempts to set up an equitable defense of implied trust but does not ask any affirmative relief, the case remains an action at law and it is error to take the case from the jury. *Hall v. Small*, 178 Mo. 629, 77 S. W. 733. (2) And the defense of fraud to be available as an equitable one to an action of ejectment must be "accompanied by a demand for such relief as the defendant supposes himself entitled to. . . . A mere equitable defense is not sufficient. There must be a counterclaim also." *Lombard v. Cowham*, 34 Wis. 486.

[c] **An issue if estoppel in pais** as a defense to an action for the recovery of possession of land is a legal issue and triable by a jury as of right. *Southern Ry. Co. v. Howell*, 89 S. C. 391, 71 S. E. 972, Ann. Cas. 1913A, 1070.

by jury as of right,<sup>98</sup> except where the issue of title is only incidentally involved in an action of equitable cognizance.<sup>99</sup>

(II.) **Actions To Quiet Title.**—Where under a statute an action may be brought against adverse claimants to quiet title to property,<sup>1</sup> such action is deemed of equitable cognizance, and neither party ordinarily is entitled to a trial by jury;<sup>2</sup> but where the issues raised in the action

98. **Cal.**—*Gillespie v. Gouly*, 120 Cal. 515, 52 Pac. 816; *Donahue v. Meister*, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283. **Fla.**—*Hughes v. Hannah*, 39 Fla. 365, 22 So. 613. **Ky.** *Kountze v. Hatfield*, 30 Ky. L. Rep. 589, 99 S. W. 262. **Mass.**—*Weeks v. Brooks*, 205 Mass. 458, 92 N. E. 45. **Mich.**—*Tabor v. Cook*, 15 Mich. 322. **Miss.**—*Wofford v. Bailey*, 57 Miss. 239. **Mo.**—*Lee v. Conran*, 213 Mo. 404, 111 S. W. 1151. **Mont.**—*Montana Ore-Purch. Co. v. Boston*, etc. Min. Co., 27 Mont. 536, 71 Pac. 1005. **Nev.** *Stonecipher v. Yellow Jacket*, etc. Co., 3 Nev. 38. **N. Y.**—*King v. Ross*, 28 App. Div. 371, 51 N. Y. Supp. 138. **Pa.**—*In re Haines' Appeal*, 73 Pa. 169. **S. C.**—*Marshall v. Pitts*, 39 S. C. 390, 17 S. E. 831. **S. D.**—*Nelson v. Jordeth*, 15 S. D. 46, 87 N. W. 140.

[a] **Title by Sheriff's Sale.**—The question whether a title acquired through a sheriff's sale is superior to the title of plaintiff under a conveyance from the judgment debtor made before the judgment was recovered but recorded after such recovery, is purely one of law to be determined by a jury. *Alpern v. Behrenburg*, 77 N. J. Eq. 373, 77 Atl. 803.

[b] **Title as Defense.**—Where defendants in an action to remove certain obstructions from a public street, claim title to land included in the street, they are entitled to a trial by jury provided that their claim of title is a bona fide claim, but if they cannot show that they are not in a position to demand a jury. *Moorman v. City of Lynchburg*, 113 Va. 90, 73 S. E. 987.

99. *Atkinson v. Crowe Coal, etc. Co.*, 80 Kan. 161, 102 Pac. 59, 106 Pac. 1052, 39 L. R. A. (N. S.) 31.

[a] "The difficulty encountered in the enforcement of this rule consists chiefly in determining whether or not the action under consideration comes within the rule. The test upon this question which has been generally followed is that, where the real object

of the action, whatever its form, appears to be to settle a disputed question of title, then either party may demand a jury as matter of right, if, on the other hand, the purpose is to obtain proper equitable relief, then the chancellor may administer it, even though it involves an examination of title." *Atkinson v. Crowe Coal, etc. Co.*, 80 Kan. 161, 102 Pac. 59, 106 Pac. 1052, 39 L. R. A. (N. S.) 31.

1. See the title "Quieting Title."

2. **U. S.**—*Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 23 L. ed. 52; *Book v. Justice Min. Co.*, 58 Fed. 827; *Grand Rapids Co. v. Sparrow*, 36 Fed. 210, 1 L. R. A. 480. **Cal.**—*McNeil v. Morgan*, 157 Cal. 373, 108 Pac. 69; *Fuller v. Kelly*, 28 Cal. App. 160, 151 Pac. 749. **Colo.**—*Rice v. Goodwin*, 2 Colo. App. 267, 30 Pac. 330. **Idaho.** *Fairview Investment Co. v. Lamberson*, 25 Idaho 72, 136 Pac. 606. **Ill.**—*Gage v. Ewing*, 107 Ill. 11. **Ia.**—*Coulthard v. Davis*, 151 Iowa 578, 131 N. W. 1083; *Bradley v. Burkhardt*, 139 Iowa 323, 115 N. W. 597, 130 Am. St. Rep. 328. **Kan.**—*Butts v. Butts*, 84 Kan. 475, 114 Pac. 1048; *Bethany Hospital Co. v. Philippi*, 82 Kan. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194. **Ky.** *Hall v. Pratt*, 142 Ky. 561, 134 S. W. 900. **Mass.**—*Crocker v. Cotting*, 173 Mass. 68, 53 N. E. 158. **Minn.**—*Johnson v. Peterson*, 90 Minn. 503, 97 N. W. 384; *Roussain v. Patten*, 46 Minn. 308, 48 N. W. 1122. **Mont.**—*Montana Ore-Purch. Co. v. Boston, etc. Co.*, 27 Mont. 288, 70 Pac. 1114. **N. J.**—*Brady v. Carteret Realty Co.*, 70 N. J. Eq. 748, 64 Atl. 1078, 118 Am. St. Rep. 778, 8 L. R. A. (N. S.) 866. **Ohio.** *Ellithorpe v. Buck*, 17 Ohio St. 72. **Okla.**—*Hartsog v. Perry*, 45 Okla. 277, 145 Pac. 328. **Ore.**—*McLeod v. Lloyd*, 43 Ore. 260, 71 Pac. 795, 74 Pac. 491. **S. C.**—*Trustees of University v. Trustees of Academy*, 85 S. C. 546, 67 S. E. 951. **S. D.**—*Grigsby v. Larson*, 24 S. D. 628, 124 N. W. 856. **Wash.**—*White v. McSorley*, 47 Wash. 18, 91 Pac. 243;

are such as at the adoption of the constitution were triable by jury, the parties are entitled to a trial by jury of such issues.<sup>3</sup> However, a

*Rohrer v. Snyder*, 29 Wash. 199, 69 Pac. 748.

[a] A statute authorizing any person claiming title to lands through a conveyance executed upon a sale for non-payment of taxes to commence a suit in chancery to quiet his title thereto without taking possession of such lands is only applicable to vacant lands and does not intend to give a remedy in chancery where at common law a trial by jury was demandable as of right. "Whatever proceeding the legislature authorizes for the determination of adverse claims, the right of the party in possession to a jury trial must be kept in view. . . . The courts will always construe a legislative act so as to give it effect as law, if it be practicable to do so. An intent to violate the constitution is not to be presumed in any case, and a construction which would have that effect is not to be adopted unless forced . . . by the terms employed. . . . We do not discover in this statute a clear intent to give a remedy in chancery in cases where the defendant was entitled to a jury trial at the common law, and as an act to that effect, without provision for a jury at the option of defendant, would be unconstitutional, it is our duty, under the principle stated, to hold the act applicable only to those cases where the defendant is not in possession." *Tabor v. Cook*, 15 Mich. 322.

[b] A proceeding under the federal statute to determine the rights of adverse claimants to a mineral location is not equitable in its nature as the right of possession is the gist of the action, and hence a jury is demandable as of right. *Burke v. McDonald*, 2 Idaho 339, 13 Pac. 351.

[c] **Establishment of Boundary Line.** But where both parties claim possession of the property and the location of the boundary line between their adjoining lands is the matter in dispute neither party is entitled to a jury trial in an action brought under the statute to quiet title. "The relief sought by the plaintiff could not have been obtained by an action for the recovery of real property, under either the code or the forms of the common

law; and was not, therefore, a case in which he could demand a trial by jury, of the issues involved. . . . It follows that the defendant had neither a statutory nor constitutional right to have the boundary line in controversy established by the verdict of a jury, as a condition precedent to the relief which the plaintiff is entitled to." *Ellithorpe v. Buck*, 17 Ohio St. 72.

[d] And where plaintiff is in possession of real property and defendant claims title thereto under a forged deed an action brought to quiet title is of purely equitable character, and a jury trial is not demandable in such action as a matter of right. *Angus v. Craven*, 132 Cal. 691, 64 Pac. 1091.

[e] Where defendants admit plaintiff's legal title to the land in controversy and base their defense upon an alleged agreement for the sale of such land and in effect ask for a specific performance of the agreement, it "is very clear . . . that the defendants were not entitled to a jury for the trial of the equitable issues thus presented." *Crocker v. Carpenter*, 98 Cal. 418, 33 Pac. 271.

**S. Ark.**—*Love v. Bryson*, 57 Ark. 589, 22 S. W. 341. **Fla.**—*Hughes v. Hannah*, 39 Fla. 365, 22 So. 613. **Ill.** *Gage v. Ewing*, 107 Ill. 11. **Ind.**—*Trittipo v. Morgan*, 99 Ind. 269; *Macy v. Wood*, 49 Ind. App. 469, 97 N. E. 553. **Md.**—*McCoy v. Johnson*, 70 Md. 490, 17 Atl. 387. **Mich.**—*Tabor v. Cook*, 15 Mich. 322. **Mo.**—*Minor v. Burton*, 228 Mo. 558, 128 S. W. 964. **Mont.**—*Montana Ore-Purch. Co. v. Boston, etc. Min. Co.*, 27 Mont. 536, 71 Pac. 1005. **N. J.**—*Powell v. Mayo*, 24 N. J. Eq. 178. **Pa.**—*North Pennsylvania Coal Co. v. Snowden*, 42 Pa. 488, 82 Am. Dec. 530. **S. D.**—*Burleigh v. Hecht*, 22 S. D. 301, 117 N. W. 367.

[a] The claims to be tried and determined in an action to quiet title brought under a statute "may plainly include legal claims proper to be tried by a jury, as well as equitable claims proper to be tried by a court of equity; and in the absence of any provisions in the act which either expressly or by necessary implication prohibit trial by jury, the fair presumption is that the right to try the former class of

counterclaim in ejectment interposed to an action to quiet title does not entitle defendant, as a matter of right, to a jury trial.<sup>4</sup> But in some jurisdictions actions to quiet title are held to be triable by a jury as a matter of right.<sup>5</sup> And where the plaintiff by an action brought in the form of the statutory action to quiet title seeks to recover possession of property, the cause is triable by jury as of right.<sup>6</sup> It has

questions to a jury is preserved to the parties." *Miles v. Strong*, 68 Conn. 273, 36 Atl. 55.

[b] In order to determine whether an action to quiet title is triable by jury "we must first determine what the issue tendered by the pleadings is, and after doing so, we must then ascertain how that issue was triable before the adoption of that constitutional provision; if by jury, then either party is entitled to a trial of that issue by a jury regardless of any statutory provision; but if it was not triable by jury prior to that time, then the constitution does not govern, and we would then look to the statutes and the common law for a rule by which to solve the question. We will first determine the nature of the issue presented by the pleadings. The petition charges that the plaintiff is the owner of the land described therein, and that defendant claims some interest or estate therein, the nature of which is unknown to plaintiff, except that it is adverse and prejudicial to his interests. The answer denies the allegations of plaintiff's ownership, and alleges that the lands are accretions. . . . When reduced to its final analysis, the issue is plainly one of accretion . . . triable by a jury prior to the adoption of . . . the constitution; and consequently, . . . any action involving that issue must still be triable by a jury regardless of any subsequent legislation upon the subject." *Lee v. Conran*, 213 Mo. 404, 111 S. W. 1151. See also to the same effect, *Frowein v. Poage*, 231 Mo. 82, 132 S. W. 241.

4. *Larkin v. Wilson*, 28 Kan. 513; *Johnson v. Peterson*, 90 Minn. 503, 97 N. W. 384.

[a] The equitable nature (1) of an action "to quiet title cannot be changed so as to entitle a defendant to a jury trial, though defendant, being out of possession, file a cross-complaint in ejectment." *Coghlan v. Quartararo*, 15 Cal. App. 662, 115 Pac. 664. (2)

But see *Donahue v. Meister*, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283, holding that where plaintiff in an action to quiet title to land ousted defendant shortly prior to the commencement of the action of the possession of such land, the defendant filing an answer in the nature of ejectment is entitled to a trial by jury.

5. *Jennings v. Moon*, 135 Ind. 168, 34 N. E. 996; *Macy v. Wood*, 49 Ind. App. 469, 97 N. E. 553; *Baxter v. Baxter*, 46 Ind. App. 514, 92 N. E. 881, 1039; *Ross v. McManigal*, 61 Neb. 90, 84 N. W. 610; *Foree v. Stubbs*, 41 Neb. 271, 59 N. W. 798.

[a] Under a statute providing that issues of exclusive equitable jurisdiction shall be tried by the court and all other issues of fact shall be triable by a jury "it is quite clear that . . . the statutory action to quiet title is triable by a jury. . . . It is the creature of positive statute and not of the courts of chancery. It did not come into existence as a suit of equitable cognizance, but as a statutory action. . . . It cannot, . . . be legally possible that the statutory action to recover possession, which is substantially the same as the common law action of ejectment, may be separated into classes, one class triable by the court and another triable by a jury. . . . If regard is had to the statute, it must inevitably follow that there is one statutory action to recover possession, and one to quiet title, and not many different actions, some triable by one tribunal and some by another." *Puterbaugh v. Puterbaugh*, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341.

6. *McNeil v. Morgan*, 157 Cal. 373, 108 Pac. 69; *Newman v. Duane*, 89 Cal. 597, 27 Pac. 66; *Burleigh v. Hecht*, 22 S. D. 301, 117 N. W. 367.

[a] Although "an action be brought in form . . . as an equitable action to quiet title to land, if, in reality, it is an action for the recovery of specific real estate and the issues made

been held, however, that a statute giving a party not in possession the right to bring suit in equity to quiet title will not be enforced in the federal courts.<sup>7</sup>

h. *Damages*.—The parties to an action for the recovery of damages generally are entitled to a trial by jury,<sup>8</sup> unless the recovery of damages is incidental only to the main issue of an action which is equitable in its nature.<sup>9</sup> But where the action is primarily brought for the recovery of damages, the fact that equitable relief is also asked

are clearly of a legal character and such as are cognizable in a court of law, the substance must control the form, and as a party is specially given the right to a trial by jury where an action is brought to recover specific real property . . . this right cannot be defeated by any particular form which the action may take." *Davis v. Judson*, 159 Cal. 121, 113 Pac. 147.

[b] "It is not every cause of action which the pleader styles an action . . . to quiet title that entitles the parties to a trial by jury; nor will the prayer for relief have any controlling influence in determining whether or not a jury may be called. The court will look to the substantial averments of the complaint or cross-complaint, as the case may be, and from the facts so averred determine whether the action is one of equitable or common law jurisdiction, and if the former, refuse a trial by jury." *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763.

[c] And in an action brought to quiet title by a party out of possession against one claiming title and in possession either party is entitled to a jury as a matter of right. *Gillespie v. Gouly*, 120 Cal. 515, 52 Pac. 816.

7. *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. ed. 873; *Taylor v. Clark*, 89 Fed. 7.

[a] "In some states it is not even necessary that plaintiff should be in possession of the land at the time of filing the bill. These statutes have generally been held to be within the constitutional power of the legislature; but the question still remains, to what extent will they be enforced in the federal courts, and how far are they subservient to the constitutional provision entitling parties to a trial by jury. . . . These provisions are obligatory at all times and under all circumstances, and are applicable to every

form of action, the laws of the several states to the contrary notwithstanding. . . . The real question . . . to be determined in this case is, whether the plaintiffs have an adequate remedy at law. If they have . . . the federal courts will not entertain the bill, but will remit the parties to their remedy at law." *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. ed. 167.

8. U. S.—*Childs v. Missouri, K. & T. Ry. Co.*, 221 Fed. 219; *Meeker v. Lehigh Valley R. Co.*, 162 Fed. 354. Ind.—*Harrisburgh Car Mfg. Co. v. Sloan*, 120 Ind. 156, 21 N. E. 1088. Neb.—*Brockway v. Reynolds*, 82 Neb. 757, 118 N. W. 1055. N. H.—*Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194. N. Y.—*Lewis v. Varnum*, 12 Abb. Pr. 305. Ore.—*Shobert v. May*, 40 Ore. 68, 66 Pac. 466, 91 Am. St. Rep. 453, 55 L. R. A. 810. S. D.—*Leisch v. Baer*, 24 S. D. 184, 123 N. W. 719. Vt.—*Plimpton v. Somerset*, 33 Vt. 283. Wis.—*Dilger v. Estate of McQuade*, 158 Wis. 328, 148 N. W. 1085.

[a] An action brought to recover unliquidated damages for breach of contract is one in which the parties under the constitution are entitled to a trial by jury and consequently it is beyond the power of the court to make in such action an order of reference without their consent; nor is it material that the counterclaim will require the examination of a long account; the action is not made referable by such counterclaim. *Untermeyer v. Beihauer*, 105 N. Y. 521, 11 N. E. 847.

9. *Koch v. Story*, 47 Colo. 335, 107 Pac. 1093. See *supra*, II, E, 4, e.

[a] An action for injunction is always equitable and when the court in the exercise of its chancery powers undertakes to administer such relief and also awards compensatory damages, the latter fact does not alter the nature of the action and a jury trial

does not affect the right to a jury trial of the issues of damages.<sup>10</sup>

i. *Recovery of Penalties and Forfeitures.*—Actions brought to enforce penalties and forfeitures generally are triable by jury as of right.<sup>11</sup>

j. *Accounting.*—In some jurisdictions no right to trial by jury exists in actions for an accounting where the accounts are complicated,<sup>12</sup> while in others the complexity of the account is not of itself sufficient to deprive a party of the right to trial by jury, and, in order to give a court of equity jurisdiction there must be either a want of an adequate remedy at law<sup>13</sup> or some cause for equitable cognizance other than the complexity of the accounts,<sup>14</sup> such as mutuality of ac-

is not a matter of right. *Atlantic, etc. Ry. Co. v. Victor Mfg. Co.*, 79 S. C. 266, 60 S. E. 675.

10. *Hughes v. Dunlap*, 91 Cal. 385, 27 Pac. 642.

[a] *Injunction Incidental.*—An action to recover damages for past trespasses is a legal remedy and the fact that plaintiff also asked for an injunction does not deprive defendant of his right to trial by jury on the issue of damages. *Hughes v. Dunlap*, 91 Cal. 385, 27 Pac. 642.

[b] *Specific Performance Impossible.* And where an action is brought for specific performance of a contract and also for damages sustained by the breach thereof, the plaintiff knowing at the time of the commencement of the action that it was not within the power of defendants to specifically perform the contract, the defendants cannot be deprived of their right to trial by jury. *Leisch v. Baer*, 24 S. D. 184, 123 N. W. 719.

11. *Idaho.*—*Stevens v. Home Sav. & Loan Assn.*, 5 Idaho 741, 51 Pac. 779. *N. J.*—*Rider v. Lakewood Market Co.* (N. J. L.), 88 Atl. 194; *Harman v. Board of Pharmacy*, 67 N. J. L. 117, 50 Atl. 662. *N. Y.*—*Tenement House Dept. v. Manhattan*, 153 N. Y. Supp. 769.

See also the title "*Penalties, Forfeitures and Fines.*"

As to the right to trial by jury in suits for the enforcement of penalties in admiralty, see 1 STANDARD PROC. 538.

12. *U. S.*—*Fowle v. Lawrason's Exrs.*, 5 Pet. 495, 8 L. ed. 204; *McMullen Lumb. Co. v. Strother*, 136 Fed. 295, 69 C. C. A. 433; *London G. & A. Co. v. Bell Tel. Co.*, 171 Fed. 278; *Balfour v. San Joaquin Valley Bank*, 156 Fed. 500; *Fenno v. Primrose*, 116

Fed. 49. *Ga.*—*Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258. *Ill.*—*Gleason & Bailey Mfg. Co. v. Hoffman*, 168 Ill. 25, 48 N. E. 143. *Ia.*—*Burt v. Harrah*, 65 Iowa 643, 22 N. W. 910. *Mich.*—*Blodgett v. Foster*, 114 Mich. 688, 72 N. W. 1000, 68 Am. St. Rep. 504. *Miss.*—*Watt v. Conger*, 13 Smed. & M. 412. *N. H.*—*Low v. Independent Christian Soc.*, 67 N. H. 488, 32 Atl. 762. *N. Y.*—*Schermerhorn v. Wood*, 4 Daly 158. *Wash.*—*Lindley v. McGlaflin*, 57 Wash. 581, 107 Pac. 355.

As to basis of jurisdiction of equity in actions for accounting, see 1 STANDARD PROC. 265, et seq.

13. *Norwich & W. R. Co. v. Storey*, 17 Conn. 364.

[a] In "every case of interposition of a court of equity in such actions there must exist a necessity arising from failure of remedy at law to afford justice. And extent of equitable jurisdiction in actions for an accounting and when to be exercised is thus stated in Pomeroy's *Equity Jurisprudence*, sec. 1421: 'The instances in which the legal remedies are held to be inadequate and, therefore, a suit in equity for an accounting proper, are: 1. Where there are mutual accounts between the plaintiff and the defendant, that is, where each of the parties has received and paid on account of the other. 2. Where the accounts are all on one side but there are circumstances of great complication or difficulties in the way of adequate relief at law. 3. Where a fiduciary relation exists between the parties, and a duty rests on the defendant to render an account.' " *O'Connor v. Henderson Bridge Co.*, 95 Ky. 633, 27 S. W. 251, 983.

14. *Ind.*—*Field v. Brown*, 146 Ind. 293, 45 N. E. 464. *Ia.*—*Galusha v.*

counts,<sup>15</sup> necessity for a discovery,<sup>16</sup> or the existence of fiduciary relations between the parties.<sup>17</sup>

Where the statute authorizes a compulsory reference of accounts, the legal issues in the case are nevertheless triable by jury,<sup>18</sup> unless the

Wendt, 114 Iowa 597, 87 N. W. 512; Burt v. Harrah, 65 Iowa 643, 22 N. W. 910. **Minn.**—Shipley v. Beldue, 93 Minn. 414, 101 N. W. 952; Judd v. Dike, 30 Minn. 380, 15 N. W. 672. **Neb.**—LaMaster v. Scofield, 5 Neb. 148; Mills v. Miller, 3 Neb. 87. **N. Y.**—Whiton v. Spring, 74 N. Y. 169. **Ohio.**—Black v. Boyd, 50 Ohio St. 46, 33 N. E. 207. **Pa.**—Holland v. Hallahan, 211 Pa. 223, 60 Atl. 735; Graham v. Cummings, 208 Pa. 516, 57 Atl. 943; Paton v. Clark, 156 Pa. 49, 27 Atl. 116. **S. C.**—Smith & Co. v. Bryce, 17 S. C. 538. **Tenn.**—Pearl v. Nashville, 10 Yerg. 179. **W. Va.**—Grafton v. Reed, 26 W. Va. 437.

See generally 1 STANDARD PROC. 267, et seq.

15. **Ia.**—Burt v. Harrah, 65 Iowa 643, 22 N. W. 910. **Ky.**—O'Connor v. Henderson Bridge Co., 95 Ky. 633, 27 S. W. 251. **Minn.**—Garner v. Reis, 25 Minn. 475. **Ohio.**—Black v. Boyd, 50 Ohio St. 46, 33 N. E. 207. **Va.**—Smith v. Marks, 2 Rand. (23 Va.) 449.

[a] "Cases involving the investigation of accounts, particularly where the accounts are mutual or complicated, are within the equity jurisdiction of the court. . . . It is the inconvenience and difficulty of properly and accurately adjusting and settling accounts of a complex nature in suits at law that have brought them within the equity jurisdiction of the court." Davis v. Dyer, 62 N. H. 231.

[b] And to "sustain a bill for an account, there must be mutual demands, and not merely payments by way of set-off. A single matter cannot be the subject of an account. There must be a series of transactions on one side, and of payments on the other." Porter v. Spencer, 2 Johns. Ch. (N. Y.) 169.

[c] An accounting between partners is triable by the court without a jury. Horn v. Lupton, 182 Ind. 355, 105 N. E. 237, 106 N. E. 708; Shipley v. Beldue, 93 Minn. 414, 101 N. W. 952; Berkey v. Judd, 14 Minn. 394. See generally the title "Partnership."

16. **Ia.**—Faville v. Lloyd, 140 Iowa 501, 118 N. W. 871; Frick v. Kabaker,

116 Iowa 494, 90 N. W. 498; Tufts v. Norris, 115 Iowa 250, 88 N. W. 367; Grant v. Bulles, 69 Iowa 525, 29 N. W. 439. **Wash.**—Veysey v. Veysey, 86 Wash. 553, 151 Pac. 39. **W. Va.**—Lafever v. Billmyer, 5 W. Va. 33.

See 1 STANDARD PROC. 269.

[a] But compare Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736, holding that the mere fact that a discovery is sought is not sufficient to deprive a party of trial by jury, where the remedy at law is adequate. And see to the same effect, LaMaster v. Scofield, 5 Neb. 148.

[b] Under the Iowa code courts "of equity have a general jurisdiction where there are mutual accounts, and also where the accounts are on one side, but a discovery is sought and is material to the relief. But where the accounts are all on one side or where there is a single matter on the one side, and mere set-offs on the other, and no discovery is sought or required, courts of equity have not jurisdiction." McMartin v. Bingham, 27 Iowa 234, 1 Am. Rep. 265.

17. **Ky.**—O'Connor v. Henderson Bridge Co., 95 Ky. 633, 27 S. W. 251. **Neb.**—LaMaster v. Scofield, 5 Neb. 148. **N. Y.**—Pendergast v. Greenfield, 127 N. Y. 23, 27 N. E. 388; Empire State T. & T. Co. v. Bickford, 72 Hun 580, 25 N. Y. Supp. 283.

See 1 STANDARD PROC. 272.

[a] The bare relation of principal and agent does not justify the interference of a court of equity in every case, "but wherever it appears that a discovery is necessary, or there are mutual accounts between the parties, or the remedy at law is not plain, simple and free from difficulty, the equitable jurisdiction attaches." Coffman v. Sangston, 21 Gratt. (62 Va.) 263. See to the same effect, Marvin v. Brooks, 94 N. Y. 71.

18. **D. C.**—Simmons v. Morrison, 13 App. Cas. 161. **Ia.**—Tufts v. Norris, 115 Iowa 250, 88 N. W. 367. **Mo.**—Tinsley v. Kemery, 170 Mo. 310, 70 S. W. 691. **N. Y.**—L'Amoureux v. Erie R. Co., 62 App. Div. 505, 71 N. Y. Supp. 70; Townsend v. Hendricks, 2

whole case is one of equitable cognizance.<sup>10</sup> A compulsory reference cannot be ordered unless it affirmatively appears from the pleadings that the case comes within the statute providing for such reference.<sup>20</sup> In some jurisdictions the statutes providing for compulsory reference are applicable only to actions of equitable cognizance.<sup>21</sup>

k. *Foreclosure of Liens.*—Actions for the foreclosure of liens ordinarily are deemed of equitable cognizance and hence no right to trial by jury obtains in such actions.<sup>22</sup> But where the action becomes or

Sweeny 503. Wash.—Carlisle Packing Co. v. Deming, 62 Wash. 455, 114 Pac. 172.

Compare *supra*, II, D, 4, i.

[a] There are cases "involving complicated matters of account . . . where, without a reference, there would be a failure of justice, and where if the parties refuse consent, the reference must be compulsory. In such cases, if demanded, a jury trial must be allowed at some stage of the proceedings; at what period of the trial must be determined by the court in such way as will be most conducive to the ends of justice and a speedy and final termination of the controversy. In analogy to equity proceedings it may be found most proper to order a jury upon the coming in of the report, when the material issues will be eliminated by the finding of the facts and the exceptions thereto." State *ex rel.* Armfield v. Brown, 70 N. C. 27.

[b] And where "there are several consistent causes of action united in one complaint, some of which the parties have a right to have tried by a jury, and others of which may be referable, the court cannot make a general reference of the action against the consent of the parties. If it was otherwise a plaintiff, by merely inserting an additional but referable cause of action in his complaint, could always deprive his adversary of trial by jury in any case of contract; which, by itself, would be a violation of a constitutional right." Evans v. Kalbfleisch, 16 Abb. Pr. N. S. (N. Y.) 13.

19. Ia.—Burt v. Harrah, 65 Iowa 643, 22 N. W. 910. Minn.—Judd v. Dike, 30 Minn. 380, 15 N. W. 672; Garner v. Reis, 25 Minn. 475. N. Y. Whiton v. Spring, 74 N. Y. 169. Okla. Board of Comrs. v. McKinley, 8 Okla. 128, 56 Pac. 1044. Vt.—*In re* Weatherhead, 53 Vt. 653.

20. Mitchell v. Oregon Woman's Flax Assn., 38 Ore. 503, 63 Pac. 881.

[a] In all such cases facts "must be disclosed either by affidavit or upon the face of the pleadings, from which the conclusion can be fairly drawn that so many separate and distinct items of account will be litigated on the trial that a jury cannot keep the evidence in mind in regard to each of the items, and give it the proper weight and application when they retire to deliberate upon their verdict." Spence v. Simis, 137 N. Y. 616, 33 N. E. 554.

21. Cal.—Grim v. Norris, 19 Cal. 140, 79 Am. Dec. 206. Minn.—St. Paul, etc. R. Co. v. Gardner, 19 Minn. 132, 18 Am. Rep. 334. S. C.—Smith & Co. v. Bryce, 17 S. C. 538.

As to right to trial by jury on hearing of exceptions to the report of an auditor or referee, see the title "References."

22. Cal.—Coghlan v. Quartararo, 15 Cal. App. 662, 115 Pac. 664. Colo. Selfridge v. Leonard-Heffner Co., 51 Colo. 314, 117 Pac. 158, Ann. Cas. 1913B, 282. Dak.—Gull River Lumb. Co. v. Keefe, 6 Dak. 160, 41 N. W. 743. Fla.—Mills v. Britt, 56 Fla. 839, 47 So. 799. Ill.—Garrett v. Stevenson, 8 Ill. 261. Ind.—Tomlinson v. Bainaka, 163 Ind. 112, 70 N. E. 155; Coleman v. Floyd, 131 Ind. 330, 31 N. E. 75; Burek v. Davis, 35 Ind. App. 648, 73 N. E. 192. Ia.—Frost v. Clark, 82 Iowa 298, 48 N. W. 82. Ky.—Rieger v. Schulte, 151 Ky. 129, 151 S. W. 395. Minn.—Sumner v. Jones, 27 Minn. 312, 7 N. W. 265. Neb.—Doble v. Omaha Foundry & M. Co., 15 Neb. 436, 19 N. W. 644. N. Y.—Sheppard v. Steele, 43 N. Y. 52, 3 Am. Rep. 660; Smith v. Fleischman, 23 App. Div. 355, 48 N. Y. Supp. 234. Ohio.—Clippenger & Co. v. Ross, 2 Ohio Dec. (Reprint) 562. S. C.—Osteen v. Bultman, 90 S. C. 452, 73 S. E. 874. Va.—Pairo v. Bethell, 75 Va. 825. Wash.—Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 339. Wis.—Warren-Webster & Co. v. Beaumont Hotel Co., 151 Wis.

may become one to enforce a personal liability, by reason of the invalidity of the lien,<sup>23</sup> or because its validity is in issue,<sup>24</sup> or because the complaint is insufficient as one to foreclose the lien,<sup>25</sup> or the lien is discharged,<sup>26</sup> the action is triable by jury as of right. The defendant, however, does not become entitled to a trial by jury merely by raising legal issues in his answer,<sup>27</sup> unless the determination of the equitable issues depends upon the decision of the legal issues raised by such answer.<sup>28</sup>

1, 138 N. W. 102; *Spafford v. McNally*, 130 Wis. 537, 110 N. W. 387.

[a] "**A mechanic's or laborer's lien** is in the nature of a mortgage on the land . . . and an action for its foreclosure is a judicial proceeding in equity in which a party to the proceeding is not entitled as matter of right to a jury trial." *Curnow v. Happy Valley Blue Gravel, etc. Co.*, 68 Cal. 262, 9 Pac. 149.

[b] **Statute Authorizing Proceedings at Law or in Equity.**—Where a statute authorizes the enforcement of a mechanic's lien either by bill in equity or by proceedings at law, the parties are not entitled to a trial by jury as a matter of right, as in "equity parties have not and never had an absolute right to a jury trial, and the provision of the constitution . . . does not guaranty such right. As the legislature had power to grant jurisdiction to courts of equity to enforce this new right created by it, and did not provide for a jury trial, the court of chancery has jurisdiction to enforce the lien . . . according to the regular course of procedure in that court without a jury." *Hathorne v. Panama Park Co.*, 44 Fla. 194, 32 So. 812, 103 Am. St. Rep. 138.

23. *Hasey v. McMullen*, 109 Minn. 332, 123 N. W. 1078.

24. *Di Menna v. City of New York*, 155 App. Div. 501, 140 N. Y. Supp. 680; *Hawkins v. Mapes-Reeves Constr. Co.*, 82 App. Div. 72, 81 N. Y. Supp. 794, *affirmed*, 178 N. Y. 236, 70 N. E. 783.

[a] **Vendor's Lien.**—Where an action is brought to enforce a lien upon property for the balance of the purchase price and the defendant in his answer sets up the defense of payment in full, the action is triable by jury as of right, for the question whether there was a lien at all depends upon the determination of the issue of payment of the purchase price. *Tapp's*

*Admr. v. Poindexter* (Ky.), 128 S. W. 594.

25. *Schwartz v. Klar*, 144 App. Div. 37, 128 N. Y. Supp. 830.

26. *Turnes v. Brenckle*, 249 Ill. 394, 94 N. E. 495.

[a] **Lien Discharged by Furnishing Bond.**—Where under a statute the defendant prior to the filing of an answer to the complaint for the enforcement of a lien furnishes a bond, it operates to release the lien and the plaintiff's claim thenceforth becomes an ordinary demand at law for the recovery of compensation and the defendant is entitled to a trial by jury. *Jamison v. Ranek*, 140 Iowa 635, 119 N. W. 76; *Gage v. Callanan*, 128 App. Div. 752, 113 N. Y. Supp. 227.

[b] **But the nature of the action as an equitable one is not changed** by the release of the lien upon a money deposit during the pendency of the action, as in order to enforce the personal liability of defendant the lien must be established precisely as if the property had never been relieved of the lien. *Schillinger, etc. Co. v. Arnott*, 152 N. Y. 584, 46 N. E. 956.

27. *Johnson Service Co. v. Kruse*, 121 Minn. 28, 140 N. W. 118, Ann. Cas. 1914C, 850.

[a] A statutory action for the foreclosure of a materialman's lien is not an action for the recovery of money only; nor is it made such by the fact that defendant in his answer not only denies plaintiff's cause of action but shows that plaintiff is indebted to him in a certain sum. *Sumner v. Jones*, 27 Minn. 312, 7 N. W. 265.

28. See *supra*, II, E, 4, e.

[a] **Breach of Warranty.**—Where the action is brought to enforce a lien for repair and the answer sets up breach of warranty as to the quality of the work and damages are asked therefor, the lien could not be enforced "except to satisfy the unpaid price of the repairs, the right to which was put

1. *Foreclosure of Mortgages.*—The constitutional right to trial by jury does not apply to actions brought to foreclose a mortgage.<sup>29</sup> Such an action is triable by the court without a jury although a sale of the mortgaged premises may result in a deficiency for which a money judgment against the defendant can be rendered in the action, as such a judgment is but an incident of the equitable relief sought.<sup>30</sup> The defendant is not entitled to a jury trial because he interposes a defense that the plaintiff is indebted to him,<sup>31</sup> or a counterclaim for damages by reason of plaintiff's failure to perform his part of the contract<sup>32</sup> or for the usurious interest paid by him to plaintiff on the mortgage debt.<sup>33</sup> But where the right to recover possession of the mortgaged property is involved in the action, the issue as to the right of possession is triable by a jury.<sup>34</sup>

m. *Enforcement of Trust.*—The right to trial by jury does not obtain in actions brought to enforce a trust.<sup>35</sup> Thus, an action to re-

in issue. That issue was a legal issue, triable by jury; . . . if there was nothing due on account of the improvements, of course there was nothing for a court of equity to enforce." Carder v. Weisenburgh, 95 Ky. 135, 23 S. W. 964.

29. *Cal.*—Downing v. LeDu, 82 Cal. 471, 23 Pac. 202. *Colo.*—Neikirk v. Boulder Nat. Bank, 53 Colo. 350, 127 Pac. 137. *Ind.*—Brown v. Russell, 105 Ind. 46, 4 N. E. 428. *Ia.*—Leach v. Kundson, 97 Iowa 643, 66 N. W. 913. *Kan.*—Morgan v. Field, 35 Kan. 162, 10 Pac. 448. *Minn.*—Johnson v. Peterson, 90 Minn. 503, 97 N. W. 384. *Mo.*—Long v. Long, 141 Mo. 352, 44 S. W. 341. *Neb.*—Albin v. Parmele, 73 Neb. 663, 103 N. W. 304; Schumacher v. Crane-Churchill Co., 66 Neb. 440, 92 N. W. 609. *N. Y.*—Carroll v. Deimel, 95 N. Y. 252; Gersmann v. Walpole, 79 Misc. 49, 139 N. Y. Supp. 1. *N. D.*—Gresens v. Martin, 27 N. D. 231, 145 N. W. 823; Avery Mfg. Co. v. Crumb, 14 N. D. 57, 103 N. W. 410. *Wis.*—Wilson v. Johnson, 74 Wis. 337, 43 N. W. 148.

30. *Cal.*—Downing v. LeDu, 82 Cal. 471, 23 Pac. 202; Van Valkenburgh v. Oldham, 12 Cal. App. 572, 108 Pac. 42. *Ind.*—Brown v. Russell, 105 Ind. 46, 4 N. E. 428. *Ia.*—Leach v. Kundson, 97 Iowa 643, 66 N. W. 913. *Kan.*—Morgan v. Field, 35 Kan. 162, 10 Pac. 448. *Mo.*—Long v. Long, 141 Mo. 352, 44 S. W. 341. *N. Y.*—Carroll v. Deimel, 95 N. Y. 252. *N. D.*—Avery Mfg. Co. v. Smith, 14 N. D. 57, 103 N. W. 410.

[a] But where the validity of the note and mortgage is put in issue, the

right to trial by jury obtains. Myers v. Knabe, 4 Kan. App. 484, 46 Pac. 472.

[b] But where a personal judgment for money is sought by plaintiff, the defendant is entitled to a trial by jury. Maas v. Dunmyer, 21 Okla. 434, 96 Pac. 591.

31. Sumner v. Jones, 27 Minn. 312, 7 N. W. 265.

32. Mobley Co. v. McLucas, 99 S. C. 99, 82 S. E. 986.

33. McLaurin v. Hodges, 43 S. C. 187, 20 S. E. 991.

34. Clark v. Baker, 6 Mont. 153, 9 Pac. 911.

35. *Cal.*—Cauhape v. Security Sav. Bank, 127 Cal. 197, 59 Pac. 589. *Ind.*—Sherwood v. Thomasson, 124 Ind. 541, 24 N. E. 334; Martin v. Martin, 118 Ind. 227, 20 N. E. 763. *Minn.*—Judd v. Dike, 30 Minn. 380, 15 N. W. 672. *N. Y.*—Reade v. Continental Trust Co., 49 App. Div. 400, 63 N. Y. Supp. 395; Burke v. Burke, 5 Misc. 312, 26 N. Y. Supp. 55. *Ohio.*—Carlisle v. Foster, 10 Ohio St. 198. *S. C.*—Knobeloch v. Germania Sav. Bank, 43 S. C. 233, 21 S. E. 13.

[a] "Where the purpose of the action is primarily to establish an equitable right to land and acquire a legal title through such right by the decree of a court, as by the specific enforcement of an agreement, the reformation of a deed, or the establishment of a trust . . . the case is of equitable cognizance." Spencer v. Robbins, 106 Ind. 580, 5 N. E. 726.

[b] Where the plaintiff seeks to set aside a sheriff's deed and to enforce

cover money received and kept in trust is not cognizable at law but exclusively within the jurisdiction of equity and therefore the parties to such action are not entitled to a trial by jury.<sup>36</sup>

n. *Cancellation and Reformation of Instruments.*—Actions brought to cancel<sup>37</sup> or reform<sup>38</sup> instruments, being of equitable cognizance, are not triable by jury as a matter of right. And the fact that plaintiff also seeks to recover a money judgment in such action does not alter its equitable nature.<sup>39</sup>

o. *Setting Aside Conveyances.*—The constitutional guaranty of trial by jury has no application to an action brought to set aside a conveyance.<sup>40</sup>

certain trusts attaching on the land which had been sold as the property of the alleged trustee, it cannot be claimed that the complaint is for the "recovery of specific real property," as the relief is sought through the equitable jurisdiction of the court and the constitutional guaranty of the right to trial by jury "has never been so construed as to deprive courts of equity . . . of jurisdiction over trusts, even in relation to real estate or to preclude them from deciding all relevant issues arising in the course of the case, without the intervention of a jury." *Price v. Brown*, 4 S. C. 144.

36. Cal.—*Cauhape v. Security Sav. Bank*, 127 Cal. 197, 59 Pac. 589. Colo.—*Cree v. Lewis*, 49 Colo. 186, 112 Pac. 326. Ind.—*Camp v. Camp*, 52 Ind. App. 250, 100 N. E. 478. S. C.—*McGee v. Wells*, 52 S. C. 472, 30 S. E. 602.

[a] "While the judgment prayed for is a money judgment in favor of plaintiffs severally, the process of reaching that judgment involves the finding that the land in question was held . . . in trust for these plaintiffs. . . . The money judgment followed as a necessary consequence because of the establishment of the trust relation. . . . Such is the theory of the case both on the pleadings and proof and it is properly one of equitable cognizance. The establishment of trusts and the enforcement of trust relations is one of the ancient grounds of equity jurisprudence." *Shelton v. Harrison*, 182 Mo. App. 404, 167 S. W. 634.

37. Cal.—*Angus v. Craven*, 132 Cal. 691, 64 Pac. 1091; *Mesenburg v. Dünn*, 125 Cal. 222, 57 Pac. 887. Colo.—*Kyle v. Shore*, 18 Colo. App. 355, 71 Pac.

895. Ind.—*Monnett v. Turpie*, 132 Ind. 482, 32 N. E. 328; *Lane v. Schlemmer*, 114 Ind. 296, 15 N. E. 454, 5 Am. St. Rep. 621; *Carpenter v. Willard Lib. Trustees*, 26 Ind. App. 619, 60 N. E. 365. Ky.—*Jones v. Wood*, 24 Ky. L. Rep. 840, 70 S. W. 45. Mo.—*Bray v. Thatcher*, 28 Mo. 129. N. H.—*Curtice v. Dixon*, 73 N. H. 393, 62 Atl. 492. N. Y.—*Flanigan v. Skelly*, 89 App. Div. 108, 85 N. Y. Supp. 4; *Stone v. Weiller*, 57 Hun 588, 10 N. Y. Supp. 828, 32 N. Y. St. 936. Ohio.—*Commercial Nat. Bank v. Wheelock*, 52 Ohio St. 534, 40 N. E. 636, 49 Am. St. Rep. 738. S. D.—*Thomas v. Ryan*, 24 S. D. 71, 123 N. W. 68.

[a] An action for the cancellation of a stock certificate and for the issuance of a new one is equitable in its nature and the defendant is not entitled to a jury trial as a matter of right. *Noble v. Learned*, 153 Cal. 245, 94 Pac. 1047.

38. Cal.—*Loftus v. Fischer*, 113 Cal. 286, 45 Pac. 328. Colo.—*Johnson v. First Nat. Bank*, 24 Colo. App. 23, 131 Pac. 284. Ohio.—*Ellsworth v. Holcomb*, 28 Ohio St. 66.

39. Colo.—*Haver v. Collins*, 21 Colo. App. 440, 122 Pac. 72. Ill.—*Keith v. Henkleman*, 68 Ill. App. 623. N. Y.—*Dykman v. United States L. Ins. Co.*, 176 N. Y. 299, 68 N. E. 362.

[a] Where the action is brought to cancel deeds and mortgages and also to quiet title and for damages and the defense is in the nature of ejectment, it is not error to refuse a trial by jury. *Hartsog v. Berry*, 45 Okla. 277, 145 Pac. 328.

40. Ind.—*McKinley v. Britton*, 55 Ind. App. 21, 103 N. E. 349. Kan.—*Appling v. Jacobs*, 91 Kan. 793, 139 Pac. 374. Mass.—*Ginn v. Almy*, 212 Mass. 486, 99 N. E. 276. N. Y.—*Hunter*

p. *Abatement of Nuisance*.—Suits to abate a nuisance are within the jurisdiction of courts of equity and no right to trial by jury exists in such suits,<sup>41</sup> even though under the statute a penalty may be imposed for the maintenance of such nuisance.<sup>42</sup> It has been held, however, that an action for the removal of a nuisance and for damages is triable by jury as a matter of right.<sup>43</sup>

*r. Ramsay*, 153 N. Y. Supp. 408. *Okla. Hogan v. Leeper*, 37 Okla. 655, 133 Pac. 190, 47 L. R. A. (N. S.) 475. *W. Va. Cheuvront v. Horner*, 62 W. Va. 476, 59 S. E. 964.

But see 10 STANDARD PROC. 189.

[a] Where the action is based upon a contract which entitles plaintiff to recover one-half of the proceeds of sale of land, it is triable by jury as of right, but where the action is brought for the purpose of setting aside the conveyance upon the ground of fraudulent representations, the trial should be by the court. *Hunter v. Ramsay*, 153 N. Y. Supp. 408.

[b] *Rescission for Mental Incapacity*.—A jury trial is properly denied in an action to rescind a transaction on the ground of mental incapacity involving restoration on both sides, including money to the plaintiff, the cancellation of instruments and other equitable features. *Kuhn v. Johnson*, 91 Kan. 188, 137 Pac. 990.

[c] *An issue of fraud and undue influence* in the procurement of deeds, under which plaintiff claims an interest in property, tendered by the answer is clearly of equitable cognizance and defendant is not entitled to a jury trial. *Clough v. All Persons*, 27 Cal. App. 268, 149 Pac. 778.

41. *Ala.*—*Fulton v. State*, 171 Ala. 572, 54 So. 688. *Ia.*—*Littleton v. Fritz*, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19. *Mo.*—*State v. Canty*, 207 Mo. 439, 105 S. W. 1078, 123 Am. St. Rep. 393, 15 L. R. A. (N. S.) 747; *Walther v. City of Cape Girardeau*, 166 Mo. App. 467, 149 S. W. 36. *S. C.* *State v. Palmetto Bowl Club*, 80 S. C. 114, 61 S. E. 209.

[a] In an action to restrain continued acts of trespass and to recover damages for trespass "the cause of action pleaded is equitable in its nature, and the issues of law, as well as of fact, are triable by the court without a jury, subject, of course, to the discretion of the court to submit issues of fact to a jury, whose find-

ings, however, would not be binding upon the conscience of the chancellor." *Koch v. Story*, 47 Colo. 335, 107 Pac. 1093.

42. *State v. Marshall*, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914A, 434; *State v. Murphy*, 71 Vt. 127, 41 Atl. 1037.

[a] Such statutes are neither penal in their nature nor do they deprive defendants of their constitutional right to trial by jury. *State v. Ryder*, 126 Minn. 95, 147 N. W. 953.

[b] And there is a clear "distinction between a proceeding to abate a nuisance, which looks only to the property that in the use made of it constitutes the nuisance, and a proceeding to punish the offender for the crime of maintaining a nuisance. . . . The latter is conducted under the provisions of the criminal law, and deals only with the person who has violated the law. The former is governed by the rules which relate to property. . . . The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance." *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 55, 14 Am. St. Rep. 446, 5 L. R. A. 193.

43. *Heughes v. Galusha Stove Co.*, 122 App. Div. 118, 106 N. Y. Supp. 606.

[a] It is immaterial that it is prayed in such action that the "defendant" be directed to remove the nuisance. "Where the judgment determines that a nuisance is maintained by a defendant, and directs the removal thereof, . . . we think it is equivalent to saying it should be removed by the defendant. There seem to be no cases where this precise question has been considered, but we think . . . no equitable relief is prayed for in the complaint. The case is one for nuisance alone, and the right of trial by jury exists." *Heughes v. Galusha Stove Co.*, 122 App. Div. 118, 106 N. Y. Supp. 606.

q. *Condemnation Proceedings.*—Proceedings to ascertain the compensation to be paid in taking private property for public use are generally not within the meaning of constitutional provisions preserving the right to trial by jury.<sup>44</sup> But where at the time of the adoption of the constitution the damages in such proceeding were assessed by a jury, a trial by jury is a matter of constitutional privilege.<sup>45</sup> In some jurisdictions it is expressly provided by the constitution that compensation for private property taken for public use shall be ascertained by a jury.<sup>46</sup> Such constitutional provisions, however, do not include

44. **U. S.**—*Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. ed. 270; *United States v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. ed. 1015; *United States v. Engerman*, 46 Fed. 176. **Conn.**—*New York, N. H. & H. R. Co. v. Long*, 69 Conn. 424, 37 Atl. 1070. **Del.**—*Bailey v. Philadelphia*, etc. R. Co., 4 Harr. 389, 44 Am. Dec. 593; *Whiteman v. Wilmington*, etc. R. Co., 2 Harr. 514, 33 Am. Dec. 411. **Ga.**—*Savannah*, etc. R. Co. v. Postal Tel. Cable Co., 112 Ga. 941, 38 S. E. 353; *Oliver v. Union Point*, etc. R. Co., 83 Ga. 257, 9 S. E. 1086. **Ind.**—*Baltimore*, etc. R. Co. v. Ketrang, 122 Ind. 5, 23 N. E. 527; *Drebert v. Frier*, 106 Ind. 510, 7 N. E. 223; *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; *Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 613. **Ia.**—*Richardson v. City of Centerville*, 137 Iowa 253, 114 N. W. 1071; *In re Bradley*, 108 Iowa 476, 79 N. W. 280. **Kan.**—*Central Branch U. P. R. Co. v. Atchison*, etc. R. Co., 28 Kan. 453. **Me.**—*Ingram v. Maine Water Co.*, 98 Me. 566, 57 Atl. 893; *Kennebec Water Dist. v. Waterville*, 96 Me. 234, 52 Atl. 774. **Minn.**—*Bruggerman v. True*, 25 Minn. 123; *Ames v. Lake Superior & M. R. Co.*, 21 Minn. 241. **Miss.**—*Riverside Drain. Dist. v. Buckner*, 108 Miss. 427, 66 So. 784; *New Orleans*, etc. R. Co. v. Drake, 60 Miss. 621; *Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300. **Nev.**—*Goldfield Consol.*, etc. Co. v. Old Sandstorm, etc. Min. Co., 38 Nev. 426, 150 Pac. 313. **N. H.**—*In re Mt. Washington Road Co.*, 35 N. H. 134; *Dalton v. North Hampton*, 19 N. H. 362; *Backus v. Lebanon*, 11 N. H. 19, 35 Am. Dec. 466. **N. J.**—*Morris v. Comptroller*, 54 N. J. L. 268, 23 Atl. 664; *American Print Works v. Lawrence*, 21 N. J. L. 248. **N. Y.**—*People ex rel. Herriek v. Smith*, 21 N. Y. 595; *Livingston v. New York*, 8 Wend. 85, 22 Am. Dec. 622; *Beckman v. Saratoga R. Co.*, 3 Paige 45. **N. C.**—*State v. Jones*, 139 N. C. 613, 52 S. E. 240, 2 L. R. A. (N. S.) 313; *Porter v. Armstrong*, 134 N. C. 447, 46 S. E. 997; *Chowan & S. R. Co. v. Parker*, 105 N. C. 246, 11 S. E. 328. **Ore.**—*Kendall v. Post*, 8 Ore. 141. **Pa.**—*Pennsylvania R. Co. v. First German Congregation*, 53 Pa. 445; *Fitzpatrick v. Pennsylvania R. Co.*, 10 Phila. 141. **S. C.**—*Gilmer v. Hunnicutt*, 57 S. C. 166, 35 S. E. 521. **Tex.**—*Rhine v. McKinney*, 53 Tex. 354; *Houston Tap & E. R. Co. v. Milburn*, 34 Tex. 224. **Vt.**—*Gold v. Vermont Cent. R. Co.*, 19 Vt. 478. **Va.**—*Lake Bowling Alley v. City of Richmond*, 116 Va. 429, 82 S. E. 97. **Wyo.**—*Edwards v. City of Cheyenne*, 19 Wyo. 110, 114 Pac. 677, 122 Pac. 900.
- [a] *Past damages* for condemnation of lands are to be determined by a jury and a statute providing for a committee appointed by the court to fix such damages must be construed to be permissive only, otherwise it would deprive defendant of his constitutional right to trial by jury. *City of Waterbury v. Platt Bros. & Co.*, 76 Conn. 435, 56 Atl. 856. See 8 STAND-ARD PROC. 299.
45. *Bachelor v. Cole*, 132 Ind. 143, 31 N. E. 569; *Louisville*, etc. Air Line R. W. Co. v. Dryden, 39 Ind. 393; *Lake Erie*, etc. R. Co. v. Heath, 9 Ind. 558; *Chicago*, etc. R. Co. v. Winslow, 27 Ind. App. 316, 60 N. E. 466.
46. **Ala.**—*Faust v. Huntsville*, 83 Ala. 279, 3 So. 771. **Ark.**—*Cairo & F. R. R. Co. v. Trout*, 32 Ark. 17. **Cal.**—*Vallejo & N. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238; *Wilcox v. Engebretsen*, 160 Cal. 288, 116 Pac. 750; *Weber v. Santa Clara*, 59 Cal. 265. **Ill.**—*Hull v. Sangamon River Dr. Dist.*, 219 Ill. 454, 76 N. E. 701; *Hutchins v. Vandalia L. & Drainage Dist.*, 217 Ill. 561, 75 N. E. 354; *Juvinall v. Jamesburg Drainage Dist.*, 204 Ill. 106, 68 N. E. 440. **Md.**—*Baltimore Belt R.*

the assessment of benefits,<sup>47</sup> nor do they affect the mode of trial of the question of the appropriation of land.<sup>48</sup>

r. *Assessments for Public Improvements*.—Proceedings pertaining to the assessment of taxes for public improvements are not triable by jury as a matter of right,<sup>49</sup> but it is held that in the absence of an express provision of the statute requiring the court without a jury to try the issues of fact the statute will be construed to mean that the right to trial by jury obtains.<sup>50</sup> The rule that a jury is not a matter of right

Co. v. Baltzell, 75 Md. 94, 23 Atl. 74. Mich.—Detroit Comrs. v. Moesta, 91 Mich. 149, 51 N. W. 903; Campau v. Detroit, 14 Mich. 276. Mo.—Kansas City v. Smith, 238 Mo. 323, 141 S. W. 1103; Chicago, etc. R. Co. v. Little Tarkio, etc. Dist., 237 Mo. 86, 139 S. W. 572. Ohio.—King v. Greenwood Cem. Assn., 67 Ohio St. 240, 65 N. E. 882; Sharer v. Starrett, 4 Ohio St. 494. Wash.—Seanor v. Whatcom Co., 13 Wash. 48, 42 Pac. 552. W. Va. Ward v. Ohio R. R. Co., 35 W. Va. 481, 14 S. E. 142. Wis.—Seifert v. Brooks, 34 Wis. 443; Norton v. Peck, 3 Wis. 714.

[a] Under a constitution declaring that the just compensation to the owner in condemnation proceedings shall be ascertained by a jury, a statute empowering the court without notice to the owner to impanel a jury for the purpose of ascertaining the amount of damages is unconstitutional, as "the property holder is entitled to an impartial jury, and to that end is the opportunity to be present and prefer legal objections to those persons tendered to serve as jurors in the cause." Wabash R. Co. v. Drainage Dist., 194 Ill. 310, 62 N. E. 679.

47. Vallesjo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238; Stack v. People, 217 Ill. 220, 75 N. E. 347; Hosmer v. Hunt Drainage Dist., 135 Ill. 51, 26 N. E. 587.

[a] "If the assessment was made under the taxing power of the state for benefits which will result to the property in consequence of the improvement, then the . . . court may try the exceptions without the aid of a jury 'in a summary manner;' but when the exceptions filed challenge the assessment of the cash value of land to be taken for the right of way for the ditches and drains, or the damages that will be done thereto by reason of the improvements, under the power of eminent domain then the court must

grant a jury trial when demanded by the landowners." Little Tarkio Drain. Dist. v. Richardson, 237 Mo. 49, 139 S. W. 576.

[b] *Damages*.—Where the constitution provides that in condemnation proceedings compensation to the owners shall be ascertained by a jury, but is silent concerning the mode of determining the other facts necessary to establish plaintiff's right to take the property, the legislature may provide the method of trial of all questions except that of compensation, and where the statute limits the right of trial by jury to actions for the recovery of property or money and of damages for breach of contract or injuries, the right of trial by jury in condemnation proceedings does not obtain save as to the issue of compensation. Vallesjo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238.

48. Cuyaboga R. P. Co. v. City of Akron, 210 Fed. 524.

49. Ala.—State v. Bley, 162 Ala. 239, 50 So. 263. Ill.—Trigger v. Drainage Dist., 193 Ill. 230, 61 N. E. 1114; Briggs v. Union Drainage Dist., 140 Ill. 53, 29 N. E. 721. Ind.—Indianapolis & C. G. Road Co. v. Christian, 93 Ind. 360. Ia.—In re Bradley, 108 Iowa 476, 79 N. W. 280. Mass.—Howe v. City of Cambridge, 114 Mass. 388. Mo. Mound City L. & S. Co. v. Miller, 170 Mo. 240, 70 S. W. 721, 94 Am. St. Rep. 727, 60 L. R. A. 190. Neb.—Drainage Dist. v. Richardson County, 86 Neb. 355, 125 N. W. 796. Okla.—Catron v. Deep Fork Drain. Dist., 35 Okla. 447, 130 Pac. 263. Tex.—City of Paris v. Breneman, 59 Tex. Civ. App. 464, 126 S. W. 58. Wash.—In re Jackson Street, 62 Wash. 432, 113 Pac. 1112; State v. Henry, 28 Wash. 38, 68 Pac. 368.

50. City of Tuscaloosa v. Hill (Ala. App.), 69 So. 486.

[a] "There is nothing in the language of the statutes . . . which ex-

in such proceedings has no application to cases in which the issue of compensation to the owner of property taken or injured by the improvement is involved.<sup>51</sup>

s. *Cancellation of License*.—A proceeding for the revocation of a license being summary in its character is not one in which the defendant as a matter of constitutional right is entitled to a jury.<sup>52</sup>

t. *Disbarment Proceedings*.—A proceeding for disbarment of an attorney is not one in which the right to a trial by jury existed prior to the adoption of the constitution and the defendant is not as a matter of law entitled to a trial by jury.<sup>53</sup> But where the statute provides that proceedings to disbar an attorney shall be governed by the rules applicable to other civil actions the right to trial by jury is granted thereby.<sup>54</sup>

u. *Quo Warranto*.—In some jurisdictions the right to trial by jury does not obtain in quo warranto proceedings,<sup>55</sup> while in others the

pressly indicates a legislative intention that these assessment cases shall or shall not be tried as other cases are tried in jury courts where issues of fact are presented. . . . And hence, though we might concede the obscurity of the legislative purpose in the statutes under consideration, we think it is a sound rule of construction to hold that when original or appellate jurisdiction of any cause is vested by law in jury courts, and trial by jury is not plainly inhibited, a jury must be impaneled and a verdict rendered thereon, as in ordinary cases, unless a jury trial is waived by the parties. This rule is certainly in accord with the spirit of our laws, and the genius of our government." *City of Huntsville v. Pulley*, 187 Ala. 367, 65 So. 405.

51. *Drainage District v. Richardson County*, 86 Neb. 355, 125 N. W. 796.

52. Conn.—*La Croix v. Fairfield*, 49 Conn. 591. Ia.—*State v. Schmidt*, 65 Iowa 556, 22 N. W. 673. Mo.—*State v. Ross*, 177 Mo. App. 223, 162 S. W. 702. Neb.—*Munk v. Frink*, 81 Neb. 631, 116 N. W. 525, 17 L. R. A. (N. S.) 439, physician's license. N. J. *Voight v. Board, etc. Comrs.*, 59 N. J. L. 358, 36 Atl. 686, 37 L. R. A. 292. N. Y.—*In re Lyman*, 163 N. Y. 552, 57 N. E. 1115; *People v. Brooklyn Comrs.*, 59 N. Y. 92. Va.—*Cherry v. Com.*, 78 Va. 375.

[a] A proceeding to cancel a license on the ground of fraud falls under the rules of equity jurisprudence and hence the defendant is not entitled to a jury trial as a matter of right. *Gulley v.*

*Territory of Oklahoma*, 19 Okla. 187, 91 Pac. 1037.

53. U. S.—*Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. ed. 552. Cal.—*In re Danford*, 157 Cal. 425, 108 Pac. 322; *In re Wharton*, 114 Cal. 367, 46 Pac. 172, 55 Am. St. Rep. 72. Kan.—*In re Norris*, 60 Kan. 649, 57 Pac. 528. La.—*State v. Fourhey*, 106 La. 743, 31 So. 325. Mich.—*In re Shepard*, 109 Mich. 631, 67 N. W. 971. Okla.—*State Bar Com. v. Sullivan*, 35 Okla. 745, 131 Pac. 703, L. R. A. 1915 D, 1218. Wash.—*State v. Rossman*, 53 Wash. 1, 101 Pac. 357, 21 L. R. A. (N. S.) 821.

[a] The conduct of "a special proceeding finding its authority solely in the statutes . . . is governed by the express provision of the statutes. There being no provision authorizing the calling of a jury, the defendant was wholly without authority to call one." *Kronschabel v. Taylor*, 30 S. D. 304, 138 N. W. 372.

54. *Wernimont v. State*, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156.

[a] Under a statute providing that a trial in disbarment proceedings may be had "as in other cases," the defendant is authorized to demand a trial by jury as a matter of right. *Reilly v. Cavanaugh*, 32 Ind. 214.

55. U. S.—*Standard Oil Co. v. Missouri*, 224 U. S. 270, 32 Sup. Ct. 406, 56 L. ed. 760. Ala.—*Taliaferro v. Lee*, 97 Ala. 92, 13 So. 125. Ark.—*Wheat v. Smith*, 50 Ark. 266, 7 S. W. 161; *State v. Johnson*, 26 Ark. 281. Conn.—*State v. Lewis*, 51 Conn. 113. Kan.—*Wheeler v. Caldwell*, 68 Kan. 776, 75

parties are held to have a constitutional right to trial by jury in such proceedings.<sup>56</sup> Where a distinction is made between the ancient writ of quo warranto and proceedings by information in the nature of quo warranto, the right to trial by jury exists in the latter,<sup>57</sup> but in the former proceedings there is no such right.<sup>58</sup>

v. *Mandamus*.—Generally constitutional provisions do not give the right of trial by jury in mandamus proceedings as such right did not exist at common law.<sup>59</sup> In some jurisdictions, however, a trial by jury in such proceedings is a matter of right,<sup>60</sup> particularly where given by statute.<sup>61</sup> So too, it has been held that where an issue of fact outside of the record is involved, the right to trial by jury obtains in mandamus proceedings.<sup>62</sup>

w. *Attachment*.—A proceeding to discharge an attachment, as a rule, is triable without a jury,<sup>63</sup> but it has been held that where any of the material facts set forth in the affidavit for attachment is put in issue, a trial by jury is a matter of right.<sup>64</sup> And the claim of a third person to the property attached must be tried by jury unless a jury is waived.<sup>65</sup>

x. *Garnishment*.—The parties ordinarily are not entitled to trial by jury in garnishment proceedings,<sup>66</sup> though in some cases the contrary is held.<sup>67</sup> And in some jurisdictions, under statutes, the right to

Pac. 1031. **Mass.**—Attorney-General v. Sullivan, 163 Mass. 446, 40 N. E. 843. **Minn.**—State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510. **Mo.**—State v. Arkansas Lumber Co., 260 Mo. 212, 169 S. W. 145; State *ex rel.* Norton v. Lupton, 64 Mo. 415, 27 Am. Rep. 253; State v. Vail, 53 Mo. 97. **Neb.**—State v. Moores, 56 Neb. 1, 76 N. W. 530. **Ore.** State v. Sengstacken, 61 Ore. 455, 122 Pac. 292. **Wash.**—State v. Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39.

56. **Fla.**—Buckman v. State, 34 Fla. 48, 15 So. 697, 24 L. R. A. 806. **Idaho.** People v. Havird, 2 Idaho 531, 25 Pac. 294, 10 L. R. A. 831. **Mich.**—People v. Doesburg, 16 Mich. 133. **N. Y.**—People v. Albany & S. R. Co., 57 N. Y. 161. **Okla.**—State v. Cobb, 24 Okla. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639. **Wis.** State v. McDonald, 108 Wis. 8, 84 N. W. 171, 81 Am. St. Rep. 878.

57. **Louisiana** & **N. W. R. Co. v. State**, 75 Ark. 435, 88 S. W. 559.

58. **Reynolds v. State**, 61 Ind. 392.

59. **Ark.**—State v. Johnson, 26 Ark. 281. **Cal.**—People v. Judge, 9 Cal. 19. **Conn.**—Castle v. Lawlor, 47 Conn. 340. **Fla.**—State v. Suwannee, 21 Fla. 1. **Ia.** Klopp v. Chicago, M. & St. P. Ry. Co., 156 Iowa 466, 136 N. W. 906. **Minn.** State v. Sherwood, 15 Minn. 221, 2 Am.

Rep. 116. **Neb.**—Mayer v. Wilkinson, 52 Neb. 764, 73 N. W. 214. **Ohio.** Dutton v. Village of Hanover, 42 Ohio St. 215. **Tenn.**—Marler v. Wear, 117 Tenn. 244, 96 S. W. 447.

60. **Ind.**—Mott v. State, 145 Ind. 353, 44 N. E. 548; State v. Burnsville Tp. Co., 97 Ind. 416. **Okla.**—Territory v. Chicago, etc. Ry. Co., 2 Okla. 108, 39 Pac. 389. **Utah.**—Chamberlain v. Warburton, 1 Utah 267.

61. *People ex rel.* Kruse v. Woodman, 1 N. Y. Supp. 335.

62. *People v. Young*, 40 Ill. 87.

63. **Ky.**—Talbot v. Pierce, 14 B. Mon. 195. **Md.**—Gover v. Barnes, 15 Md. 576. **N. C.**—Pasour v. Lineberger, 90 N. C. 159. **Okla.**—McComb v. Watt, 39 Okla. 412, 135 Pac. 361. **Wash.** Windt v. Banniza, 2 Wash. 147, 26 Pac. 189. **Wyo.**—Wearne v. France, 3 Wyo. 273, 21 Pac. 703.

64. *Capehart's Exr. v. Dowery*, 10 W. Va. 130. See also *Shrewsbury v. Pearson*, 1 McCord (S. C.) 331.

65. 3 STANDARD PROC. 663.

66. **Minn.**—Weibeler v. Ford, 61 Minn. 398, 63 N. W. 1075. **N. M.** New Mexico Nat. Bank v. Brooks, 9 N. M. 113, 49 Pac. 947. **Wis.**—Delaney v. Hartwig, 91 Wis. 412, 64 N. W. 1035; La Crosse Bank v. Wilson, 74 Wis. 391, 43 N. W. 153.

67. **Cal.**—Cahoon v. Levy, 5 Cal.

trial by jury obtains in such proceedings where the question of title to property is involved.<sup>68</sup>

y. *Commitment of Juvenile Delinquent*.—A proceeding in the juvenile court to commit a juvenile delinquent to an industrial or reform school is not a criminal action and the defendant has no constitutional right to a trial by jury.<sup>69</sup> The statutes in a number of states, however, permit a jury trial.<sup>70</sup>

z. *In Other Cases*.—(I.) **Generally**.—The right to jury trial in numerous other proceedings is treated elsewhere in this work.<sup>71</sup>

(II.) **Partition**.—Suits in partition generally are deemed of equitable cognizance and a trial by jury in such suits is not a matter of right,<sup>72</sup> and in some jurisdictions there is no right to trial by jury even though the title to the property is put in issue;<sup>73</sup> but in other jurisdictions the issues of title<sup>74</sup> and possession in partition suits are

294. **La.**—*Denouvion v. McNight*, 26 La. Ann. 74. **Mo.**—See *Maze v. Griffin*, 65 Mo. App. 377.

68. *Neff v. Manuel*, 121 Iowa 706, 97 N. W. 73; *Hubbard v. Lamburn*, 189 Mass. 296, 75 N. E. 707.

69. **U. S.**—*Ex parte Januszewski*, 196 Fed. 123. **Fla.**—*Pugh v. Bowden*, 54 Fla. 302, 45 So. 499. **Idaho.**—*In re Sharp*, 15 Idaho 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886. **Ind.**—*Dinson v. Drosta*, 39 Ind. App. 432, 80 N. E. 32. **La.**—*State v. Ragan*, 125 La. 121, 51 So. 89. **Minn.**—*State v. Brown*, 50 Minn. 353, 52 N. W. 935, 36 Am. St. Rep. 651, 16 L. R. A. 691. **Pa.**—*Com. v. Fisher*, 213 Pa. 48, 62 Atl. 198. **Tex.**—*Ex parte Bartee* (Tex. Crim.), 174 S. W. 1051. **Utah.**—*Mill v. Brown*, 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935. **Wis.**—*Wisconsin Industrial School v. Clark*, 103 Wis. 651, 179 N. W. 422.

[a] "The question as to the extent to which a child's constitutional rights are impaired by a restraint upon its freedom has arisen many times with reference to statutes authorizing the commitment of dependent, incorrigible, or delinquent children to the custody of some institution, and the decisions appear to warrant the statement, as a general rule, that, where the investigation is into the status and needs of the child, and the institution to which he or she is committed is not of a penal character, such investigation is not one to which the constitutional guaranty of a right to trial by jury extends." *In re Watson*, 157 N. C. 340, 72 S. E. 1049. But see 12 STANDARD PROC. 874, note 38.

70. 12 STANDARD PROC. 873.

71. **In forcible entry and detainer cases**, see 8 STANDARD PROC. 1122.

**In proceedings to ascertain value of homestead**, see 11 STANDARD PROC. 369.

**In proceedings to determine competency**, see 12 STANDARD PROC. 16.

**In Chinese exclusion cases**, see 11 STANDARD PROC. 909.

**In proceedings to enforce health regulations**, see 10 STANDARD PROC. 985.

**On inquisition of lunacy**, see 13 STANDARD PROC. 461.

**In insolvency proceedings**, see 13 STANDARD PROC. 673, et seq.

**In actions on awards**, see 2 STANDARD PROC. 662.

**In proceedings to open or vacate judgments**, see 15 STANDARD PROC. 230.

**In habeas corpus proceedings**, see 10 STANDARD PROC. 935.

**In injunction suits**, see 13 STANDARD PROC. 175 et seq.

**In bankruptcy proceedings**, see 3 STANDARD PROC. 1001.

72. *Flaherty v. McCormick*, 113 Ill. 538; *Judd v. Dike*, 30 Minn. 380, 15 N. W. 672.

73. **Fla.**—*Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77. **Ill.**—*Flaherty v. McCormick*, 113 Ill. 538. **Va.**—*Pillow v. Southwest Va. Imp. Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804. **W. Va.**—*Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216.

74. **Me.**—*Allen v. Hall*, 50 Me. 253. **Mo.**—*Benoist v. Thomas*, 121 Mo. 660, 27 S. W. 609. **N. C.**—*Covington v. Covington*, 73 N. C. 168. **S. C.**—*Osborne v. Osborne*, 41 S. C. 195, 19 S. E. 494; *Connor v. Edwards*, 36 S. C. 559, 15 S.

triable by jury as of right.<sup>75</sup> And under some statutes the parties to a partition suit are entitled to a trial by jury.<sup>76</sup>

(III.) **Specific Performance.**—The right to trial by jury, as a rule, does not obtain in actions for specific performance.<sup>77</sup> And the fact that plaintiff seeks to recover also a money judgment does not necessarily confer such right upon the parties to the action.<sup>78</sup> But where plaintiff joins a cause of action for specific performance with one for damages<sup>79</sup> and it appears that the defendant is not and has never been able to perform the contract specifically,<sup>80</sup> the issue of damages is triable by a jury.

(IV.) **Enforcement of Bonds and Recognizances.**—The parties to a summary proceeding under a statute to enforce execution on forfeited bonds and recognizances are not entitled to a trial by jury,<sup>81</sup> unless such right is expressly given by the statute,<sup>82</sup> or the execution of the bond itself is controverted.<sup>83</sup>

(V.) **Scire Facias.**—A trial by jury is not a matter of right in proceedings by scire facias.<sup>84</sup>

(VI.) **Establishment of Lost Instruments or Records.**—Actions brought

E. 711; *Reams v. Spann*, 28 S. C. 530, 6 S. E. 325.

[a] But this right does not extend to the adjustment of the rights of the parties in respect to advancements made to them. *Gunn v. Thruston*, 130 Mo. 339, 32 S. W. 654.

75. *Harding v. Devitt*, 10 Phila. (Pa.) 95, 30 Leg. Int. 416.

76. *Martin v. Martin*, 118 Ind. 227, 20 N. E. 763; *Bowen v. Sweeney*, 143 N. Y. 349, 38 N. E. 271; *Hewlett v. Wood*, 62 N. Y. 75; *Ward v. Ward*, 23 Hun (N. Y.) 431.

[a] A statute providing that the issues of fact in partition suits are triable by jury does not apply where the only matter in controversy relates to the amounts with which the respective shares of the parties are chargeable. *Brown v. Brown*, 52 Hun 532, 5 N. Y. Supp. 893.

77. *Idaho*.—*Brady v. Yost*, 6 Idaho 273, 55 Pac. 542. *Mass.*—*Shapira v. D'Arcy*, 180 Mass. 377, 62 N. E. 412. *Mo.*—*McCullough v. McCullough*, 31 Mo. 226. *N. Y.*—*Wurster v. Armfield*, 98 App. Div. 298, 90 N. Y. Supp. 699.

[a] Where plaintiff demands specific performance and asks also that defendant, in case of inability to perform the contract specifically, be required to furnish security for the performance of the contract and the answer does not show defendant's inability to specifically perform the contract, it is proper to deny a motion for

trial by jury. *O'Beirne v. Bullis*, 158 N. Y. 466, 53 N. E. 211.

78. *Pierce v. Stewart*, 61 Ohio St. 422, 56 N. E. 201.

[a] An action to enforce the specific performance of a contract by which the defendants agreed to convey property and to pay a sum of money cannot be regarded as one for the recovery of specific property or money only, but belongs to that class of cases which were formerly within the exclusive jurisdiction of equity. *Hull v. Bell*, 54 Ohio St. 228, 43 N. E. 584.

79. *Sternberger v. McGovern*, 56 N. Y. 12.

80. *Stevenson v. Buxton*, 15 Abb. Pr. (N. Y.) 352.

81. *Ala.*—*Boring v. Williams*, 17 Ala. 510. *Ark.*—*Ex parte Reardon*, 9 Ark. 450. *Ga.*—*Young v. Wise*, 45 Ga. 81. *Ky.*—*Murry v. Askew*, 6 J. J. Marsh. 27; *McCord v. Johnson*, 4 Bibb 531. *Miss.*—*Scott v. Nichols*, 27 Miss. 94, 61 Am. Dec. 503. *N. Y.*—*Gildersleeve v. People*, 10 Barb. 35. *Tex.*—*James v. Reynolds' Admrs.*, 2 Tex. 250.

See generally the title "Summary Proceedings."

82. *Miller v. Moore*, 2 Humph. (Tenn.) 421.

83. *Buchanan v. McKenzie*, 53 N. C. 91.

84. *State v. Murmann*, 124 Mo. 502, 28 S. W. 2; *State v. Hoeffner*, 124 Mo. 488, 28 S. W. 1.

to establish lost instruments or records being of equitable nature are not triable by jury as a matter of right.<sup>85</sup> And the fact that the remedy is given by an express statute does not alter the rule.<sup>83</sup>

(VII.) **Winding Up Insolvent Corporations and Receiverships.** — In proceedings to settle the estate of an insolvent corporation, there is generally no right to trial by jury as this mode of trial was not in use in such proceedings prior to the adoption of the constitution.<sup>87</sup> Upon the appointment of a receiver, a court of equity retains jurisdiction over all matters connected with the distribution of the assets of the insolvent corporation and adjudicates them without the aid of a jury.<sup>88</sup> But where the receiver's report is controverted,<sup>89</sup> or an action is brought by him for the recovery of money, without involving the issue of equitable distribution of the insolvent estate,<sup>90</sup> a trial by jury is demandable as of right.

(VIII.) **Actions Involving Separate Property of Married Woman.** An action brought to recover judgment against a married woman and subject her separate estate to the payment of a debt is not triable by jury as of right,<sup>91</sup> but where under the statute a married woman is the absolute owner of her separate estate the general rules as to the right to trial by jury apply to actions brought against a married woman involving her separate estate.<sup>92</sup>

(IX.) **Establishment of Boundaries.** — In some jurisdictions a party making objections to a report fixing disputed boundaries of land is entitled to a trial by jury of the issues raised by such objections,<sup>93</sup> while in others such right does not obtain.<sup>94</sup>

(X.) **Proceedings Against Public Officers.** — There is no right to trial by jury in summary proceedings against public officers for misfeasance in office,<sup>95</sup> and for the collection of public moneys in their possession.<sup>96</sup>

(XI.) **Proceedings Against Sheriffs and Constables.** — In a proceeding against a sheriff or constable to compel the enforcement of a writ, the

85. *Wright v. Fultz*, 138 Ind. 594, 38 N. E. 175; *Weil v. Kume*, 49 Mo. 158.

86. *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053; *Culver v. Colehour*, 115 Ill. 558, 5 N. E. 89; *Kimball v. Connor*, 3 Kan. 414.

[a] "The power conferred upon a court of equity by the Burnt Records act is similar to a proceeding in equity for partition and . . . is no more obnoxious to the constitutional provision for a jury than is a bill in equity for partition." *Heacock v. Hosmer*, 109 Ill. 245.

87. *Central Trust Co. v. Thurman*, 94 Ga. 735, 20 S. E. 141; *Sands v. Kimbark*, 27 N. Y. 147; *Matter of Empire City Bank*, 18 N. Y. 199.

88. *Ross, etc. Co. v. Southern M. Iron Co.*, 72 Fed. 957.

89. *Hamm v. Stone & Sons Live*

*Stock Co.*, 13 Tex. Civ. App. 414, 35 S. W. 427.

90. *Hun v. Cary*, 82 N. Y. 65, 59 How. Pr. 439, 37 Am. Rep. 546.

91. *Gay v. Ihm*, 69 Mo. 584.

92. *Litchfield v. Dezendorf*, 11 Hun (N. Y.) 358.

93. *Huston v. Atkins*, 74 Ill. 474; *Townsend v. Radcliffe*, 63 Ill. 9.

94. *Caldwell v. Nash*, 68 Iowa 658, 27 N. W. 812; *Coombs v. Quinn*, 66 Iowa 469, 23 N. W. 928.

95. *Cal.*—*Woods v. Varnum*, 85 Cal. 639, 24 Pac. 843. *Idaho.*—*Rankin v. Jauman*, 4 Idaho 53, 36 Pac. 502. *W. Va.* *Moore v. Strickling*, 46 W. Va. 515, 33 S. E. 274, 50 L. R. A. 279.

See generally the title "Summary Proceedings."

96. *Ga.*—*Tift v. Griffin*, 5 Ga. 185. *Pa.*—*School Dist. v. Pitts*, 184 Pa. 156,

right to trial by jury ordinarily does not obtain,<sup>97</sup> though sometimes it is regarded as a matter of right.<sup>98</sup>

**5. In Criminal Proceedings.**—a. *Generally.*—A constitutional provision preserving inviolate the right to trial by jury, unless expressly extended to all criminal cases, has reference only to those criminal cases which were triable by jury prior to the adoption of the constitution.<sup>99</sup> It also includes, however, according to the weight of authority, such statutory offenses which though created after the adoption of the constitution belong to a class of cases<sup>1</sup> wherein a jury there-

39 Atl. 64. **Vt.**—*In re Hackett*, 53 Vt. 354.

97. **Fla.**—*Johnson v. Price*, 47 Fla. 265, 36 So. 1031. **Ky.**—*Wells v. Caldwell*, 1 A. K. Marsh. 441. **Miss.**—*Lewis v. Fellows*, 6 How. 261; *Lewis v. Garrett's Admrs.*, 5 How. 434.

[a] **Order To Show Cause.**—An order of court directed to the sheriff and requiring him to show cause why execution should not issue against him is in the nature of a contempt proceeding to be determined by the court without a jury. *Hart v. Robinett*, 5 Mo. 11.

98. *Andrews v. Keep*, 38 Ala. 315; *Evans v. State Bank*, 15 Ala. 81; *Dawson v. Shaver*, 1 Blackf. (Ind.) 204.

99. **U. S.**—*McElrath v. United States*, 102 U. S. 426, 26 L. ed. 189; *Low v. United States*, 169 Fed. 86, 94 C. C. A. 1. **Ala.**—*Ex parte State ex rel. Birmingham*, 164 Ala. 576, 51 So. 309. **Ark.**—*Bond v. State*, 17 Ark. 290. **Colo.**—*McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516. **Conn.**—*Goddard v. State*, 12 Conn. 448, 454. **D. C.**—*Bowles v. District of Columbia*, 22 App. Cas. 321. **Fla.**—*Hunt v. Jacksonville*, 34 Fla. 504, 16 So. 398, 43 Am. St. Rep. 214. **Ga.**—*Hill v. Mayor*, 72 Ga. 314. **Ill.**—*Paulsen v. People*, 195 Ill. 507, 63 N. E. 144. **Ind.**—*State v. McCoy*, 2 Blackf. 5. **Ia.**—*State v. Beneke*, 9 Iowa 203. **Kan.**—*State v. Topeka*, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529. **Ky.**—*Carson v. Com.*, 1 A. K. Marsh. 290. **La.**—*State v. Jackson*, 106 La. 189, 30 So. 309. **Md.**—*State v. Glenn*, 54 Md. 572. **Mass.**—*Jones v. Robbins*, 8 Gray 329. **Minn.**—*City of St. Paul v. Robinson*, 129 Minn. 383, 152 N. W. 777, Ann. Cas. 1916E, 845. **Mo.**—*King City v. Duncan*, 238 Mo. 513, 142 S. W. 246; *Delaney v. Police Court*, 167 Mo. 667, 67 S. W. 589. **N. J.**—*McGear v. Woodruff*, 33 N. J. L. 213. **N. Y.**—*People ex rel. St. Clair v. Davis*, 143 App. Div.

579, 127 N. Y. Supp. 1072. **Ohio.** *Sanders v. State*, 20 Ohio Cir. Ct. (N. S.) 395. **Okla.**—*Ex parte Simmons*, 5 Okla. Crim. 399, 115 Pac. 380. **Ore.** *Wong v. Astoria*, 13 Ore. 538, 11 Pac. 295. **Pa.**—*Byers v. Com.*, 42 Pa. 89. **S. C.**—*Ex parte Schmidt*, 24 S. C. 363. **Tenn.**—*State v. Sexton*, 121 Tenn. 35, 114 S. W. 494. **Tex.**—*Moore v. State*, 22 Tex. App. 117, 2 S. W. 634. **Vt.** *State v. Conlin*, 27 Vt. 318. **Va.**—*Ragsdale v. City of Danville*, 116 Va. 484, 82 S. E. 77; *Miller v. Com.*, 88 Va. 618, 14 S. E. 161, 342, 979, 15 L. R. A. 441.

See generally *supra*, II, A; II, C, 1.

1. *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609.

[a] "The constitution was intended to provide for the future as well as the past, to protect the rights of the people by every safeguard which their wisdom and experience then approved, whether those rights then existed by the rules of the common law, or might from time to time arise out of subsequent legislation. All the rights, whether then or thereafter arising, which would properly fall into those classes of rights to which by the course of the common law the trial by jury was secured, were intended to be embraced within this article. Hence it is not the time when the violated right first had its existence, nor whether the statute which gives rise to it was adopted before or after the constitution that we are to regard as the criterion of the extent of this provision of the constitution; but it is the nature of the controversy between the parties and its fitness to be tried by a jury according to the rules of the common law that must decide the question. . . . The dangerous tendency of the principle of construction, which would authorize the legislature

tofore was a matter of right, although there are cases to the contrary.<sup>2</sup>

b. *Misdemeanors and Petty Offenses.*—Constitutional provisions guaranteeing the right to trial by jury, as a rule, do not include misdemeanors<sup>3</sup> and petty offenses.<sup>4</sup> But the constitutional guaranty ex-

to do away with jury trials in regard to rights founded upon statutes passed since the adoption of the constitution, becomes more apparent when applied to statutes creating offences not known to the common law. Such statutes and the offences which arise under them are of frequent occurrence. But no one can suppose it a reasonable construction of the constitution, that persons accused of such offences should be excepted from the enjoyment of this constitutional right." *Plimpton v. Town of Somerset*, 33 Vt. 283.

[b] A constitutional provision that the right to trial by jury shall remain inviolate in all cases in which it has heretofore been used is generic. "It does not limit the right to the mere instances in which it had been used, but extends it to such new and like cases as might afterwards arise." *Wynehamer v. People*, 13 N. Y. 378, 426.

2. See *Com. v. Andrews*, 211 Pa. 110, 60 Atl. 554.

[a] "There is nothing to forbid the legislature from creating a new offence and prescribing what mode they please of ascertaining the guilt of those who are charged with it. . . . The purpose of the constitution undoubtedly was to preserve the jury trial wherever the common law gave it, and in all other cases to let the legislature and the people do as their wisdom and experience might dictate." *Van Swartow v. Com.*, 24 Pa. 131.

3. **U. S.**—*McElrath v. United States*, 102 U. S. 426, 26 L. ed. 189. **Ia.**—*State v. Beneke*, 9 Iowa 203; *State v. Bryan*, 4 Iowa 349. **Ky.**—*Frost v. Com.*, 9 B. Mon. 362. **La.**—*State v. Gutierrez*, 15 La. Ann. 190. **Md.**—*State v. Glenn*, 54 Md. 572. **N. Y.**—*Murphy v. People*, 2 Cow. 815; *People ex rel. St. Clair v. Davis*, 143 App. Div. 579, 127 N. Y. Supp. 1072. **Ohio.**—*Sanders v. State*, 20 Ohio Cir. Ct. (N. S.) 395. **S. C.** *Comrs. of New Town Cut v. Seabrook*, 2 Strobb. 563. **Tenn.**—*State v. Sexton*, 121 Tenn. 35, 114 S. W. 494. **Tex.** *Moore v. State*, 22 Tex. App. 117, 2 S. W. 634. **Vt.**—*State v. Conlin*, 27 Vt. 318.

[a] In deciding upon questions involving the right of trial by jury in minor offenses it becomes necessary only "to look into the laws regulating the trial of such cases at the time, and previous to, the adoption of the constitution. For if, before and at that time, those who should be accused of like offences were, by the existing laws, allowed to have a decision of their case by a jury, any change in the law, by which they may be deprived of that privilege, must, as it is an innovation upon the ancient right, be considered an infraction of the clear and obvious meaning of the constitution." *Carson v. Com.*, 1 A. K. Marsh. (Ky.) 290.

[b] Under a constitution providing that the right to trial by jury shall remain inviolate "in all cases in which it has been heretofore used" the qualifying "words which have been quoted imply that there were and had been trials otherwise than by a common law jury and the framers of the constitution must be presumed to have had knowledge of previous legislation and usage as to trials otherwise than by a jury of twelve in inferior courts of local jurisdiction, and must be presumed to have recognized and adopted the principle which had dictated the legislature and which originated and undertook to authorize the usage." *People ex rel. Metropolitan Bd. of Health v. Lane*, 6 Abb. Pr. N. S. (N. Y.) 105.

4. **Colo.**—*McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516. **Conn.**—*Godard v. State*, 12 Conn. 448, 454. **Ga.** *Williams v. Augusta*, 4 Ga. 509. **Ind.** *State v. McCory*, 2 Blackf. 5. **La.** *State v. Noble*, 20 La. Ann. 325. **Mass.** *Jones v. Robbins*, 8 Gray 329. **Minn.** *City of St. Paul v. Robinson*, 129 Minn. 383, 152 N. W. 777, Ann. Cas. 1916E, 845. **N. J.**—*McGear v. Woodruff*, 33 N. J. L. 213; *Johnson v. Barclay*, 16 N. J. L. 1. **N. Y.**—*People ex rel. Murray v. Justices*, 74 N. Y. 406; *People ex rel. Ezra v. Fisher*, 20 Barb. 652; *People v. McCarthy*, 45 How. Pr. 97. **Pa.**—*Haines v. Levin*, 51 Pa. 412; *By-*

tends to misdemeanors which prior to the adoption of the constitution were triable by jury because they could be prosecuted only by indictment,<sup>5</sup> or involved severe punishment.<sup>6</sup> The constitutional provision securing the right to trial by jury does not alter the mode of trial of offenses consisting in violation of municipal ordinances<sup>7</sup> unknown to the common law.<sup>8</sup> In some jurisdictions no right to trial by jury ob-

ers *v. Com.*, 42 Pa. 89. **Tenn.**—*State v. Sexton*, 121 Tenn. 35, 114 S. W. 494.

[a] "If the state has no power to provide by law for the summary trial and conviction of vagrant and disorderly persons by justices of the peace, it would clearly follow that no such power could be granted to be exercised under charters or ordinances of municipal corporations; and the consequence would be that, for the violation of all mere police ordinances, prescribing penalties for their infraction, it would be the right of the party accused to insist upon indictment and trial by jury. Such a mode of proceeding, if it were practicable, has never been contended for; nor could such contention be maintained for a moment." *State v. Glenn*, 54 Md. 572.

[b] Notwithstanding "the broad language of the constitution . . . there are many petty offenses against statutes or municipal ordinances, such as Sabbath-breaking, drunkenness, vagrancy and a vast variety of others which are triable without a jury, because they were so triable when the constitution was adopted and the right of trial by jury which is secured is the right as it existed at the time the constitution was adopted." *Miller v. Com.*, 88 Va. 618, 14 S. E. 161, 342, 979, 15 L. R. A. 441.

5. *Bond v. State*, 17 Ark. 290; *Paulsen v. People*, 195 Ill. 507, 63 N. E. 144.

6. *Low v. United States*, 169 Fed. 86, 94 C. C. A. 1; *State v. Jackson*, 106 La. 189, 30 So. 309.

7. **Ala.**—*Ex parte State ex rel. Birmingham*, 164 Ala. 576, 51 So. 309; *Costello v. Feagin*, 162 Ala. 191, 50 So. 134; *Miller v. Birmingham*, 151 Ala. 469, 44 So. 388, 125 Am. St. Rep. 31. **Fla.**—*Hunt v. Jacksonville*, 34 Fla. 504, 16 So. 398, 43 Am. St. Rep. 214. **Ga.** *Hill v. Mayor*, 72 Ga. 314. **Ill.**—*City of Chicago v. Knobel*, 232 Ill. 112, 83 N. E. 459. **Kan.**—*State v. Topeka*, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529. **Minn.**—*City of St. Paul v. Robinson*,

129 Minn. 383, 152 N. W. 777, Ann. Cas. 1916E, 845. **Mo.**—*King City v. Duncan*, 238 Mo. 513, 142 S. W. 246; *Delaney v. Police Court*, 167 Mo. 667, 67 S. W. 589. **N. Y.**—*People ex rel. St. Clair v. Davis*, 143 App. Div. 579, 127 N. Y. Supp. 1072. **Okla.**—*Ex parte Simmons*, 5 Okla. Crim. 399, 115 Pac. 380. **Ore.**—*Wong v. Astoria*, 13 Ore. 538, 11 Pac. 295. **Pa.**—*Com. ex rel. Seranton v. Adams*, 20 Pa. Dist. 91. **S. C.**—*Ex parte Schmidt*, 24 S. C. 363. **Va.**—*Miller v. Com.*, 88 Va. 618, 14 S. E. 161, 342, 979, 15 L. R. A. 441.

[a] "Notwithstanding the provision of Magna Charta safeguarding the right of jury trial in cases involving life and liberty, and similar provisions in the constitution of the United States and of the several states of the Union, it is matter of common knowledge that the general course of legislation in both countries has been for centuries to confer summary jurisdiction upon mayors and police justices of cities and towns and justices of the peace of counties for the trial of minor offenses. Such offenses are not regarded essentially as crimes and misdemeanors within the purview of the constitutional guaranties." *Ragsdale v. City of Danville*, 116 Va. 484, 82 S. E. 77.

[b] The fact that an ordinance provides for the commitment of defendant in case of failure to pay the fine does not make the offense triable by jury. "Imprisonment is not provided . . . by the ordinance . . . as an alternative punishment. . . . Imprisonment could not be imposed in this case primarily; and it is always competent for the party to avoid it by paying his fine. It would not be competent for him to avoid it if it were originally imposed as punishment." *Bowles v. District of Columbia*, 22 App. Cas. (D. C.) 321.

8. **Ala.**—*Tims v. State*, 26 Ala. 165; *Wilson v. State*, 10 Ala. App. 158, 64 So. 510. **Colo.**—*McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516. **Mo.**—*King*

tains in such cases even though the violation of the ordinance in question is also made a misdemeanor under the statute.<sup>9</sup>

c. *Fixing Punishment.*—The accused has no constitutional right to have the jury assess the penalty as well as pass on his guilt;<sup>10</sup> but a statute may provide otherwise.<sup>11</sup>

d. *Violation of Terms of Probation or Suspended Sentence.*—The proceedings following a violation of the terms of probation do not come within the constitutional guaranty of trial by jury.<sup>12</sup> The same is true of proceedings to determine whether or not defendant has violated conditions upon which sentence and judgment were suspended,<sup>13</sup>

*City v. Duncan*, 238 Mo. 513, 142 S. W. 246. **Okl.**—*Ex parte Simmons*, 5 Okla. Crim. 399, 115 Pac. 380.

[a] "There is not, and there never was, any such criminal offense known to the common law as that of fast driving, even on the streets of a great city. The offense that was known to the common law was that of fast driving in such manner and under such circumstances as to endanger the lives of the inhabitants. Fast driving of itself was never an offense at common law. Its denunciation, therefore, by municipal ordinance is not the conversion of a common-law offense into a violation of municipal ordinance." *Bowles v. District of Columbia*, 22 App. Cas. (D. C.) 321.

[b] And the words "shall remain inviolate" contained in the paragraph of the constitution which refers to the right of trial by jury "take all matters of police power in cities without the operation of that paragraph; because there never had been in this state such jury trials in police courts and therefore there was nothing to remain inviolate in the matter of jury trial in such courts." *Hill v. Mayor of Dalton*, 72 Ga. 314.

9. **Colo.**—*McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516. **D. C.**—*Bowles v. District of Columbia*, 22 App. Cas. 321. **Fla.**—*Hunt v. Jacksonville*, 34 Fla. 504, 16 So. 398, 43 Am. St. Rep. 214. **Ga.**—*Littlejohn v. Stells*, 123 Ga. 427, 51 S. E. 390. **La.**—*Anite City v. Holly*, 50 La. Ann. 627, 23 So. 746. **N. J.**—*Howe v. Plainfield*, 37 N. J. L. 145. **Ore.**—*Wong v. Astoria*, 13 Ore. 538, 11 Pac. 295. **S. C.**—*Anderson v. O'Donnell*, 29 S. C. 355, 7 S. E. 523, 12 Am. St. Rep. 728, 1 L. R. A. 632. **Wis.**—*Ogden v. Madison*, 111 Wis. 415, 87 N. W. 568, 55 L. R. A. 506.

10. **Ill.**—*People v. Heise*, 257 Ill.

443, 100 N. E. 1000; *George v. People*, 167 Ill. 447, 47 N. E. 741; *People v. Illinois St. Reformatory*, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139. **Ind.**—*Skelton v. State*, 149 Ind. 641, 49 N. E. 901. **Tenn.**—*Woods v. State*, 130 Tenn. 100, 169 S. W. 558, L. R. A. 1915F, 531; *Durham v. State*, 89 Tenn. 723, 18 S. W. 74. **Tex.**—*Ex parte Marshall*, 72 Tex. Crim. 83, 161 S. W. 112.

11. *McSpadden v. State*, 8 Okla. Crim. 489, 129 Pac. 72.

12. **Ala.**—*Fuller v. State*, 122 Ala. 32, 26 So. 146, 82 Am. St. Rep. 1, 45 L. R. A. 502. **Fla.**—*See Alvarez v. State*, 50 Fla. 24, 39 So. 481, 111 Am. St. Rep. 102, court may in its discretion call a jury. **Ia.**—*State v. Hunter*, 124 Iowa 569, 100 N. W. 510, 104 Am. St. Rep. 361. **N. Y.**—*People ex rel. Clark v. Warden of Sing Sing Prison*, 39 Misc. 113, 78 N. Y. Supp. 907.

[a] "When probation was granted, respondent agreed to its terms and fully understood that, for certain misconduct, his probation would be revoked and terminated . . . When brought before the court for sentence he is not charged with a new crime, but merely with the violation of his agreement with the court." *People v. Dudley*, 173 Mich. 389, 138 N. W. 1044.

13. *State v. Everitt*, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848.

[a] A hearing to determine whether or not defendant has complied with the terms upon which the sentence was suspended is not a "trial for any new offense nor for any offense whatever. When the judgment was suspended, defendant assumed the obligation of showing, to the satisfaction of the court, from time to time that he had demeaned himself as a good citizen and was worthy of judicial clemency. Whether or not he had so demeaned himself was not an issue of fact to be

unless the identity of the defendant is denied, in which event he is entitled to a trial by jury on that issue.<sup>14</sup>

e. *Plea of Former Jeopardy*.—A defendant has the constitutional right to trial by jury of issues of fact arising on a plea of former acquittal.<sup>15</sup> But where the plea on its face shows that the question raised by it is a matter of law and not of fact, it is a question for the court alone.<sup>16</sup>

F. ASSERTION OF RIGHT.—1. **Generally**.—The constitutional guaranty of the right to trial by jury does not obviate the necessity of asserting such right in the manner prescribed by the statute,<sup>17</sup>

submitted to a jury, but a question of fact to be passed upon by the court. It was a matter to be determined by the sound discretion of the court." *State v. Everitt*, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848.

14. *Carraway v. State*, 58 Fla. 15, 61 So. 142; *Alvarez v. State*, 50 Fla. 24, 39 So. 481, 111 Am. St. Rep. 102.  
15. *Carraway v. State*, 58 Fla. 15, 51 So. 142.

[a] "The plea of autrefois acquit is of a mixed nature and consists partly of matter of record and partly of matter of fact. The matter of fact is the averment of the identity of the offense and of the person as having been formerly acquitted. . . . It was proper to submit such special issue of fact to a jury, the defendant not consenting to a trial thereof by the court." *State v. Dewees*, 76 S. C. 72, 56 S. E. 674.

16. *State v. Potter*, 125 Mo. App. 465, 102 S. W. 668.

17. **U. S.**—*Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. ed. 113.

**Ala.**—*Harrison v. City of Anniston*, 156 Ala. 620, 46 So. 980; *Moore v. Crowthait*, 135 Ala. 272, 33 So. 28; *Ex parte Ansley*, 107 Ala. 613, 18 So. 242; *Neal v. Watkins*, 12 Ala. App. 593, 68 So. 552; *Ritter v. Griswold*, 2 Ala. App. 618, 56 So. 860. **Cal.**—*In re Heaton's Estate*, 139 Cal. 237, 73 Pac. 186; *Ferreira v. Chabot*, 121 Cal. 233, 53 Pac. 689; *McGuire v. Drew*, 83 Cal. 225, 23 Pac. 312. **Colo.**—*Kurtze v. McCord*, 1 Colo. 164. **Conn.**—*Rowell v. Ross*, 89 Conn. 201, 93 Atl. 236. **Ga.**—*Miller v. Georgia E. Bank*, 120 Ga. 17, 47 S. E. 525; *Heard v. Kennedy*, 116 Ga. 36, 42 S. E. 509; *Waterman v. Glisson*, 115 Ga. 773, 42 S. E. 95. **Ill.**—*Heacock v. Hosmer*, 109 Ill. 245; *Esmond v. Esmond*, 154 Ill. App. 357. **Ind.**—*Indianapolis North. T. Co. v. Brennan*,

174 Ind. 1, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503, 30 L. R. A. (N. S.) 85; *Blair v. Curry*, 150 Ind. 99, 46 N. E. 672, 49 N. E. 908; *Sheets v. Bray*, 125 Ind. 33, 24 N. E. 357; *Sprague v. Pritchard*, 108 Ind. 491, 9 N. E. 416; *Madison & I. R. Co. v. Whiteneck*, 8 Ind. 217. **Ia.**—*State v. Brooks*, 146 Iowa 295, 125 N. W. 168. **La.**—*Foulhouze v. Gaines*, 26 La. Ann. 84. **Me.** *Davis v. Auld*, 96 Me. 559, 53 Atl. 118. **Md.**—*Chappell Chem. & F. Co. v. Sulphur Mines Co.*, 85 Md. 684, 36 Atl. 712. **Mass.**—*Vitrified Wheel & Emery Co. v. Edwards*, 135 Mass. 501. **Mich.** *Odell v. Reynolds*, 40 Mich. 21. **Minn.** *Roberts v. Tremayne*, 61 Mich. 264, 28 N. W. 113; *Gibbens v. Thompson*, 21 Minn. 398. **Mo.**—*Chicago, M. & St. P. R. Co. v. Randolph Town-Site Co.*, 103 Mo. 451, 15 S. W. 437; *Pike v. Martindale*, 91 Mo. 268, 1 S. W. 858; *Walker v. Modern Woodmen of America*, 190 Mo. App. 355, 177 S. W. 331. **Neb.**—*Horton v. Simon*, 5 Neb. (Unof.) 172, 97 N. W. 604; *Goble v. Swobe*, 64 Neb. 838, 90 N. W. 919. **Nev.** *Truekee River General Electric Co. v. Durham*, 38 Nev. 311, 149 Pac. 61; *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815. **N. J.** *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 86 Atl. 451; *Haythorn v. Van Keuren & Son*, 79 N. J. L. 101, 74 Atl. 502; *Joy & Seliger Co. v. Blum*, 55 N. J. L. 518, 26 Atl. 861; *Wanser v. Atkinson*, 43 N. J. L. 571. **N. Y.** *Sporza v. German Sav. Bank*, 192 N. Y. 8, 84 N. E. 406; *Pegram v. New York, etc. R. Co.*, 147 N. Y. 135, 41 N. E. 424; *Stone v. Weller*, 128 N. Y. 655, 23 N. E. 653; *Whittlesey v. Delaney*, 73 N. Y. 571; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Hawkins v. Mapes-Reeve Const. Co.*, 82 App. Div. 72, 81 N. Y. Supp. 794. **Ohio.**—*Ellithorpe v. Buck*, 17 Ohio St. 72. **R. I.**—*White v.*

and compliance with statute is essential to enforcement of such right.<sup>18</sup>

2. Demand. — a. *Generally.* — Statutes and rules of court may and frequently do provide for a demand for a jury trial.<sup>19</sup> But where one party has demanded a jury it is not necessary that the adverse party also demand a jury.<sup>20</sup>

b. *Time for Demand.* — It is variously provided by the statutes that a jury must be demanded prior to the setting of a cause for trial,<sup>21</sup> or at the time of setting it,<sup>22</sup> or at least one day prior to the return day,<sup>23</sup> or within a specified time after the return<sup>24</sup> or the filing of a bond,<sup>25</sup> or at the time of joining issue,<sup>26</sup> or on the first day of the term

Eddy, 19 R. I. 108, 31 Atl. 823. **Tenn.** — *Ferris v. Bloom*, 132 Tenn. 466, 178 S. W. 1112. **Tex.** — *Brooks v. Pegg*, 8 S. W. 595; *Miller v. Miller*, 10 Tex. 319. **Utah.** — *Gibson v. McGurrian*, 37 Utah 158, 106 Pac. 669. **Wash.** — *Stetson & Post Co. v. McDonald*, 5 Wash. 496, 32 Pac. 108. **Wis.** — *Leonard v. Rogan*, 20 Wis. 540.

See also *infra* II, F, 2, g and h; II, F, 3; II, F, 4.

18. **Ala.** — *Redd v. State*, 169 Ala. 6, 53 So. 908. **Ill.** — *Morrison H. & R. Co. v. Kirsner*, 152 Ill. App. 43. **Md.** — *Condon v. Gore*, 89 Md. 230, 42 Atl. 900. **N. Y.** — *Ross v. McCaldin*, 123 App. Div. 13, 107 N. Y. Supp. 381; *Spencer v. Adams Dry Goods Co.*, 54 Misc. 614, 104 N. Y. Supp. 867. **Wis.** — *Siebrecht v. Hogan*, 99 Wis. 437; 75 N. W. 71.

But see *infra*, II, F, 2, g and h; II, F, 3; II, F, 4.

As to effect of failure to demand a jury, see *infra*, II, F, 2, h.

19. See *supra*, II, D, 4, f; II, F, 1.

20. *Przybyla v. Chain Belt Co.*, 157 Wis. 216, 147 N. W. 31.

[a] Where under the statute a demand for a jury trial is in the nature of an appeal, all joint defendants must join in the demand, and one defendant alone is not entitled thereto. *Bassett v. Loewenstein*, 22 R. I. 468, 48 Atl. 589.

21. *Condon v. Gore*, 89 Md. 230, 42 Atl. 900; *Wood v. Rio Grande W. Ry. Co.*, 28 Utah 351, 79 Pac. 182.

22. **Colo.** — *Peeps Fixture Co. v. Gove*, 24 Colo. App. 149, 133 Pac. 143. **Ia.** — *Smith v. Redmond*, 141 Iowa 105, 119 N. W. 271; *Waterman v. Randlett*, 34 N. W. 680. **La.** — *Wheless v. Fisk*, 28 La. Ann. 731; *Simpson v. Richardson*, 18 La. Ann. 121; *Reynolds' Curator v. Mahle*, 12 La. 424. **Utah.** — *Wood*

*v. Rio Grande W. Ry. Co.*, 28 Utah 351, 79 Pac. 182; *State v. Cherry*, 22 Utah 1, 60 Pac. 1103. **Wis.** — *State v. Clark*, 67 Wis. 229, 30 N. W. 122.

[a] **Effect of Vacating Order Setting Case.** — Under a statute requiring the demand for a trial by jury to be made at the time of setting a cause for trial the right to demand a trial by jury is revived, where, though at the time of setting the cause no jury is demanded, the order setting the cause for trial is subsequently vacated. *Truckee River General Electric Co. v. Durham*, 38 Nev. 311, 149 Pac. 61.

23. *Haythorn v. Van Keuren & Son*, 79 N. J. L. 101, 74 Atl. 502; *Home Coupon Exch. Co. v. Goldfarb*, 78 N. J. L. 146, 74 Atl. 143.

[a] **Non-Resident Defendant.** — Such statute, however, is not applicable to cases where the defendant is a non-resident. *Walnut v. Newton*, 82 N. J. L. 290, 82 Atl. 317.

24. *Camp v. Carroll*, 73 Conn. 247, 47 Atl. 122.

25. *Fletcher v. State*, 11 Ala. App. 180, 65 So. 683.

[a] **Statement of Preference Not a Demand.** — Under a statute providing that in prosecutions for violations of prohibitive liquor laws a defendant giving bond waives the right to a trial by jury unless "at the time he gives bond within five days thereafter" he "file in the cause a demand for trial by jury," a memorandum by defendant on the bond that he prefers a jury is not sufficient to constitute a demand for a trial by jury, where it does not appear when the bond was filed after that statement was written upon it. *Fletcher v. State*, 11 Ala. App. 180, 65 So. 683.

26. *Levy v. Roossin*, 93 App. Div. 387, 87 N. Y. Supp. 707.

of the court at which the cause is to be tried,<sup>27</sup> on the first appearance by the party demanding the jury,<sup>28</sup> or when called for trial.<sup>29</sup> Other

[a] **New York Municipal Court.** Where under the statute a jury must be demanded in the municipal court "at the joining of issue," the plaintiff having brought his action against several defendants jointly after having failed to demand a jury when issue was joined as to some of the defendants cannot thereafter demand a jury at the time issue is joined as to other defendants. *Spencer v. Adams Dry Goods Co.*, 54 Misc. 614, 104 N. Y. Supp. 867.

27. *Ga.*—*Pelham Mfg. Co. v. Powell*, 8 Ga. App. 38, 68 S. E. 519. *Tenn.* *McGuire v. North Carolina, etc. Ry. Co.*, 95 Tenn. 707, 33 S. W. 724; *Swink v. McKnight's Exrs.*, 88 Tenn. 765, 14 S. W. 311; *East Tennessee, etc. R. Co. v. Martin*, 85 Tenn. 134, 2 S. W. 381. *Tex.*—*Petri v. Lincoln Nat. Bank*, 84 Tex. 153, 19 S. W. 379; *McFaddin v. Preston*, 54 Tex. 403.

[a] "It is the duty of the trial court to give a liberal construction to the statute, so as to permit parties to exercise the right of trial by jury where it can be done without delay or prejudice to the opposite party," but where no jury is demanded on the first day of the term or at any time before the jury is discharged for the term, parties can "not then force a continuance of the cause in order to get a jury." *Barton v. American Nat. Bank*, 8 Tex. Civ. App. 223, 29 S. W. 210.

[b] **On Appeal From Justice Court.** A party desiring a trial by jury in a case brought up by appeal from the justice's court must demand such trial at the first term at which the cause stands for trial. *Salvo v. Wilson & Co.*, 189 Ala. 446, 66 So. 613.

[c] **First Term After Arrest.**—A defendant waives the right to a trial by jury by failing to make the demand for same before the first jury term of the court after his arrest. *Hammond v. State*, 154 Ala. 81, 45 So. 654.

28. *Morrison Hotel & R. Co. v. Kirsner*, 245 Ill. 431, 92 N. E. 285, 137 Am. St. Rep. 335; *Western Union Tel. Co. v. Thompson*, 18 Tex. Civ. App. 279, 44 S. W. 402; *Scott v. Rowland*, 14 Tex. Civ. App. 370, 37 S. W. 380.

[a] The "words, 'default day' and 'appearance day' as used in the stat-

utes . . . have the same meaning; in other words, 'default day' is 'appearance day,' which is the second day of each term." *Cruger v. McCracken* (Tex. Civ. App.), 26 S. W. 282.

[b] **After Setting Aside Judgment by Confession.**—But under a statute requiring a party to file his demand for a jury trial in writing and pay a certain fee therefor at the time of entering his appearance in the cause, a failure of a defendant against whom a judgment by confession had been entered, to file a written demand for a jury trial with his motion to vacate the judgment does not waive or bar his right to a jury trial if he makes his demand at the time the motion to vacate is allowed. *Morrison Hotel & R. Co. v. Kirsner*, 245 Ill. 431, 92 N. E. 285, 137 Am. St. Rep. 335.

[c] **Appearance on the Merits.**—So too, where defendant fails to demand a jury at the first appearance, as provided by the statute, and the first appearance is entered to compel the non-resident plaintiffs to furnish a statutory bond for costs, such failure will not be deemed a waiver of trial by jury. "To hold that under such circumstances the failure to make such a demand and payment before any bond for costs was filed amounted to a waiver of the constitutional right of trial by jury would be to adopt a most narrow and technical, instead of a liberal construction of the statute. When defendant appeared for the first time in answer to plaintiff's claim on the merits he filed his written demand for a jury trial. We think this was a sufficient compliance with the statute, and that the court erred in refusing to give him a trial by jury." *Lofaro v. Maggi*, 184 Ill. App. 571.

29. *State v. Clark*, 67 Wis. 229, 30 N. W. 122. See *Ladd v. Watkins*, 113 Ark. 261, 168 S. W. 138.

[a] **Called for Trial.**—Under a statute declaring that a jury shall be deemed waived if not demanded "when an action shall be called for trial" the quoted words of the statute "should not be construed to mean a mere calling of the case at the opening of the court on the first day of the term, as is usual in courts, for the purpose of

statutes provide that a trial by jury may be demanded at any time prior to the actual commencement of the trial<sup>30</sup> and before the introduction of evidence.<sup>31</sup> A demand for a trial by jury made after the actual commencement of the trial ordinarily comes too late.<sup>32</sup>

In the absence of a statute designating the time for demanding a trial by jury, the demand therefor must be made within a reasonable time.<sup>33</sup> Where a cause is to be referred, the demand for a trial by jury generally must be made prior to the order to refer the cause,<sup>34</sup> al-

ascertaining in a general way what cases are for trial at the term." State v. Clark, 67 Wis. 229, 235, 30 N. W. 122.

30. *Goodrum v. Merchants' & Planters Bank*, 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914A, 511.

[a] **The mere inspection by the court of a bill which was put in issue by the plea is not such a commencement of the trial as to prevent a party from demanding a trial by jury.** *Olney v. Bacon*, 1 Johns. (N. Y.) 142.

[b] **Action on Mechanic's Lien.** Where the statute pertaining to the enforcement of mechanics' and materialmen's liens provides that the demand for a jury in such cases shall be made before the commencement of the trial and that the demand shall specify the particular issue or issues to be submitted, a compliance with these requirements is a condition precedent to the right of trial by jury and such demand, when made after the close of the evidence, is too late. *Siebrecht v. Hogan*, 99 Wis. 437, 75 N. W. 71.

[c] **The trial has been commenced** where the case has been opened and a motion made to dismiss the complaint. *Marshall v. De Cordova*, 26 App. Div. 615, 50 N. Y. Supp. 294.

31. *Spring v. Collins Bldg. & Const. Co.*, 60 Misc. 239, 113 N. Y. Supp. 29; *Herb v. Metropolitan Hospital*, 80 App. Div. 145, 80 N. Y. Supp. 552, 12 N. Y. Ann. Cas. 415.

[a] **A mere statement of counsel is not "the production of any evidence within the contemplation of the statute."** *Herb v. Metropolitan Hospital & Dispensary*, 80 App. Div. 145, 80 N. Y. Supp. 552, 12 N. Y. Ann. Cas. 415.

32. **Ark.**—*Goodrum v. Merchants' & Planters Bank*, 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914A, 511. **Cal.** *Maddux v. Walthall*, 141 Cal. 412, 74 Pac. 1026. **Ind.**—*Whitcomb v. Stringer*, 160 Ind. 82, 66 N. E. 443. **N. J.**—*Tilton v. Brand*, 4 N. J. L. 289. **N. Y.**

*Koehler v. New York El. R. Co.*, 159 N. Y. 218, 53 N. E. 1114; *Rogers v. Straub*, 75 Hun 264, 26 N. Y. Supp. 1066, 58 N. Y. St. 287. **Ohio.**—*Terry v. State*, 12 Ohio Cir. Dec. 274, 22 Ohio Cir. Ct. 16. **S. C.**—*State v. Mays*, 24 S. C. 190. **S. D.**—*Webster v. White*, 8 S. D. 479, 66 N. W. 1145. **Wis.**—*Siebrecht v. Hogan*, 99 Wis. 437, 75 N. W. 71.

[a] **In Rhode Island either party may under express provision of the statute demand a jury after the entry of a decision by the court provided that the party claiming such trial shall pay all costs.** *Dorney v. Ives*, 36 R. I. 276, 90 Atl. 164.

33. *Brock v. Fuller Lumber Co.*, 153 Fed. 272, 82 C. C. A. 402.

34. **Mass.**—*Atlanta Mills v. Mason*, 120 Mass. 244. **Mo.**—*Smith v. Baer*, 166 Mo. 392, 66 S. W. 166. **N. H.**—*Patriek v. Cowles*, 45 N. H. 553.

See *infra*, II, F, 4, a, (II), (C).

[a] "A party can not take chances of winning before a referee, and when he fails, demand a jury trial . . . after the referee's report is filed." *Smith v. Baer*, 166 Mo. 392, 66 S. W. 166.

[b] **But where commissioners are appointed in vacation, the failure of a party to demand a trial by jury at the time of their appointment does not deprive him of the right to demand a jury.** "The appointment of commissioners in vacation was merely an initiatory step, a provisional measure, which might or might not fix the right of the parties, as subsequent events should determine. Besides, at the time of the appointment of the commissioners, it was impossible for defendant to have had a jury, though never so desirous of obtaining one; and if he had demanded one, and had been refused, there was no way known to the law, whereby he could have saved his exceptions to such refusal . . . A man can scarcely waive anything which is

though in some jurisdictions such demand may be made even after the filing of the report of the referee.<sup>35</sup>

c. *Form and Sufficiency of Demand.*—(I.) Generally.—Statutes regulating the mode of demanding a trial by jury, as a rule, must be strictly complied with,<sup>36</sup> though it has been held that such statutes are to be liberally construed in favor of the exercise of the right to trial by jury.<sup>37</sup> Under some statutes the demand for a trial by jury must be made in writing,<sup>38</sup> while pursuant to others it may be made orally in open court.<sup>39</sup> Where an oral demand for a jury trial is sufficient

out of his reach. And as soon as the report of the commissioners came in . . . he exercised his right of . . . demanding a jury. His demand was, therefore, timely." *Kansas City, C. & S. Ry. Co. v. Story*, 96 Mo. 611, 10 S. W. 203.

As to waiver by failure to object to order of reference, see *infra*, II, F, 4, a, (II), (C).

35. *Harrington's Sons Co. v. United States Exp. Co.*, 87 N. J. L. 154, 93 Atl. 697.

36. Ala.—*Ex parte Ansley*, 107 Ala. 613, 18 So. 242. Md.—*City Pass. Ry. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161. Tex.—*Gibson v. Singer Sew. Mach. Co.* (Tex. Civ. App.), 147 S. W. 285.

[a] A conclusion to the country in a plea is not a sufficient demand but a jury must be demanded in terms if a party desires the issue tendered to be tried by a jury. *Gleaves v. Davidson*, 85 Tenn. 350, 3 S. W. 348.

[b] By Written Endorsement.—Under a statute providing that where a jury is demanded by plaintiff such demand must be endorsed by him on the summons and complaint, and in the event that the defendant desires a trial by jury he must endorse such demand in writing on the plea or demurrer, an oral demand of the clerk who endorses upon defendant's plea the receipt of the jury tax fee is not sufficient to meet the requirements of the statute, as it is expressly declared therein that "a failure to demand a jury as . . . directed . . . shall be deemed and held a waiver of the rights of trial by jury." *Ex parte Ansley*, 107 Ala. 613, 18 So. 242.

37. *Morrison Hotel & R. Co. v. Kirsner*, 245 Ill. 431, 92 N. E. 285, 137 Am. St. Rep. 335.

38. *First Nat. Bank v. Denson*, 124 Ala. 336, 27 Sd. 2.

[a] A complaint concluding with the words: "The plaintiff prays a jury trial" is not an election to have the cause tried by a jury within the meaning of the statute requiring the party to file his election in writing. "These words were in fact a part of the declaration. A withdrawal of the declaration under leave of court would have withdrawn the election for a trial by a jury, notwithstanding the rule forbids a withdrawal of an election without the consent of both parties. It was the obvious intent of the rule that an election for a trial by a jury should be a separate and distinct act, evidenced by a writing different from the pleadings, so that no change in the latter could affect or interfere with the former." *Baltimore City Pass. Ry. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161.

[b] But an endorsement upon the cover of a complaint separately signed by counsel is in contemplation of law a separate act signifying the election of plaintiff to demand a trial by jury. *Condon v. Gore*, 89 Md. 230, 42 Atl. 900.

[c] And an endorsement upon an appeal bond demanding a trial by jury on appeal from a judgment of a justice of the peace is a sufficient compliance with the statute requiring a written demand to be filed in the case. *Freeman v. Bridges*, 123 Ala. 287, 26 So. 512.

39. *Kansas City, Ft. S. & S. Ry. Co. v. Cox*, 41 Mo. App. 499; *Halsey v. Paulson*, 36 N. J. L. 406.

[a] Under a statute providing that an application for a jury trial must be made in open court, a written application for a jury filed with the clerk but not brought to the notice of the court does not comply with the statute. *Gibson v. Singer Sew. Mach. Co.* (Tex. Civ. App.), 147 S. W. 285.

under the statute, it is necessary that such demand be entered on the trial docket.<sup>40</sup> The failure of the clerk, however, to enter the demand in the minutes does not deprive a party of his constitutional right to trial by jury, where his demand was properly made in open court.<sup>41</sup> The demand for a trial by jury must be direct and express.<sup>42</sup>

Where some issues involved in the cause are properly triable by jury, demand must be made, not that all issues in the case be tried by a jury, but that the specific issues proper for trial by jury be so tried.<sup>43</sup>

(II.) **Compliance With Conditions Precedent.**—If the statute makes the right to demand a trial by jury dependent upon certain conditions a party must comply with such conditions in order to avail himself of the right to trial by jury.<sup>44</sup>

d. *Notice.*—In some jurisdictions the statute provides that in civil actions a party desiring a trial by jury must at a designated time give notice of his intention to demand a jury.<sup>45</sup> There is no definite form in

40. *McGuire v. North Carolina*, etc. R. Co., 95 Tenn. 707, 33 S. W. 724.

41. *Harrington's Sons Co. v. United States Exp. Co.*, 87 N. J. L. 154, 93 Atl. 697.

42. *Goble v. Swobe*, 64 Neb. 838, 90 N. W. 919.

[a] An objection that the court has no jurisdiction to try the case as one in equity does not sufficiently raise the question of the right to trial by jury and does not constitute a demand therefor. *Goble v. Swobe*, 64 Neb. 838, 90 N. W. 919.

43. *Cal.*—*Meek v. De Latour*, 2 Cal. App. 261, 83 Pac. 300. *Ind.*—*Peden v. Cavins*, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276; *McKinley v. Britton*, 55 Ind. App. 21, 103 N. E. 349. *Md.*—*Wilmer v. Placide*, 118 Md. 305, 84 Atl. 491. *Minn.*—*Morton B. & T. Co. v. Sodergren*, 130 Minn. 252, 153 N. W. 527; *Chadbourne v. Zilsdorf*, 34 Minn. 42, 24 N. W. 308.

44. *D. C.*—*National Met. Bank v. Hitz*, *McArthur & M.* 198. *Ga.*—*Dortie v. Lockwood*, 61 Ga. 293. *Miss.*—*Thigpen v. Mississippi Cent. R. Co.*, 32 Miss. 347.

[a] **Verified Answer.**—Under the code of Louisiana a defendant to an action brought on an unconditional promise to pay must verify his answer, in order to obtain a trial by jury. *Meyer v. Weil*, 37 La. Ann. 160; *Williams v. Boozeman*, 18 La. Ann. 532; *Gallot v. McCluskey*, 18 La. Ann. 259; *Frellson v. McDonald*, 15 La. Ann. 536.

[b] **Payment of Fees.**—Where "the statute provides that payment of certain necessary fees shall be made at

the time a jury trial is demanded, a demand unaccompanied by this payment is ineffectual, and . . . under these circumstances, notwithstanding an otherwise timely demand, . . . such failure constitutes a waiver of the right to a jury trial." *Lazier Gas Engine Co. v. Yokom*, 125 N. Y. Supp. 465. See *infra* II, F, 3.

45. *Cal.*—*Doll v. Anderson*, 27 Cal. 248. *Mass.*—*Bailey v. Joy*, 132 Mass. 356. *N. Y.*—*People v. Hall*, 169 N. Y. 184, 62 N. E. 170. *R. I.*—*Arnold v. Regan*, 29 R. I. 71, 69 Atl. 292.

[a] A proceeding to enforce a mechanic's lien is a civil action within the meaning of such statute. *Graham v. Lord*, 170 Mass. 1, 48 N. E. 778.

[b] "If a party does not file a notice that he desires a trial by jury . . . he takes the risk of any amendments that may thereafter be allowed by the court; and, after the time provided for filing such a notice . . . has elapsed, it is in the discretion of the court, on amendments being allowed which change the issues or introduce new issues, to grant or deny to any party the right to file the notice required by the statute." *Cleverly v. O'Connell*, 156 Mass. 88, 30 N. E. 88.

[c] Under a statute providing that if several issues are joined in a cause upon the jury docket, the party who placed it on the docket as a jury case shall within three weeks after the issues are joined, file a notice stating whether he desires all such issues to be tried before a jury and, if not, which of them he desires to be so tried, a failure to file such notice au-

which such notice must be given,<sup>46</sup> and need not be given in the form of an independent pleading.<sup>47</sup>

e. *Special or Struck Jury*.—The court cannot on its own motion summon a special or struck jury,<sup>48</sup> but where such jury is desired by a party a timely demand therefor is essential.<sup>49</sup> In some jurisdictions a special jury must be demanded before the placing of the cause on the calendar for trial by a regular jury,<sup>50</sup> or before the day on which the cause is set for trial.<sup>51</sup> Under some statutes a struck or special jury cannot be demanded after issue joined,<sup>52</sup> while under others a party may demand such a jury at any time prior to the commencement of the trial term.<sup>53</sup> Where the statute does not fix the time, the trial court determines whether such demand is timely.<sup>54</sup>

thorizes the court to try the whole cause without a jury, although it has been the practice among the members of the bar to treat a case entered on the jury docket as standing for the trial of all issues to the jury, unless notice to the contrary had been filed. *Rowell v. Ross*, 89 Conn. 201, 93 Atl. 236.

46. *Higgins v. Boston Elev. Ry. Co.*, 214 Mass. 335, 101 N. E. 992.

[a] "Any written words which convey the idea that the supposed right is insisted upon are enough. The object of the statute is to secure a jury trial of controverted matters of fact to any party who makes known his desire for it in writing at the proper place and time." *Arnold v. Regan*, 29 R. I. 71, 69 Atl. 292.

47. A memorandum on the outside of the writ that "plaintiff claims trial by jury" is a sufficient compliance with the statute. These words "show unmistakably the intention of the person who wrote them to assert for the plaintiff his constitutional right to a jury trial. They are conspicuous in position. No one looking at the writ could fail to observe them and comprehend their meaning. They are above the name of the attorney whose signature even though in typewriting assumes responsibility for that which stands above it. In the absence of any court rule or more definite statute governing the subject, we are of opinion that the plaintiff did enough to express his intention to claim a trial by jury." *Higgins v. Boston Elev. Ry. Co.*, 214 Mass. 335, 101 N. E. 992.

48. *McDaniel v. Nashville, C. & St. L. R. Co.*, 88 Tenn. 542, 13 S. W. 76.

49. *McArthur v. Carrie's Admr.*, 32 Ala. 75, 70 Am. Dec. 529.

50. *Goodson v. Brothers*, 111 Ala. 589, 20 So. 443; *Rauche v. Blumenthal*, 4 Penne. (Del.) 521, 57 Atl. 368.

51. *Basham v. Hammond Packing Co.*, 107 Mo. App. 542, 81 S. W. 1227.

[a] *Discretion of Court*.—Where pursuant to the statute the demand for a special venire is made three days before that on which the case is set for trial, the court has no discretion and it is error to refuse such application, but if not made within the statutory time, the court has the discretion to make the order for a special venire or not. *State v. Leabo*, 89 Mo. 247, 1 S. W. 288.

52. *State v. Carey*, 28 La. Ann. 49.

53. *O'Brien v. Minneapolis*, 22 Minn. 378.

[a] *Proceedings instituted after the commencement of the term for the purpose of obtaining a struck jury are unauthorized*. *Mark v. St. Paul, M. & M. Ry. Co.*, 32 Minn. 208, 20 N. W. 131.

[b] *In Criminal Case*.—"Under the 'act to provide for struck juries' . . . a struck jury is demandable as of right by either the defendant or the state in all criminal cases, save those in which one of the parties is entitled to more than two peremptory challenges. This right may be waived by the parties for whose benefit it was intended. And where sufficient time intervenes before the day set for the trial of the case to allow the parties . . . due opportunity, under all the circumstances, for claiming a struck jury the demand of one on that day comes too late and the parties must be taken to have waived the privilege." *Whitehead v. State*, 10 Ohio St. 449.

54. *Lessee of Neff v. Neff*, 1 Binn.

In some jurisdictions a party intending to demand a special jury must give notice of an application therefor to the opposing party,<sup>56</sup> while in other jurisdictions the statute does not provide for such notice.<sup>58</sup> Upon demand made for a struck jury a party cannot withdraw his demand and ask for a regular jury.<sup>57</sup>

f. *Effect of Demand, and Withdrawal.* — A demand for a trial by jury made in an action, which is triable by jury as a matter of right, pursuant to the statute, deprives the court of authority to try the cause without a jury.<sup>58</sup> Such demand, however, extends only to the term of the court at which it is made and if the cause is not tried on that term, the demand must be renewed,<sup>59</sup> and the mere fact that a previous trial of the cause was before a jury does not entitle a party to a jury on the second trial.<sup>60</sup> A demand for a trial by jury cannot be withdrawn to the prejudice of the adverse party and without his consent.<sup>61</sup>

(Pa.) 350; *Goodell's Exrs. v. Gibbons*, 91 Va. 608, 22 S. E. 504.

55. *People v. Hall*, 169 N. Y. 184, 62 N. E. 170.

56. *Fuller v. Den ex dem. Saxton*, 20 N. J. L. 61.

57. *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290.

[a] "It is true that the machinery of the law is put in motion by the party making the demand for a struck jury; but when it is once set in motion . . . it does not lie with the party invoking its aid to arrest the force so created; and when . . . the parties appeared . . . at the time fixed for striking the jury . . . it was not then within the power of the defendants to stop or impede the proceeding by withdrawing their demand for a struck jury." *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290.

58. *Colo.*—*Woods v. Tanquary*, 3 Colo. App. 515, 34 Pac. 737. *Ill.*—*Ware v. Nottinger*, 35 Ill. 375. *Ind. Ter.* *Warwick v. Kingman*, 2 Ind. Ter. 435, 51 S. W. 1076. *Ia.*—*Dupont v. Downing*, 6 Iowa 172. *La.*—*Fellows, Johnson & Co. v. Reid*, 6 La. Ann. 724. *Md.*—*Desche v. Gies*, 56 Md. 135. *N. J.* *Clayton v. Clark*, 55 N. J. L. 539, 26 Atl. 795. *N. C.*—*Chasteen v. Martin*, 81 N. C. 51. *N. D.*—*Hanson v. Carlblom*, 13 N. D. 361, 100 N. W. 1084. *Ore.*—*American Mortg. Co. v. Hutchinson*, 19 Ore. 334, 24 Pac. 515. *Tex.* *Payne v. Ellwood* (Tex. Civ. App.), 163 S. W. 93.

[a] When "a jury has been demanded and the necessary fee de-

posited within the proper time and a case placed upon the jury docket, it cannot, without the consent and over the protest of a party who has thus demanded his constitutional right, be displaced from the jury docket and tried by the court in the absence of a jury." *Burrows v. Rust* (Tex. Civ. App.), 44 S. W. 1019.

59. *Blair v. Curry*, 150 Ind. 99, 46 N. E. 672, 49 N. E. 908.

[a] "A demand for a jury must have reference to the term and time at which the demand is made. Many causes, such as the constitution of the jury, the condition of the business in court, the state of the party's preparation and readiness for trial, etc., may render a jury desirable at one term of court. At the next term of the court no cause may exist rendering a jury trial desirable, and the party may prefer submitting his cause to the court." *Davidson v. Wright*, 46 Iowa 383.

[b] *Renewal of Demand After Dismissal.*—Where defendant demanded a trial by jury in due time but the action is dismissed for want of prosecution he must renew his demand after reinstatement of the cause and cannot rely upon the former demand prior to dismissal of the action. *Ward v. Lemon*, 3 Ariz. 219, 73 Pac. 443.

60. *Ellis v. Bonner*, 7 Tex. Civ. App. 539, 27 S. W. 687.

61. *Kelly v. Barbin*, 2 Mart. O. S. (La.) 47.

[a] *Demand Gives Both Parties the Right.*—After a jury had been demanded by the defendant and the cause is put on the jury docket, both

But under some statutes a party may withdraw his demand for a jury at any time before the trial.<sup>62</sup> And upon withdrawal of the jury fees a party cannot complain of the trial of the cause without a jury.<sup>63</sup>

g. *Excuse for Failure To Demand.*—Neither ignorance of law<sup>64</sup> nor a mistake of fact<sup>65</sup> excuse a party's failure to make a timely demand for a trial by jury. But where at the time, when pursuant to the statute the demand must be made, there is no judge competent to receive the demand,<sup>66</sup> or to impanel a jury,<sup>67</sup> the failure to demand a jury at the proper time is excused. Where no jury is in attendance when the appearance docket is called it is not fatal to the right of trial by jury that the demand therefor is made at a later hour of that day upon denial of a motion for a continuance.<sup>68</sup> The failure to demand a jury likewise is excused where a jury cannot be had in the tribunal before which the case is heard.<sup>69</sup>

h. *Effect of Failure To Demand.*—Except in those cases where a waiver is not permitted,<sup>70</sup> a failure to demand a trial by jury in the manner or at the time prescribed by the statute,<sup>71</sup> as a rule, constitutes

parties have the right to trial by jury regardless of the question as to which party had applied for a jury and a jury can be dispensed with only by the consent of both parties. *Lewis v. Klotz*, 39 La. Ann. 259, 1 So. 539.

[b] **Withdrawal of Pleading Containing Endorsement of Demand.** Where plaintiff in compliance with the statute endorses his demand for a jury trial upon a copy of the complaint a subsequent withdrawal of such copy does not affect defendant's right to trial by jury. The "defendant's right ought not now to be prejudiced by the withdrawal of such claim by the plaintiff against the defendant's objection and after the plaintiff has permitted the defendant to rely thereon until the time has expired within which a jury trial might have been claimed by the defendant. . . . The right of jury trial being a constitutional right, a waiver of it should not be presumed." *Allworth v. Interstate Ry. Co.*, 27 R. I. 106, 60 Atl. 834.

62. *Guthmann Transfer Co. v. Bryant College*, 172 Ill. App. 301.

63. *Harris v. Kellum & Rotan Inv. Co.* (Tex. Civ. App.), 43 S. W. 1027.

64. *Coulter v. Weed Sew. Mach. Co.*, 3 Lea (Tenn.) 115.

65. *Walcott v. O'Connor*, 163 Mass. 21, 39 N. E. 345.

[a] **Mistake.**—Under a statute requiring the demand for a jury trial to be made on the first day of the term, the failure to do so is not excused

by the fact that the party did not expect the case to be tried on that term. *Griffith v. Griffith* (Tenn.), 46 S. W. 340.

66. *Hays v. Hays*, 66 Tex. 606, 1 S. W. 895.

67. *Smith v. City of San Antonio*, 17 Tex. 643.

68. *Cook v. Cook*, 5 Tex. Civ. App. 30, 23 S. W. 927.

69. *Smith v. San Antonio*, 17 Tex. 643.

[a] **Trial Before Mayor.**—Under a city ordinance authorizing the mayor to try certain cases without conferring upon him the power to impanel a jury a demand for a jury would be vain and useless. *Smith v. San Antonio*, 17 Tex. 643.

70. As to when waiver is not permitted, see *infra*, II, F, 4, b, (1).

71. U. S.—*Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. ed. 113.

Ala.—*Evans v. State Bank*, 15 Ala. 81.

Ark.—*Ladd v. Watkins*, 113 Ark. 261, 168 S. W. 138.

Cal.—*Ferrea v. Chabot*, 121 Cal. 233, 53 Pac. 689;

*Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22.

Conn.—*Rowell v. Ross*, 89 Conn. 201, 93 Atl. 236; *Camp v. Carroll*, 73 Conn. 247, 47 Atl. 122.

Ga.—*Heard v. Kennedy*, 116 Ga. 36, 42 S. E. 509; *Pelham Mfg. Co. v. Powell*, 8 Ga. App. 38, 68 S. E. 519.

Ill.—*Heacock v. Hosmer*, 109 Ill. 245; *Esmond v. Esmond*, 154 Ill. App. 357; *Morrison H. & R. Co. v. Kirsner*, 152 Ill. App. 43.

Ind.—*Sheets v. Bray*, 125 Ind. 33,

a waiver of the right thereto, and some statutes expressly so provide.<sup>72</sup> It is discretionary with the court, however to grant a demand for a trial by jury, even though such demand is made after the expiration of the statutory time, provided that the adverse party is not prejudiced thereby.<sup>73</sup> And it has been held that if no prejudice has resulted to

24 N. E. 357; *Sprague v. Pritchard*, 108 Ind. 491, 9 N. E. 416. **Ia.**—*Waterman v. Randlett*, 84 N. W. 680. **La.**—*Wheelless v. Fisk*, 28 La. Ann. 731; *Wood v. Lyle*, 4 La. Ann. 145. **Me.**—*Davis v. Auld*, 96 Me. 559, 53 Atl. 118. **Md.** *Chappell Chem. & F. Co. v. Sulphur Mines Co.*, 85 Md. 684, 36 Atl. 712. **Mass.**—*Culbert v. Hall*, 181 Mass. 24, 62 N. E. 955; *Vitrified Wheel & Emery Co. v. Edwards*, 135 Mass. 591. **Mich.** *Roberts v. Tremayne*, 61 Mich. 264, 28 N. W. 113. **Minn.**—*Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855. **Mo.**—*Chicago, M. & St. P. R. Co. v. Randolph Co.*, 103 Mo. 451, 15 S. W. 437; *Walker v. Modern Woodmen of America*, 190 Mo. App. 355, 177 S. W. 331. **Neb.**—*Horton v. Simon*, 5 Neb. (Unof.) 172, 97 N. W. 604. **Nev.**—*Costello v. Scott*, 30 Nev. 43, 93 Pac. 1, 94 Pac. 222; *Haley v. Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815. **N. J.**—*Joy & Seliger Co. v. Blum*, 55 N. J. L. 518, 26 Atl. 861. **N. Y.**—*Pegram v. New York*, etc. R. Co., 147 N. Y. 135, 41 N. E. 424; *Matter of Holmes' Will*, 167 App. Div. 237, 152 N. Y. Supp. 822; *Arnot v. Nevins*, 44 App. Div. 61, 60 N. Y. Supp. 401; *People v. Halwig*, 41 Misc. 227, 84 N. Y. Supp. 221. **Ohio.**—*Ellithorpe v. Buck*, 17 Ohio St. 72. **R. I.**—*White v. Eddy*, 19 R. I. 108, 31 Atl. 823. **S. C.**—*Marshall v. Marshall*, 42 S. C. 436, 20 S. E. 298. **Tenn.**—*McGuire v. North Carolina*, etc. R. Co., 95 Tenn. 707, 33 S. W. 724. **Tex.**—*Petri v. Lincoln Nat. Bank*, 84 Tex. 153, 19 S. W. 379; *McFaddin v. Preston*, 54 Tex. 403; *Barton v. American Nat. Bank*, 8 Tex. Civ. App. 223, 29 S. W. 210. **Wash.** *Stetson & Post Mill Co. v. McDonald*, 5 Wash. 496, 32 Pac. 108; *Keane v. Brygger*, 3 Wash. 338, 28 Pac. 653. **Wis.**—*Leonard v. Rogan*, 20 Wis. 540.

See also cases cited throughout this section.

[a] "The constitution . . . does not say that trials shall be by jury. . . . If a party voluntarily abstains from claiming the right in a given case, . . . it may be judicially held that it is waived." *Madison & In-*

*dianapolis R. Co. v. Whiteneck*, 8 Ind. 217.

[b] "Where there has been no demand for a jury trial within the time prescribed and the case is subsequently removed to another court, a party has no right to demand a jury trial in such other court." *Chappell Chemical, etc. Co. v. Sulphur Mines Co.*, 85 Md. 684, 36 Atl. 712.

**72.** *Nixon Bros. v. Killian*, 90 Ala. 484, 7 So. 761.

**73. Tex.**—*Petri v. Lincoln Nat. Bank*, 84 Tex. 153, 19 S. W. 379; *Allen v. Plummer*, 71 Tex. 546, 9 S. W. 672; *Gallagher v. Goldfrank*, 63 Tex. 473; *Kenedy T. & I. Co. v. First Nat. Bank* (Tex. Civ. App.), 136 S. W. 558. **Utah.** *Wood v. Rio Grande W. Ry. Co.*, 28 Utah 351, 79 Pac. 182. **Wash.**—*Peterson v. Arland*, 79 Wash. 679, 141 Pac. 63; *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 105 Pac. 632, 28 L. R. A. (N. S.) 1053; *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209.

[a] "The purpose of the demand . . . is to enable the court to have a jury in attendance when the case comes on for trial. We think that where a jury is in fact present so that the trial may forthwith proceed without delay, the adverse party cannot successfully interpose the objection that the jury has not been demanded or the jury fee paid in the precise manner and at the precise time prescribed by the statute. The provisions in the statute are not intended for the benefit of an adversary. No doubt if the demand and payment are not made as required by the statute the party has waived his right to require the court to call a jury, but we cannot see how the adverse party can complain if the court, in its discretion, permits a jury to try the case if one is in fact in attendance and no delay is occasioned in proceeding with the case. In our judgment, where a jury is in attendance the court may permit a party to pay the jury fee at any time before a trial and may impanel a jury to try

the adversary a party's failure to strictly comply with the statute as to demand does not deprive him of his constitutional right.<sup>74</sup> So too, the court may call a jury on its own motion, notwithstanding the failure of the parties to demand a trial by jury.<sup>75</sup>

**3. Payment of Fees.**—Pursuant to some statutes a party demanding a trial by jury must deposit the jury fees in advance,<sup>76</sup> and rules

the case." *Davis v. Denver & R. G. R. Co.*, 45 Utah 1, 142 Pac. 705.

[b] But where the jury has been discharged for the term, it is not error to refuse a demand for a jury made after expiration of the time when under the statute it should have been made. *Petri v. First Nat. Bank*, 83 Tex. 424, 18 S. W. 752, 29 Am. St. Rep. 657.

74. See the notes following.

[a] A failure to demand a jury on appearance day does not forfeit the right to a jury where such failure does not operate to the prejudice of the adverse party. "It is not the intention of the statute to deny to any litigant the right of trial by jury but to regulate the exercise of such right, for the purpose of facilitating the business and lessening the expense of the courts, and a litigant can only be deprived of such privilege when his delay in demanding a jury and tendering the jury fee will probably work injury to his adversary. In this case the plaintiff had assured the defendant he would not be prejudiced by failure to answer the petition by appearance day, and the plaintiff having failed to call up the case and require the defendant to defend the suit until the jury docket was called and jurors empaneled for the week, we cannot see that the defendant was in fault in not sooner demanding a jury or that the plaintiff would have been harmed had the court yielded to the defendant's demand." *Scott v. Rowland*, 14 Tex. Civ. App. 370, 37 S. W. 380.

[b] And a failure to strictly comply with a rule of court requiring that notices to have causes set for trial must indicate whether the cause is to be tried by jury or court is not sufficient to warrant a denial of the constitutional right of a party to trial by jury. *Peeps Fixture Co. v. Gove*, 24 Colo. App. 149, 133 Pac. 143. As to rules of court, see *infra*, II, G, 1.

75. *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 Pac. 687.

[a] "It is within the discretion of the trial court to permit a demand for a jury to be made after the case is called to be set for trial, or to submit the issues of fact in a case to a jury of its own motion, and no error can be predicated upon its ruling in that regard." *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209.

[b] And a constitutional provision declaring that a jury in civil cases shall be deemed waived unless demanded does not prevent the court from calling a jury on its own motion where the parties fail to demand a jury. *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 Pac. 687.

[c] But where the court on its own motion calls a jury, it cannot disregard the verdict and findings of the jury and proceed to make findings of its own and base a judgment thereon. *Hill v. Ellis*, 5 Kan. App. 532, 48 Pac. 204.

76. Cal.—*Naphtaly v. Rovegno*, 130 Cal. 639, 63 Pac. 66; *Conneau v. Geis*, 73 Cal. 176, 14 Pac. 580, 2 Am. St. Rep. 785. La.—*Daniels v. Andrews*, 7 Rob. 160. Me.—*Randall v. Kehlror*, 60 Me. 37, 11 Am. Rep. 169. Mich.—*Roberts v. Tremayne*, 61 Mich. 264, 28 N. W. 113; *McGraw v. Sturgeon*, 29 Mich. 426. Minn.—*Rollins v. Nolting*, 53 Minn. 232, 54 N. W. 1118. Mo.—*De-laney v. Police Court*, 167 Mo. 667, 67 S. W. 589. N. J.—*Cendon v. Royce*, 68 N. J. L. 222, 52 Atl. 630. N. Y.—*Kilpatrick v. Carr*, 3 Abb. Pr. 117. Utah. *People v. Van Tassel*, 13 Utah 9, 43 Pac. 625. Wash.—*State v. Neterer*, 33 Wash. 535, 74 Pac. 668.

[a] Upon appeal from a judgment of a justice of the peace a party is not relieved of the necessity to comply with a statute requiring the payment of jury fees in advance because of the fact that the case has been tried before a jury in the justice's court. *Wood v. Gamble* (Tex. Civ. App.), 32 S. W. 368.

[b] But a party filing an affidavit

of court making such deposit a condition precedent to a jury trial have been upheld as a reasonable regulation of such statutory provisions.<sup>77</sup> But in some cases it is held that a failure of a party to strictly comply with the statutory requirements in reference to the payment of jury fees does not deprive him of the right to a trial by jury,<sup>78</sup> provided that the payment of the jury fees is not delayed for such a length of time as to prejudice the adverse party.<sup>79</sup> So too, it has been held that a failure of the court to insist upon the payment of the jury fees in advance, as provided by statute, does not constitute reversible error.<sup>80</sup>

Where the statute does not provide for payment of the jury fees in advance a party cannot be denied a trial by jury in consequence of his failure to pay such fees,<sup>81</sup> unless payment be required by rule

of impecuniosity is relieved from the obligation to deposit jury fees. *Toltec Ranch Co. v. Babcock*, 24 Utah 183, 66 Pac. 876.

77. See *infra*, II, G, 1.

78. *Allen v. Plummer*, 71 Tex. 546, 9 S. W. 672; *Western Union Tel. Co. v. Everheart*, 10 Tex. Civ. App. 468, 32 S. W. 90.

[a] Where a jury had been demanded by defendants at the proper time but the fees were not then paid, it is error to grant plaintiff's motion to strike the cause from the jury docket where the fees were paid prior to the filing of such motion. *Allyn & Co. v. Willis & Bro.*, 65 Tex. 65.

79. *Cabell v. Hamilton-Brown Shoe Co.*, 81 Tex. 104, 16 S. W. 811.

80. *Board of County Comrs. v. Brown*, 2 Colo. App. 473, 31 Pac. 525.

[a] "It was doubtless the duty of the court to compel the plaintiffs to advance . . . fees before they called the jury into the box. . . . Failure to compel the prepayment, however, cannot be permitted to disturb the validity of the judgments which the plaintiffs have recovered, for it is an error which has worked no harm, since an adverse judgment would necessarily include the fees advanced." *Board of County Comrs. v. Brown*, 2 Colo. App. 473, 31 Pac. 525.

81. Colo.—*Woods v. Tanquary*, 3 Colo. App. 515, 34 Pac. 737. Idaho.—*Randall v. Kelsey*, 7 Idaho 168, 61 Pac. 515. Ill.—*Condit v. Lee*, 83 Ill. App. 537. Mo.—*Scott v. Young*, 113 Mo. App. 46, 87 S. W. 544. N. J.—*Story v. Walker*, 71 N. J. L. 256, 58 Atl. 349; *MacKenzie v. Gilbert*, 69 N. J. L. 184, 54 Atl. 524; *Clayton v. Clark*, 55

N. J. L. 539, 26 Atl. 795. S. C.—*Pinkney v. Green*, 67 S. C. 309, 45 S. E. 202.

[a] "The most that could be insisted upon would be to require payment before the jury should be called in the case or sworn; but . . . a failure to pay at the time the demand is made cannot be considered as nullifying the demand." *Odell v. Reynolds*, 40 Mich. 21.

[b] Under a statute providing that when a jury is demanded the jury fee shall be assessed against the party having to pay the costs of trial, defendants demanding are not required "to pay the jury fee in advance, although it might be ultimately assessed against them." *Hine v. Sweney*, 3 Greene (Ia.) 511.

[c] A statute, providing that a justice of the peace, juror, etc., is not obliged to render any services without the previous payment of the fee therefor does not authorize a justice of the peace to insist, as a condition of the issuing of the venire, that the jury fees be paid in advance. It "does not appear, by the express language of the section under consideration, nor will it bear the construction, that a justice . . . is entitled to impose, as a condition of the performance of any official duty, the payment of the fees of any other officer than himself. . . . It is undoubtedly true that defendants frequently avail themselves in an action brought before a justice of the peace of the provisions of the statute giving them the right to a trial by jury, merely for the purpose of delay and annoyance; but, nevertheless, the right is one which is

of court;<sup>82</sup> but it has been held that notwithstanding the absence of a statutory provision requiring the payment of jury fees in advance a party desiring a trial by jury must pay such fees, when called upon to do so.<sup>83</sup>

In criminal cases a party demanding a trial by jury ordinarily is not required to pay jury fees,<sup>84</sup> but under an ordinance requiring a defendant charged with a violation thereof to deposit jury fees in the event that he desires a trial by jury he is not entitled to a jury unless the fees are paid.<sup>85</sup>

4. **Waiver.** — *a. In Civil Cases.* — (I.) **Generally.** — While the right to trial by jury is secured by the federal and the various state constitutions, it is a privilege which may be waived by the parties<sup>86</sup> to a

statutory in its character and therefore it cannot be abridged by the courts in any other manner than is provided by the statute." *Bellappi v. Hovey*, 35 N. Y. Supp. 624.

[d] And where the statute confers upon justices of the peace the authority to summon a jury, though no demand therefor is made by the parties, it is not error for him to order a trial by jury notwithstanding the failure of the party who demanded a jury to pay the jury fees. *Equitable Gaslight Co. v. French*, 10 Misc. 749, 31 N. Y. Supp. 812, 64 N. Y. St. 620.

82. See *infra*, II, G, 1.

83. *Rollins v. Nolting*, 53 Minn. 232, 54 N. W. 1118.

[a] While "the statute nowhere provides in express words when the fee shall be paid, yet we think it . . . implies that payment should be made in advance. It should accompany the demand for a jury, or at least be made on request of the justice; and until the amount is deposited the justice is not required to take any steps towards issuing a venire. A refusal to pay the fees when thus demanded amounts to a waiver of the right to a jury trial." *Rollins v. Nolting*, 53 Minn. 232, 54 N. W. 1118.

84. *Condit v. Lee*, 83 Ill. App. 537.

[a] "The constitution guarantees the accused in criminal cases the right of trial by jury. If the legislature has made no provision for paying the jurors, the inference is that it was intended that they should serve without pay." *State v. Barnett*, 98 S. C. 422, 82 S. E. 795.

85. *Delaney v. Police Court*, 167 Mo. 667, 67 S. W. 589.

86. *U. S.*—*Columbia Bank v. Okely*, 4 Wheat. 235, 4 L. ed. 559; *Hawkins*

*v. Bleakley*, 220 Fed. 378; *United States v. Rathbone*, 2 Paine 578, 27 Fed. Cas. No. 16,121. *Ala.*—*Johnston v. Atwood*, 2 Stew. 225. *Ark.*—*Chapline v. Robertson*, 44 Ark. 202. *Cal.*—*Farwell v. Murray*, 104 Cal. 464, 38 Pac. 199; *Gillespie v. Benson*, 18 Cal. 409. *Colo.*—*Leahy v. Dunlap*, 6 Colo. 552. *Ill.*—*Claussenius v. Claussenius*, 179 Ill. 545, 53 N. E. 1006; *Whipple v. Eddy*, 161 Ill. 114, 43 N. E. 789; *Chicago, etc. Ry. Co. v. Ward*, 128 Ill. 349, 18 N. E. 828, 21 N. E. 562; *Kreuchi v. Dehler*, 50 Ill. 176; *Kanorowski v. People*, 113 Ill. App. 468. *Ind.*—*Lake Erie, W. & St. L. R. Co. v. Heath*, 9 Ind. 558. *Ia.*—*Wilkins v. Treynor*, 14 Iowa 391. *Ky.*—*Burgess v. Jacobs*, 14 B. Mon. 517. *Md.*—*Lanshan v. Heaver*, 77 Md. 605, 26 Atl. 866, 20 L. R. A. 759. *Mass.*—*Dole v. Wooldredge*, 142 Mass. 161, 7 N. E. 832. *Mich.*—*Borgman v. City of Detroit*, 102 Mich. 261, 60 N. W. 696. *Minn.*—*St. Paul, etc. R. Co. v. Gardner*, 19 Minn. 132, 18 Am. Rep. 334. *Miss.*—*Lewis v. Garrett's Admrs.*, 5 How. 434. *Mo.*—*O'Day v. Conn*, 131 Mo. 321, 32 S. W. 1109; *Merrill v. City of St. Louis*, 83 Mo. 244, 53 Am. Rep. 576. *Neb.*—*Gregory v. Lincoln*, 13 Neb. 352, 14 N. W. 423; *Baker v. Daily*, 6 Neb. 464. *N. H.*—*Marsh v. Brown*, 57 N. H. 173; *King v. Hutehins*, 26 N. H. 139. *N. J.*—*Joy & Seliger Co. v. Blum*, 55 N. J. L. 518, 26 Atl. 861. *N. Y.*—*Baird v. New York*, 74 N. Y. 382; *Davidson v. Associates of Jersey Co.*, 71 N. Y. 333; *Akin v. Water Comrs. of Amsterdam*, 31 N. Y. Supp. 254; *Chase v. Chase*, 19 N. Y. Supp. 268, 44 N. Y. St. 766. *N. C.*—*Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427. *Pa.*—*Lummis v. Big Sandy Land & Mfg. Co.*, 188 Pa. 27, 41 Atl. 319.

civil action, even, it has been held, in the case of infants,<sup>87</sup> though as to the latter there is authority to the contrary.<sup>87½</sup> The constitution of some states expressly declares that the parties to any civil cause may submit it to the court without the aid of a jury.<sup>88</sup>

(II.) **Form and Sufficiency of Waiver.**—(A.) **GENERALLY.**—Where the statute designates the manner in which a trial by jury may be waived,<sup>89</sup> the requirements of the statute must be substantially followed.<sup>90</sup>

**R. I.**—*Dorney v. Ives*, 36 R. I. 276, 90 Atl. 164. **S. C.**—*Aultman & Co. v. Salinas*, 44 S. C. 299, 22 S. E. 465. **Va.** *Meade v. Meade*, 111 Va. 451, 69 S. E. 330. **Wis.**—*Jerdee v. State*, 36 Wis. 170; *Home Ins. Co. v. Security Ins. Co.*, 23 Wis. 171.

[a] "It is not the trial by jury, but the right of trial by jury, that is to remain inviolate. If a party cannot waive this right, it is a restraint, and not a privilege. The object . . . was not to protect the citizen from his own acts, but to protect him from the acts of others." *Ex parte Reardon*, 9 Ark. 450.

[b] **Condemnation Proceedings.**—Under a constitution providing that in condemnation proceedings the compensation to the owner shall be ascertained by a jury, the right of a jury trial is a mere privilege which may be waived or dispensed with by the parties. *Chicago, M. & St. P. Ry. Co. v. Hock*, 118 Ill. 587, 9 N. E. 205.

[c] "The word 'shall' in a statute providing that certain issues shall be tried by a jury does not prevent a waiver of trial by the jury, since the word is to be construed in the sense of 'may.'" *Meade v. Meade*, 111 Va. 451, 69 S. E. 330. And see to the same effect, *Whipple v. Eddy*, 161 Ill. 114, 43 N. E. 789.

[d] **Under a Bastardy Act** directing that the issue of parentage shall be tried by a jury, such trial may be waived and the case may be submitted to the court without a jury. *Kanorowski v. People*, 113 Ill. App. 468. To the same effect, see *Jerdee v. State*, 36 Wis. 170.

87. *Wiley v. Edmondson* (Okla.), 133 Pac. 38, holding that an infant is bound by the acts of his attorney and that a waiver by such attorney of a jury is binding upon the infant. But see *Hunter v. Empire State Surety Co.*, 261 Ill. 335, 103 N. E. 1052, holding while an infant cannot waive a trial by jury, a judgment entered

against him in a replevin suit is not void.

87½. 12 STANDARD PROC. 762.

[a] See *People v. McDonald*, 178 Ill. App. 159, a criminal case holding an infant may waive jury trial.

88. **Cal.**—*Farwell v. Murray*, 104 Cal. 464, 38 Pac. 199; *Gillespie v. Benson*, 18 Cal. 409. **Md.**—*Lanahan v. Heaven*, 77 Md. 605, 26 Atl. 866, 20 L. R. A. 759. **N. Y.**—*Hosford v. Carter*, 10 Abb. Pr. 452. **N. C.**—*Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427. **Pa.**—*Lummis v. Big Sandy Land & Mfg. Co.*, 188 Pa. 27, 41 Atl. 319; *Campbell v. Fayette County*, 6 Pa. Co. Ct. 132.

89. **Ark.**—*Chapline v. Robertson*, 44 Ark. 202. **Cal.**—*Farwell v. Murray*, 104 Cal. 464, 38 Pac. 199. **Colo.**—*Leahy v. Dunlap*, 6 Colo. 552. **Ind.**—*Fountain v. Loeb*, 68 Ind. 29; *Shaw v. Kent*, 11 Ind. 80; *Whitestown Milling Co. v. Zahn*, 9 Ind. App. 270, 36 N. E. 653. **Ind. Ter.**—*Warwick v. Kingman*, 2 Ind. Ter. 435, 51 S. W. 1076. **Ky.**—*Burgess v. Jacobs*, 14 B. Mon. 517. **Mo.** *Briggs v. St. Louis & S. F. Ry. Co.*, 111 Mo. 168, 20 S. W. 32; *Tower v. Moore*, 52 Mo. 118. **Mont.**—*Chessman v. Hale*, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410. **Neb.**—*Baker v. Daily*, 6 Neb. 464. **N. Y.**—*Mackellar v. Rogers*, 109 N. Y. 468, 17 N. E. 350; *Kennedy v. Apgar*, 93 N. Y. 539. **N. C.** *Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427; *Armfield v. Brown*, 70 N. C. 27. **Ohio.**—*Bonewitz v. Bonewitz*, 50 Ohio St. 373, 34 N. E. 332, 40 Am. St. Rep. 671. **S. C.**—*Stapp v. National Life & M. Assn.*, 37 S. C. 417, 16 S. E. 134; *Sale v. Meggett*, 25 S. C. 72.

90. *Swan v. Mulherin*, 67 Ill. App. 77.

[a] Under a statute providing that a stipulation in writing waiving a jury must be filed with the clerk, a stipulation submitting the cause to the court for trial on the agreed facts meets the requirements of the statute.

Where the constitution<sup>91</sup> or the statute<sup>92</sup> of the jurisdiction prescribes the manner in which a waiver may be made they exclude any other mode of waiving a trial by jury, though there is authority to the contrary.<sup>93</sup>

Where the waiver of the right to trial by jury is predicated upon an implication, the intention to waive a jury must be clearly manifested,<sup>94</sup> and only such unequivocal acts or conduct as clearly show

"As a case cannot be submitted to the court for trial without waiving a jury, a stipulation to submit, especially if it be on agreed facts, is of itself a sufficient waiver." *Supervisors v. Kennicott*, 103 U. S. 554, 26 L. ed. 486. To the same effect, *Bamberger v. Terry*, 103 U. S. 40, 26 L. ed. 317.

[b] **Record Entry of Submission to Court.**—But under a statute requiring a formal waiver in writing, a record entry to the effect that "the parties submitted the cause to the court for trial without a jury," is not a substantial compliance with the statute. *Ickes v. State*, 63 Ohio St. 549, 59 N. E. 233.

[c] **But under a statute declaring that a failure to appear shall be deemed a waiver of the right to trial by jury, a party who has appeared but fails to plead further does not waive thereby his right to a jury trial.** *Burgess v. Jacobs*, 14 B. Mon. (Ky.) 517.

91. *Brown v. Greer*, 16 Ariz. 222, 141 Pac. 843.

[a] Under a constitutional provision declaring that a trial by jury may be waived "in civil cases where the consent of the parties interested is given thereto," a statute providing that on the first day of the term upon the call of the docket a jury must be demanded or "the right to a trial by jury shall be regarded as waived, is inoperative as being in conflict with the constitution. . . . And unless the parties 'consent' to waive a jury in civil causes, it is error for the court to refuse either party his constitutional right." *Brown v. Greer*, 16 Ariz. 222, 141 Pac. 843.

92. *Cal.*—*Platt v. Havens*, 119 Cal. 244, 51 Pac. 342; *Farwell v. Murray*, 104 Cal. 464, 38 Pac. 199; *Biggs v. Lloyd*, 70 Cal. 447, 11 Pac. 831. *Ind.*—*Shaw v. Kent*, 11 Ind. 80. *N. Y.*—*Moot v. Moot*, 214 N. Y. 204, 108 N. E. 424; *Stafford v. Stafford*, 165 App. Div. 27, 150 N. Y. Supp. 212; *Halgren v. Halgren*, 160 App. Div. 477, 145 N. Y.

Supp. 987. *N. C.*—*Hockaday v. Lawrence*, 156 N. C. 319, 72 S. E. 387. *Ore.* *In re McCormick's Estate*, 72 Ore. 608, 143 Pac. 915, 144 Pac. 425; *American Mortg. Co. v. Hutchinson*, 19 Ore. 334, 24 Pac. 515. *S. C.*—*Sale v. Meggett*, 25 S. C. 72. *S. D.*—*Albien v. Smith*, 19 S. D. 421, 103 N. W. 655. *W. Va.* *Lipsecomb v. Condon*, 56 W. Va. 416, 49 S. E. 392, 107 Am. St. Rep. 938, 67 L. R. A. 670.

But as to "implied waiver," see *infra*, II, F, 4, a, (II), (C).

**Rules of court inconsistent with statute**, see *infra*, II, G, 1.

93. *Poppitz v. German Ins. Co.*, 85 Minn. 118, 88 N. W. 438 (from acts and conduct of parties. But presumptions are against such a waiver); *Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427.

94. *Ala.*—*Stedham's Heirs v. Stedham's Exr.*, 32 Ala. 525. *Cal.*—*Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119. *Ind.*—*Boonville Nat. Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529; *Sheets v. Bray*, 125 Ind. 33, 24 N. E. 357. *Mass.* *Dole v. Wooldredge*, 142 Mass. 161, 7 N. E. 832. *Minn.*—*Hasey v. McMullen*, 109 Minn. 332, 123 N. W. 1078. *N. Y.* *Mackellar v. Rogers*, 109 N. Y. 468, 17 N. E. 350. *Pa.*—*Pusey's Appeal*, 83 Pa. 67. *R. I.*—*Allworth v. Interstate Consol. R. Co.*, 27 R. I. 106, 60 Atl. 834.

[a] Where the parties stipulated that a case be tried in a department of the court which for some time had been engaged in the trial of court cases and had no jury in attendance, it cannot be implied from such stipulation that a jury trial was waived. *Platt v. Havens*, 119 Cal. 244, 51 Pac. 342.

[b] **Consent to Examination of Report of Auditor.**—A party to a common-law action in which an accounting is involved cannot be deemed to have waived a trial by jury by consenting to an order that the report of the auditor shall be examined and passed

an intention to forego the right of trial by jury will be construed as a waiver thereof.<sup>95</sup>

(B.) EXPRESS WAIVER. — The parties to an action may expressly agree to waive their right to a trial by jury,<sup>96</sup> but such waiver must be

upon in vacation by the presiding judge, as such "order might properly have referred to that . . . duty devolving upon the trial judge which requires that . . . he . . . classify the questions . . . stating which exceptions . . . present mere matter of law, and which present questions of fact. . . . Inasmuch as the consent order might have been properly referred to the exercise of this . . . duty . . . a construction of it which imports into the order another significance, the effect of which is to deprive the party of this important right, should not have been adopted; and we consequently hold, that consenting to such an order is not equivalent to a waiver of trial by jury." *Hudson v. Hudson*, 98 Ga. 147, 26 S. E. 482.

[c] An admission of the facts upon which a motion to dismiss a suit is based cannot be construed as a waiver of trial by jury or consent to try the cause before the court without a jury. *Moore v. Helms*, 74 Ala. 368.

[d] That the defendant excepted to the findings of fact and to conclusions of law cannot be regarded as a waiver of a trial by jury or as estopping him from taking the ground on his appeal that the trial without a jury was irregular. *Fasnacht v. Stehn*, 5 Abb. Pr. N. S. (N. Y.) 338.

[e] Where the record does not show that the cause was referred with the consent of a party, it will not be presumed that there was such consent. "Whenever a party is concluded by his own act and held to have waived any right or privilege, such act should not be left doubtful, but should plainly and explicitly appear. Every reasonable presumption should be made against the waiver, especially when it relates to a right or privilege deemed so valuable as to be secured by the constitution." *United States v. Rathbone*, 2 Paine 578, 27 Fed. Cas. No. 16,121.

95. Mass.—*Dole v. Wooldredge*, 142 Mass. 161, 7 N. E. 832. Minn.—*Popitz v. German Ins. Co.*, 85 Minn. 118, 88 N. W. 438. Neb.—*Schumacher v. Crane-Churchill Co.*, 66 Neb. 440, 92 N.

W. 609. Tenn.—*Ferris v. Bloom*, 132 Tenn. 466, 178 S. W. 1112.

[a] "Not only has the legislature declared how a party may waive the benefit of the provision of the constitution in reference to trial by jury, but the courts have from time to time declared that the waiver may be made by conduct inconsistent with the intent to insist upon it. Where a party omits at an opportune moment to declare his purpose to claim the constitutional protection and thereby so misleads his adversary as that to insist upon it at a later stage of the proceeding would place the opposing party at a disadvantage by delaying the adjudication of his rights, it is competent for the courts to so far restrict and regulate the rights as to prevent needless or wanton infringements upon the rights of others." *Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427.

[b] A trial judge ought not to be technical "in finding causes for a waiver. If he has any doubt or is not able to certify in positive terms, that no jury was demanded at the time provided for by statute, he should entertain the demand." *Pontiac & Tapeer Plank-Road Co. v. Hopkinson*, 69 Mich. 10, 36 N. W. 797.

[c] Failure To Serve Venire. Where a party undertakes to serve the venire and fails to do so, such conduct is equivalent to a waiver of trial by jury. *Coon v. Snyder*, 19 Johns. (N. Y.) 384. To the same effect, *Daniels v. Scott*, 12 N. J. L. 27.

[d] Where a rule of court requires that a jury is demanded upon the calling of the trial calendar in all cases answered "ready" and it does not appear that the case was answered "ready" by either party, the record is entirely consistent with the view that the parties were not ready to go to trial and that a jury was not waived. *People v. Metropolitan Surety Co.*, 164 Cal. 174, 128 Pac. 324, Ann. Cas. 1914B, 1181.

96. Ind. Ter.—*Sharrock v. Kreiger*, 6 Ind. Ter. 466, 98 S. W. 161. Ia. *Timonds v. Hunter*, 169 Iowa 598, 151 N. W. 961. Minn.—*Wittenberg v. Ons-*

strictly construed and cannot be extended beyond its agreed scope.<sup>97</sup> But where the parties intend to limit the operation of a waiver, such intention should be clearly expressed in the stipulation waiving a jury.<sup>98</sup> Where the conditions of a stipulation waiving the right to trial by jury are not disclosed by the record, the stipulation will be presumed to have been general.<sup>99</sup> The stipulation generally need not be in writing<sup>1</sup> unless the statute requires it.<sup>2</sup>

gard, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141.

[a] Where the parties agree to waive the jury upon certain issues joined and the plaintiff subsequently, by leave of the court, files an additional count to the complaint, raising new issues, it is error to force the parties to trial without a jury if demanded by either. *Gage v. Commercial Nat. Bank*, 86 Ill. 371.

97. *Gage v. Commercial Nat. Bank*, 86 Ill. 371.

[a] Where a party stipulates to waive a jury upon "issues joined" and there is subsequently a continuance of the cause to another term of the court and the pleadings are so amended as to raise, in part, new and different issues, such stipulation ceases to be operative and binding and it is error to deny a trial by jury, when demanded under such circumstances. *Gage v. Commercial Nat. Bank*, 86 Ill. 371.

[b] Where defendants agree to submit a cause to the court upon the evidence introduced and the plaintiffs upon discharge of the jury present new evidence, it cannot be claimed that such waiver of trial by jury embraced the evidence introduced by plaintiffs thereafter. "The introduction of further evidence by the plaintiffs after the jury had been discharged, and the cause as it then stood had been submitted to the decision of the court by agreement of the parties . . . was in violation of such agreement and prejudicial to the defendants. The defendants had a right to a jury trial upon the new facts so put in evidence by the plaintiffs and upon any evidence which they might offer in defense of such new matter; and they had not waived such right." *Hewitt v. Week*, 51 Wis. 368, 8 N. W. 269.

98. *Heacock v. Lubukee*, 108 Ill. 641.

[a] **Not Conditioned on Immediate Trial.**—A stipulation to waive a trial by jury will not be held to be conditioned upon an immediate trial where no such limitation appears in the stip-

ulation. *Heacock v. Lubukee*, 108 Ill. 641.

[b] **Does Not Refer Alone to Judge Then Presiding.**—(1) And a stipulation to submit a cause to the court without a jury cannot be claimed to refer only to the trial judge then presiding, in the absence of an express agreement to that effect. *Lanahan v. Heaver*, 77 Md. 605, 26 Atl. 866, 20 L. R. A. 759. (2) And where in waiving a jury trial the parties agreed to submit the cause to the judge then presiding over the court, if upon death of such judge the parties proceed to trial before his successor, it is too late to insist after judgment that the agreement to waive a jury trial terminated with the death of the former judge. *Cowsill v. Vipond Const. Co.*, 250 Pa. 32, 95 Atl. 317.

As to effect in subsequent trial, see *infra*, II, F, 4, a, (III).

99. *Boslow v. Shenberger*, 52 Neb. 164, 71 N. W. 1012, 66 Am. St. Rep. 487.

1. "The right to a trial by jury is regarded as something sacred, of which no person should be deprived without his consent. The waiver of jury need not, however, be by written stipulation, and as a matter of fact is rarely ever done in that manner. The parties usually express themselves on the subject in open court when the case is called, and the court sets the case down for trial, either with or without jury, in accordance with such announcements. While in this case the record does not show that the counsel for either party expressly announced a waiver of jury, yet the court evidently understood that they both desired to waive a jury, and so stated to them both in open court, and they could not have failed to understand that he intended to try the case on its merits. . . . We think that the record abundantly sustains the recital in the journal entry of judgment that a jury was waived by both parties." *Lanahan v. Landrum* (Okla.), 151 Pac. 479.

2. *Eastern Oil Co. v. Holcomb*, 212 Fed. 126, 128 C. C. A. 642.

(C.) IMPLIED WAIVER.<sup>3</sup> — A party who elects to avail himself of a remedy which does not entitle him to a trial by jury ordinarily is deemed to have waived his right to such a trial.<sup>4</sup> Hence, a plaintiff bringing his suit in equity waives thereby his right to trial by jury.<sup>5</sup> A party setting a cause for trial before a court without a jury waives thereby his right to trial by jury;<sup>6</sup> the same result follows where the cause is set for trial before a court of which a jury forms no part,<sup>7</sup>

[a] A recital in a judgment "that both plaintiff and defendant announcing 'Ready for trial' and formally waiving a jury in open court," is not such a recital as will show that a jury waived by a stipulation in writing. *Columbus Compress Co. v. United States F. & G. Co.*, 186 Fed. 487, 108 C. C. A. 465.

[b] But notwithstanding such statute it has been held that the parties may waive a jury by implied consent. *Kearney v. Case*, 12 Wall. (U. S.) 275, 20 L. ed. 395; *Brock v. Fuller Lumber Co.*, 153 Fed. 272, 82 C. C. A. 402.

3. Waiver by failure to demand in the manner and at the time required, see *supra*, II, F, 2, b and c.

4. U. S.—*Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. ed. 649; *Book v. Justice Min. Co.*, 58 Fed. 827. Cal.—*Russell v. Elliott*, 2 Cal. 245. Ill. *Garrity v. Hamburger Co.*, 136 Ill. 499, 27 N. E. 11. Mass.—*Citizens' Gaslight Co. v. Inhab. of Wakefield*, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457. Mo.—*Nelson v. Betts*, 21 Mo. App. 219. N. H.—*Plummer v. Meserve*, 54 N. H. 166. N. J.—*Beattie v. David*, 40 N. J. L. 102. N. C.—*Armfield v. Brown*, 73 N. C. 81, 70 N. C. 27. Ohio.—*Bonewitz v. Bonewitz*, 50 Ohio St. 373, 34 N. E. 332, 40 Am. St. Rep. 671; *Strauss v. Cooch*, 47 Ohio St. 115, 24 N. E. 1071.

5. U. S.—*In re Standard T. & El. Co.*, 157 Fed. 106; *Southern Development Co. v. Silva*, 89 Fed. 418. Ia. *Slaughter v. McManigal*, 138 Iowa 643, 116 N. W. 726. N. Y.—*Killeen v. Kieran*, 73 Misc. 21, 130 N. Y. Supp. 647.

But see *Ward v. Hill*, 4 Gray (Mass.) 593.

[a] "The constitutional right of trial by jury may be waived, and the bringing of an action of a distinctly equitable character, . . . is a clear waiver, so far as the plaintiff is concerned, of that mode of trial, although

upon the facts he may be entitled to either legal or equitable relief. The court in determining the mode of trial, may, as to him, be governed by the nature of the action as stated in the complaint. The defendant does not stand in the same position. He cannot be deprived of a jury trial in a proper case, because the plaintiff has demanded equitable instead of legal relief." *Davison v. Associates of Jersey Co.*, 71 N. Y. 333. To the same effect, *Turnes v. Brenekle*, 249 Ill. 394, 94 N. E. 495.

6. N. Y.—*Mackellar v. Rogers*, 109 N. Y. 468, 17 N. E. 350; *Werner v. Mohawk C. Milk Co.*, 152 App. Div. 956, 136 N. Y. Supp. 585; *Collins v. Collins*, 59 Hun 620, 13 N. Y. Supp. 28; *Third Nat. Bank v. Shields*, 55 Hun 274, 8 N. Y. Supp. 298. Ohio. *Ellithorpe v. Buck*, 17 Ohio St. 72. S. D.—*McEwen v. Gotthelf*, 31 S. D. 180, 140 N. W. 264; *Webster v. White*, 8 S. D. 479, 66 N. W. 1145.

[a] Where plaintiff sets the case down "not for the jury" he thereby declares of record that there is nothing in the case which he claims to have tried by the jury and, if damages are to be assessed, he thereby waives the assessment of them by the jury and submits that question to the court. *Briggs v. Gleason*, 32 Vt. 472.

[b] But where the cause is set by the adverse party and the party desiring a jury asks for several continuances, such conduct does not constitute a waiver of trial by jury. *Barker v. Barker*, 166 App. Div. 863, 152 N. Y. Supp. 356.

7. *Mackellar v. Rogers*, 109 N. Y. 468, 17 N. E. 350.

[a] Where the parties notice a cause for the equity term, the right to trial by jury is waived by them and the cause may be tried by the court without a jury "unless the judge presiding shall deem it proper, in his discretion to impanel a jury for the

or before a court in which no jury can be had.<sup>8</sup> An order of the court made by consent of the parties and setting a case for trial without a jury has the same effect.<sup>9</sup>

A party failing to object to an order placing a cause on the calendar for trial by the court, likewise is deemed to have waived his right to trial by jury.<sup>10</sup> But where equitable relief as well as legal is demanded in the complaint a party does not waive his right to trial by jury by noticing the cause for trial at a court term.<sup>11</sup> Nor does the consent thereto in such cases operate as a waiver of trial by jury.<sup>12</sup>

A transfer of a cause triable by jury to the equity docket without objection constitutes a waiver of the right to trial by jury,<sup>13</sup> unless,

trial of the issues." *Boyd v. Boyd*, 12 Misc. 119, 33 N. Y. Supp. 74.

8. See *Lewis v. Baca*, 5 N. M. 289, 21 Pac. 343.

[a] Where "the parties by consent set down a case for trial at a day when no jury is to be expected no complaint can be made to the court proceeding with the trial without the aid of a jury." *Cole v. Terrell*, 71 Tex. 549, 9 S. W. 668.

[b] On **Appeal**.—Where plaintiff elects to sue in a court in which there is no jury, his election does not deprive him of his right to trial by jury on appeal. *Lewis v. Baca*, 5 N. M. 289, 21 Pac. 343.

9. *St. Paul Distilling Co. v. Pratt*, 45 Minn. 215, 47 N. W. 789.

[a] Where the record (1) does not show that such order was made by consent of the parties it will be presumed after judgment that it was so made. *Tabler v. Anglo-American Assn.*, 17 Ky. L. Rep. 815, 32 S. W. 602. (2) But compare *Hasey v. McMullen*, 109 Minn. 332, 123 N. W. 1078, holding that a waiver of a jury trial by consenting that the cause be set for trial by the court will not be implied. It is said there: "A party cannot be held to have waived his constitutional right to a jury trial unless an intention to do so appears affirmatively or by necessary inference from unequivocal acts or conduct."

10. *Donahue v. McCosh*, 81 Iowa 296, 46 N. W. 1008; *Owens v. Reed*, 36 S. D. 184, 153 N. W. 1093.

11. *Wheelock v. Lee*, 74 N. Y. 495; *Baylis v. Bullock Elec. Co.*, 59 App. Div. 576, 69 N. Y. Supp. 693. But see *Cogswell v. New York, N. H. & H. R. Co.*, 105 N. Y. 319, 11 N. E. 518; *Shenfield v. Bernheimer*, 63 Hun 630,

17 N. Y. Supp. 881, 43 N. Y. St. 383; *Jacob v. Schiff*, 149 N. Y. Supp. 273; and *supra*, II, E, 4, e.

[a] In *Tietzel v. Tietzel*, 122 App. Div. 873, 107 N. Y. Supp. 878, which was an action for divorce, it is said: "The right to a jury trial . . . should not be deemed . . . waived by noticing the case for trial at special term. . . . The special term is the proper place for the trial of equity suits generally. Unless and until a demand has been made for a jury trial of the issue of adultery the case could not be properly noticed for a jury trial term. . . . There is nothing in the law nor in the practice which . . . compels either party to elect in advance of putting the case on the special term calendar whether he will insist upon his right to a jury trial or not."

12. *Betz v. Newport P. M. Assn.*, 6 Ky. L. Rep. 222.

13. *Ala.*—*Blankenship v. Parsons*, 113 Ala. 275, 21 So. 71. *Ind. Ter.* *Sharrock v. Kreiger*, 6 Ind. Ter. 466, 98 S. W. 161. *Ia.*—*Vincent v. German Ins. Co.*, 120 Iowa 272, 94 N. W. 458; *Gibbs Bros. v. Coonrod*, 54 Iowa 736, 7 N. W. 146; *Richmond v. Dubuque*, etc. R. Co., 33 Iowa 422. *Ky.*—*Smith v. Moberly*, 15 B. Mon. 70. *Wash.* *Zilke v. Woodley*, 36 Wash. 84, 78 Pac. 299.

[a] **Transfer After Withdrawal of Adverse Party's Demand for Jury.** Where, although "after the withdrawal of the plaintiff's request for a jury trial the clerk had taken the case from the list of cases for trial by jury, and had placed it upon the jury waived list without any special order of court, the defendant made no complaint, and no effort to have the case retransferred to the list of cases for

perhaps, in a case where there are equitable issues to be tried by the court.<sup>14</sup> Where a cause through mistake has been placed upon the equity docket of the court and no motion is made for its transfer to the law docket the right to trial by jury is waived.<sup>15</sup> A party proceeding to trial before a court without a jury,<sup>16</sup> or failing to object

trial by jury until the case was actually reached for trial, . . . the waiver may be found from conduct the only explanation of which, other than a design to obstruct the adverse party's right to obtain justice in the courts 'promptly and without delay' is an assent to a trial without a jury." *Stevens v. McDonald*, 173 Mass. 382, 53 N. E. 885, 73 Am. St. Rep. 300.

14. See *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440, 92 N. W. 609.

[a] "The whole case is not of necessity triable to the court without a jury because there are incidental issues which are equitable in their nature. . . . By asking for a transfer, plaintiff merely asserted that there were equitable issues proper for the court to decide. He did not assert that there was nothing for a jury." *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440, 92 N. W. 609.

15. Ark.—*Gerstle v. Vandergriff*, 72 Ark. 261, 79 S. W. 776. Ia.—*Richmond v. Dubuque, etc. Co.*, 33 Iowa 422. Mass.—*Walcott v. O'Connor*, 163 Mass. 21, 39 N. E. 345. Neb.—*Davis v. Snyder*, 45 Neb. 415, 63 N. W. 789. Wash. *Frye v. Hill*, 14 Wash. 83, 43 Pac. 1097.

[a] "That a law action may have found its way to the equity side of the docket does not defeat the jurisdiction of the court to try the case, and if either party to the action desires it tried as a law action a specific request to that effect should be made upon the court." *Goble v. Swobe*, 64 Neb. 338, 90 N. W. 919.

16. Ark.—*Love v. Bryson*, 57 Ark. 589, 22 S. W. 341. Ill.—*Wolf v. Bolinger*, 62 Ill. 368; *Pike v. Pike*, 112 Ill. App. 243. Ia.—*Bennett Sav. Bank v. Smith*, 171 Iowa 405, 152 N. W. 717; *McEwen v. Fletcher*, 164 Iowa 517, 146 N. W. 1. Kan.—*Carlson v. Allen*, 90 Kan. 457, 135 Pac. 669. Md.—*Lanahan v. Heaver*, 77 Md. 605, 26 Atl. 866, 20 L. R. A. 759. Mass.—*Bass v. Haverhill Mut. Fire Ins. Co.*, 10 Gray 400. Mo.—*Bruner v. Marcum*, 50 Mo. 405. N. H.—*Plummer v. Meserve*,

54 N. H. 166; *Beebe v. Dudley*, 30 N. H. 34. N. M.—*Territory v. Bernalillo*, 5 N. M. 1, 16 Pac. 855. N. Y. *Howell v. Wright*, 122 N. Y. 667, 25 N. E. 912; *Bensen v. Manhattan R. Co.*, 14 App. Div. 442, 43 N. Y. Supp. 914. N. C.—*Pasour v. Lineberger*, 90 N. C. 159; *Crump v. Thomas*, 85 N. C. 272. Ohio.—*Bonewitz v. Bonewitz*, 50 Ohio St. 373, 34 N. E. 332, 40 Am. St. Rep. 671. Pa.—*Hayes v. Grier*, 4 Binn. 80. Wash. Ter.—*Walla Walla v. Moore*, 2 Wash. Ter. 184, 2 Pac. 187.

[a] Where the statute requires a stipulation in writing (1) to waive trial by jury, the submission of a cause to a trial without a jury will be held equivalent to such stipulation. *Butterly v. Deering*, 158 App. Div. 181, 142 N. Y. Supp. 1050. (2) A party who has submitted his evidence in support of his claim for damages to an auditor appointed by the court, cannot thereafter be heard to say that he did not file an agreement as required by the statute in case of waiver of a jury; "to allow a party at whose instance a proceeding has been appointed, and who has taken advantage of it by pursuing it, to afterwards defeat it, against the wishes of the opposing party, by alleging his own default in the matter of filing a formal written agreement, would be to suffer the strict letter of the law to overcome its clear purpose." *Pittsburgh's Petition*, 243 Pa. 392, 90 Atl. 329, 52 L. R. A. (N. S.) 262.

[b] Implied Consent.—Under a statute providing that a trial by jury may be waived by consent of a party the submission of a trial of a cause to the court without a jury constitutes a consent such as is contemplated by the statute. *Bonewitz v. Bonewitz*, 50 Ohio St. 373, 34 N. E. 332, 40 Am. St. Rep. 671.

[c] A party does not lose or waive a trial by jury. *But by merely consenting that the cause might be consolidated with another proceeding in which no right to a jury exists, a party does not waive the right to a jury*

to the trial of the cause by the court<sup>17</sup> ordinarily thereby waives his right to trial by jury. And one party cannot avail himself of an objection to a trial without a jury made by another party.<sup>18</sup>

On the other hand, a party submitting without objection to a trial by a jury waives his right to a trial of the cause by the court without a jury.<sup>19</sup> But where a party objects to a trial by jury on the ground that the action is of equitable nature, he does not waive any right by going to trial before the jury after the court overruled his objection to such trial.<sup>20</sup> Nor does a party who upon rejection of his demand for a jury proceeds to trial before the court thereby waive his right to trial by jury.<sup>21</sup>

trial. *Orr v. Miller*, 98 Ind. 436.

17. *Ala.*—*Moore v. Crosthwait*, 135 Ala. 272, 33 So. 28. *Cal.*—*Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22. *Ill.*—*Washington v. Louisville & N. R. Co.*, 136 Ill. 49, 26 N. E. 653; *Chicago, S. F. & C. Ry. Co. v. Ward*, 128 Ill. 349, 18 N. E. 828, 21 N. E. 562. *Ia.*—*Timonds v. Hunter*, 169 Iowa 598, 151 N. W. 961; *Davidson v. Wright*, 46 Iowa 383. *Kan.*—*Hanson v. Hanson*, 86 Kan. 622, 122 Pac. 100; *Feight v. Thisler*, 84 Kan. 185, 114 Pac. 249. *La.*—*Wallace v. Smith*, 8 La. Ann. 376; *La Blane v. Johns*, 4 Mart. (N. S.) 635. *Mass.*—*Walcott v. O'Connor*, 163 Mass. 21, 39 N. E. 345. *Minn.*—*Banning v. Hall*, 70 Minn. 89, 72 N. W. 817; *Peterson v. Ruhnke*, 46 Minn. 115, 48 N. W. 768. *Miss.*—*Lewis v. Garrett's Admsrs.*, 5 How. 434. *N. J.*—*Joy & Seliger Co. v. Blum*, 55 N. J. L. 518, 26 Atl. 861. *N. Y.*—*Barnes v. Perine*, 12 N. Y. 18; *Eysaman v. Small*, 61 Hun 618, 15 N. Y. Supp. 288, 40 N. Y. St. 30. *Ohio.*—*Ellithorpe v. Buck*, 17 Ohio St. 72. *Wash.*—*Zilke v. Woodley*, 36 Wash. 84, 78 Pac. 299. *Wis.*—*Baumbach Co. v. Hobkirk*, 104 Wis. 488, 80 N. W. 740.

[a] A defendant going to trial before the special term without raising any question as to the power of the court to hear the cause cannot in his request for findings claim for the first time that he was entitled to a trial by jury, as he had waived his right thereto. *Rogers v. Straub*, 75 Hun 264, 26 N. Y. Supp. 1066, 58 N. Y. St. 287.

[b] Where a cause is tried as though it were an equitable action and a jury rendered an advisory verdict without objection or exception to such mode of trial, the right of trial by jury is waived thereby even if the

action was in fact one in which the parties had a constitutional right to trial by jury. *Baumbach Co. v. Hobkirk*, 104 Wis. 488, 80 N. W. 740.

[c] Where legal as well as equitable issues are involved in a cause, a defendant who permits the court without objection to hear all the issues together, thereby waives his right to a trial by jury of the legal issues. *Pike v. Martindale*, 91 Mo. 268, 1 S. W. 858; *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440, 92 N. W. 609.

18. *Kennedy v. Dodge*, 19 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 360.

19. *Ga.*—*Taffe v. State*, 90 Ga. 459, 16 S. E. 204. *Minn.*—*Finch v. Green*, 16 Minn. 355. *N. Y.*—*Dayhoush v. Enos*, 5 N. Y. 531; *Danziger v. Metropolitan El. Ry. Co.*, 81 Hun 5, 30 N. Y. Supp. 580, 62 N. Y. St. 581. *N. C.*—*Leggett v. Leggett*, 88 N. C. 108. *Wash.*—*Weigle v. Cascade Fire & M. Ins. Co.*, 12 Wash. 449, 41 Pac. 53.

[a] An acquiescence in the calling and swearing of a jury amounts to a consent that the cause be tried by a jury. *Brown v. Lawler*, 21 Minn. 327.

[b] Even though a cause is not properly triable by jury a party cannot complain where a jury is impaneled by agreement or his own request. *State v. Powell*, 10 Neb. 48, 4 N. W. 217.

20. *Fromme v. Davidow*, 71 Misc. 467, 128 N. Y. Supp. 745; *Fraedrich v. Flieth*, 64 Wis. 184, 25 N. W. 28.

21. *In re Robinson's Est.*, 106 Cal. 493, 39 Pac. 862; *Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119; *Hinchly v. Machine*, 15 N. J. L. 476.

[a] **Waiving Demand.**—(1) But where upon demanding a trial by jury a party proceeds to try a case before the court as if no such demand was made, the right to trial by jury is

In some jurisdictions the statute provides that a party failing to appear at the trial of a cause thereby waives his right to trial by jury.<sup>22</sup> Under such statute a party who though appearing at the trial declines to participate therein is deemed to have waived his right to trial by jury.<sup>23</sup> The filing of an answer does not operate as an appearance at the trial within the meaning of such statute.<sup>24</sup> So too, a failure to plead further, if required, is not a failure to appear at the trial within the meaning of such a statute.<sup>25</sup> And in the absence of such a statute, the mere absence of a party at the trial does not work a forfeiture of trial by jury, where the demand therefor has been duly made.<sup>26</sup>

clearly waived thereby. *Alexander v. Mentzer*, 91 Wash. 552, 158 Pac. 75. (2) Thus where the plaintiff having demanded a trial by jury proceeds to hearing upon a plea of abatement before the judge without objection and without insisting upon a trial by jury as to the issues raised by the plea the right to a jury trial as to that point is waived. *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1.

[b] **Ruling Reserved.**—Where defendants demand a jury trial and the court does not then pass upon the question but reserves its decision, and the parties submit the case to the court, they must be held to have waived a jury trial. "The defendants should have insisted upon a ruling by the judge upon their right to a jury trial, and if he ruled adversely to them, they should then have taken an exception. If he declined to rule at all or decided to reserve his decision, they should have excepted to this; or as soon as the nature of the case was developed by the opening or the evidence, they should have insisted upon a ruling and taken their exception. . . . It would not be just to allow the defendants, under such circumstances, to go through the trial and take their chances of succeeding, and then, after an adverse decision, raise the question that they ought to have had a jury trial." *Hand v. Kennedy*, 83 N. Y. 149.

22. *Cal.*—*McGuire v. Drew*, 83 Cal. 225, 23 Pac. 312; *Waltham v. Carson*, 10 Cal. 178; *Zane v. Crowe*, 4 Cal. 112. *Colo.*—*Cerussite Min. Co. v. Anderson*, 19 Colo. App. 307, 75 Pac. 158. *Ind.*—*Love v. Hall*, 76 Ind. 326; *Willets v. Ridgway*, 9 Ind. 367. *Ia.* *Fox v. Nolan*, 165 Iowa 302, 145 N. W. 491; *Clute v. Hazleton*, 51 Iowa

355, 1 N. W. 672. *Kan.*—*Weems v. McDavitt*, 49 Kan. 260, 30 Pac. 481; *Green v. Bulkley*, 23 Kan. 130; *Cohen v. Hamill*, 8 Kan. 621. *Ky.*—*Burgess v. Jacobs*, 14 B. Mon. 517. *Mo.*—*Jones v. St. Joseph Fire & M. Ins. Co.*, 55 Mo. 342; *Tower v. Moore*, 52 Mo. 118. *Neb.*—*In re Walker*, 61 Neb. 803, 86 N. W. 510. *N. Y.*—*Kilpatrick v. Carr*, 3 Abb. Pr. 117; *Giberton v. Fleischel*, 5 Duer 652. *Ohio.*—*Springfield, etc. Co. v. Western R. Const. Co.*, 49 Ohio St. 681, 32 N. E. 961. *Okla.*—*Farmers' & M. Ins. Co. v. Cuff*, 29 Okla. 106, 116 Pac. 435, 35 L. R. A. (N. S.) 892. *Tex.*—*Harris v. Kellum & Rotan Co.* (Tex. Civ. App.), 43 S. W. 1027. *Wyo.*—*Pointer v. Jones*, 15 Wyo. 1, 85 Pac. 1050.

[a] **The Party Appearing, However, May Insist Upon a Trial by Jury.** The statute "provides for a waiver, which implies a voluntary relinquishment of a right, not the enforcement of one; . . . The plaintiffs were not bound to accept the defendants' waiver by his failing to appear." *Hendricks v. Carpenter*, 4 Robt. (N. Y.) 665.

[b] **A failure to appear before a referee appointed in the cause is not a waiver of a jury under the statute.** *Kelley v. Simonds*, 57 N. H. 308.

23. *Tower v. Moore*, 52 Mo. 118.

24. *Zane v. Crowe*, 4 Cal. 112.

25. *Burgess v. Jacobs*, 14 B. Mon. (Ky.) 517.

26. *Fitzgerald v. Wygal*, 24 Tex. Civ. App. 372, 59 S. W. 621; *Haskins v. Wilson*, 5 Wis. 106.

[a] "The defendant having demanded a jury was entitled to it, and though he left and absented himself from the court room and from further subsequent proceedings in the case, it was no waiver of the jury." *Boatz*

In some jurisdictions where each party requests the court to direct a verdict in his favor and requests no other instructions, they are deemed to waive the right to the decision of a jury,<sup>27</sup> but in other jurisdictions a motion for a directed verdict does not constitute a waiver of the right to trial by jury.<sup>28</sup> And where such requests are coupled with a request to submit certain issues to the jury, it is held no waiver results.<sup>29</sup>

It has also been held that a defendant, who upon denial of his motion for a nonsuit declines to offer any evidence, waives thereby the right to trial by jury.<sup>30</sup>

**Reference.** — The consent<sup>31</sup> of a party to an order of the court to

*v. Berg*, 51 Mich. 8, 16 N. W. 184.

[b] Under a statute providing that when one party has applied for a jury trial, he shall not be permitted to withdraw such application without the consent of the adverse party, the absence of the latter party at the trial of the cause will not deprive him of a trial by jury. *Jones v. Hamby* (Tex. Civ. App.), 29 S. W. 75.

[c] But where the jury fee has been voluntarily withdrawn by a party and he fails to appear at the trial, he cannot claim that he was deprived of a jury trial, as it was attributable to his own conduct. *Harris v. Kellum & Rotan Inv. Co.* (Tex. Civ. App.), 43 S. W. 1027.

27. **U. S.**—*Beuttell v. Magone*, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. ed. 655. **Ark.**—*St. Louis S. W. Ry. Co. v. Mulkey*, 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339. **N. Y.** *Sweetland v. Buell*, 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 676; *Thompson v. Simpson*, 128 N. Y. 270, 28 N. E. 627.

[a] **Motion for Directed Verdict.** Where a party assuming that there is no question in the case but one of law moves the court to direct a verdict in his favor and the court overrules the motion and directs a verdict for the opposing party, he cannot be heard to say that the cause should have been submitted to the jury. *Grigsby v. Western Union Tel. Co.*, 5 S. D. 561, 59 N. W. 734.

28. *Hogan v. Milburn*, 44 Okla. 641, 146 Pac. 5; *Farmers' Nat. Bank v. McCall*, 25 Okla. 600, 106 Pac. 866, 26 L. R. A. (N. S.) 217.

[a] "Under our practice a request to withdraw a case from the jury could scarcely be converted into an application to the court to take the place

of the jury and decide disputed questions of fact. After the court refuses to withdraw the case from the jury it is not requisite, in our practice, for the party to ask the court to allow the jury to decide it, which the court has already done by denying the motion. When one party asks the court to direct a verdict in his favor, the fact that the other party makes a similar motion cannot in any way affect the rights of the first party. If that were true, no party could make a motion for a directed verdict without waiving his right to trial by jury if his opponent chose to make the same motion." *Wolf v. Chicago Sign Printing Co.*, 233 Ill. 501, 84 N. E. 614.

29. *Poppitz v. German Ins. Co.*, 85 Minn. 118, 88 N. W. 438.

30. *Patty v. Salem Flouring Mills Co.*, 53 Ore. 350, 96 Pac. 1006, 98 Pac. 521, 100 Pac. 298.

[a] By "moving for a nonsuit after the plaintiff has introduced his evidence and rested, the defendant waives his right to a jury trial, on the ground that the proof is insufficient to make a case adequate to be submitted to the jury. When the nonsuit is denied, and an exception saved, if the defendant declines to produce any evidence and does not request that the cause be submitted to the jury, he insists upon his waiver by adhering to the position thus assumed. In such a case, the plaintiff, by moving for a directed verdict joins in the waiver." *Patty v. Salem Mills Co.*, 53 Ore. 350, 96 Pac. 1106, 98 Pac. 521, 100 Pac. 298.

31. **U. S.**—*Kelly v. Smith*, 1 Blatchf. 290, 14 Fed. Cas. No. 7,675. **Fla.** *Rivas v. Summers*, 33 Fla. 539, 15 So. 319. **Ill.**—*Garrity v. Hamburger Co.*, 136 Ill. 499, 27 N. E. 11. **Ind.**—*Good-*

refer a cause, or a failure to except to such order,<sup>32</sup> ordinarily are deemed a waiver of the right to trial by jury. Where some of the

win *v. Hedrick*, 24 Ind. 121. **Ind. Ter.** Walsh *v. Tyler*, 2 Ind. Ter. 52, 47 S. W. 308. **Ia.**—*In re Hooker's Estate*, 75 Iowa 377, 39 N. W. 652; *Hewitt v. Egbert*, 34 Iowa 485. **Ky.** *Reece v. West*, 145 Ky. 331, 140 S. W. 543; *Blanton v. Howard*, 25 Ky. L. Rep. 929, 76 S. W. 511. **La.**—*Hatch v. Watkins*, 1 Mart. (N. S.) 154. **Minn.**—*Deering v. McCarthy*, 36 Minn. 302, 30 N. W. 813. **N. J.**—*Beattie v. David*, 40 N. J. L. 102. **N. Y.**—*Corbett v. Fleming*, 134 App. Div. 544, 119 N. Y. Supp. 543; *Lee v. Tillotson*, 24 Wend. 337, 35 Am. Dec. 624; *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 105 App. Div. 88, 93 N. Y. Supp. 849. **N. C.**—*Simpson v. Seronce*, 152 N. C. 594, 67 S. E. 1060; *Collins v. Young*, 118 N. C. 265, 23 S. E. 1005; *Grant v. Reese*, 82 N. C. 72. **Ohio.**—*Averill Coal & O. Co. v. Verner*, 22 Ohio St. 372; *Butler v. Lee*, 13 Ohio Dec. 734, 2 Cin. Rep. 5. **Okla.** *Jones v. Balsley*, 27 Okla. 220, 111 Pac. 942. **R. I.**—*Doane v. Simmons*, 31 R. I. 530, 77 Atl. 775. **S. C.**—*Williams v. Weeks*, 70 S. C. 1, 48 S. E. 619; *Rhodes v. Russell*, 32 S. C. 585, 10 S. E. 828; *Trenholm v. Morgan*, 28 S. C. 268, 5 S. E. 721. **Wash.**—*Park v. Mighell*, 7 Wash. 304, 35 Pac. 63.

[a] Where a party not only does not note an exception to an order of reference but signifies his consent thereto, it is too late to demand thereafter a jury trial upon any issue in the cause. *Bruce v. Carolina Queen Consol. Min. Co.*, 147 N. C. 642, 61 S. E. 579.

[b] **Consent to Reference to Particular Person.**—But a party by consenting to an order to refer the cause to a particular referee does not waive his right to a trial by a jury, if for any reason the person consented to was not named as referee. *Newman v. Benedict*, 121 N. Y. Supp. 921.

[c] **Consent Must Appear of Record.** Under a statute providing that the consent to a reference must be filed with the court, it is essential that the consent appears of record in order to operate as a waiver. "The order of reference had the direct effect to deprive the appellant of a constitutional right. The waiver of such right

must appear in the manner prescribed by law." *Smith v. Pollock*, 2 Cal. 92.

[d] **Consent Inferred.**—An order of reference made by the court in the presence of the parties and their counsel who did not object thereto is not a compulsory reference, but a reference made by consent of the parties. *Smith v. Hicks*, 108 N. C. 248, 12 S. E. 1035.

[e] **Where, after order of reference the parties agree to try the cause before the court instead of the referee, the right to demand a jury trial is not revived by such agreement.** *Lapham v. Kansas & Tex. Oil Co.*, 87 Kan. 65, 123 Pac. 863, Ann. Cas. 1913D, 813.

[f] **In New Hampshire** (1) under a statute, consent to an order of reference of itself is not a waiver of the right to trial by jury. *Smith v. Fellows*, 58 N. H. 169. (2) But where the consent is coupled with an agreement to waive trial by jury, a party will not be relieved from such waiver upon the ground that the statute provides for a jury trial notwithstanding the consent to a reference. *Marsh v. Brown*, 57 N. H. 173.

32. **Ark.**—*Goodrum v. Merchants & Planters Bank*, 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914A, 511. **Ill.** *Garrity v. Hamburger Co.*, 136 Ill. 499, 27 N. E. 11. **Ind.**—*Hauser v. Roth*, 37 Ind. 89. **Ky.**—*Blanton v. Howard*, 25 Ky. L. Rep. 929, 76 S. W. 511. **Mass.** *Freeland v. Wright*, 154 Mass. 492, 28 N. E. 678; *Parker v. Nickerson*, 137 Mass. 487. **N. Y.**—*Baird v. New York*, 74 N. Y. 382. **N. C.**—*Nissen v. Genesee Gold Min. Co.*, 104 N. C. 309, 10 S. E. 512; *Atkinson v. Whitehead*, 77 N. C. 418. **Ohio.**—*Averill Coal & O. Co. v. Verner*, 22 Ohio St. 372. **S. C.**—*Griffith v. Cromley*, 58 S. C. 448, 36 S. E. 738.

[a] "Silence under such circumstances is inconsistent with the purpose to insist upon the settlement of an issue decisive of the whole controversy by any other tribunal than the referee, and to allow a party to do so would be to give him the chance of prevailing by a second mode of trial after his adversary had been induced by his silence to incur costs, often

issues involved in a cause are referred, the right to trial by jury as to other issues is not affected thereby.<sup>33</sup> Under some statutes a failure to object to an order of compulsory reference is not a waiver of the right to trial by jury,<sup>34</sup> while in other jurisdictions a party will be deemed to have abandoned his right to trial by jury by failing to except to an order of compulsory reference.<sup>35</sup>

A party who objects to a reference of the cause does not waive his right to a jury trial by failing to appeal directly from the order of reference<sup>36</sup> and going to trial after his objection is overruled.<sup>37</sup> Nor does a previous reference of a cause by stipulation deprive the parties of the right to demand a trial by jury upon reversal of the judgment.<sup>38</sup>

very heavy, in meeting him in another forum, to which he had not objected." *Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427.

[b] **A failure of the clerk to enter an exception to the reference does not affect the right of party to a trial by jury.** *Adams v. Board of Education*, 83 N. J. L. 489, 83 Atl. 868.

[c] **Where a party at first objects to a reference and demands a jury trial but subsequently consents that a referee should be appointed, he must be held to have abandoned his former objection and demand, and the subsequent consent to the appointment of a referee constitutes a waiver of trial by jury.** *Smith v. Burlingham*, 44 Kan. 487, 24 Pac. 947.

[d] **Entry of Objection on Minutes.** Either party may at the time of ordering a reference of the court's own motion, enter in the minutes his reservation of the right to trial by jury. *Harrington's Sons. Co. v. United States Exp. Co.*, 87 N. J. L. 154, 93 Atl. 697.

[e] **An exception to a reference of the cause must be specific, naming the issues upon which a trial by jury is demanded.** *Ogden v. Appalachian L. & L. Co.*, 146 N. C. 443, 59 S. E. 1027; *Roughton v. Sawyer*, 144 N. C. 766, 56 S. E. 480.

33. *Tinsley v. Kemery*, 170 Mo. 310, 70 S. W. 691.

34. *Smith v. Kunert*, 17 N. D. 120, 115 N. W. 76.

35. *Keerl v. Hayes*, 166 N. C. 553, 82 S. E. 861.

36. *Pritchett v. Greensboro Supply Co.*, 153 N. C. 344, 69 S. E. 249.

[a] "A party may object to a reference, if there is a plea in bar and appeal at once, if he is so minded,

or he may rely upon his objection by reserving his exception and appeal from the final judgment. This is a convenient practice or procedure, because if the case goes on and the party who has excepted succeeds finally, by the decision of the referee or the verdict of the jury, his exception to the reference becomes immaterial." *Pritchett v. Greensboro Supply Co.*, 153 N. C. 344, 69 S. E. 249.

37. *St. Paul & S. C. R. Co. v. Gardner*, 19 Minn. 132, 18 Am. Rep. 334.

[a] But where a party at first objects to a reference and demands a jury trial but thereafter consents to the appointment of a referee, he must be held to have abandoned his former objection and demand, and his subsequent consent constitutes a waiver of the right to a trial by jury and cures the error of the court denying the demand for a jury trial. *Smith v. Burlingham*, 44 Kan. 487, 24 Pac. 947.

38. *Hopkins v. Sanford*, 41 Mich. 243, 2 N. W. 39.

[a] "The effect of a reversal by this court, where a new trial is ordered, is to send the case back to the court below to be tried in the usual and customary manner by the court, with or without a jury as may thereafter be determined. The case, where tried before a referee the first time, does not again go before him; his powers and duties in the premises ceased when he made his report and a judgment was entered thereon. The case could no more properly be referred back to him than it could, when tried before a jury, be sent back to them; and in a case of disputed facts, where the referee has made a report with conclusions thereon and a new trial is afterwards ordered, the case

A submission of a cause to arbitration likewise is equivalent to a waiver of the right to trial by jury.<sup>39</sup> But a tentative agreement to submit disputes to arbitration is not a waiver of the right to trial by jury.<sup>40</sup>

(D.) RECORD OF WAIVER.—The record, as a rule, must show that the right of trial by jury has been waived,<sup>41</sup> and in some jurisdictions the statute expressly provides that a waiver of the right to trial by jury must be entered of record.<sup>42</sup> In the absence of such statute a recital in the record that neither party demanded a jury is sufficient to show a waiver,<sup>43</sup> and where the cause was tried by the court without a jury and the record discloses no objection to such trial, a waiver of the right to a jury may be presumed therefrom.<sup>44</sup> And it has been held that one who waives a jury,<sup>45</sup> or who, without objection, proceeds

should not be again sent to him. The parties if they desire may have the case again referred to the same referee, but either party has a right to demand that the issue be tried by an impartial jury." *Hopkins v. Sanford*, 41 Mich. 243, 2 N. W. 39.

39. **D. C.**—*Strong v. Barbour*, 1 Mackey 209. **Ind.**—*Spencer v. Curtis*, 57 Ind. 221. **Mass.**—*Boyden v. Lamb*, 152 Mass. 416, 25 N. E. 609.

[a] Where "the submission is under a statute which authorizes parties to submit their differences to arbitrators and they agree that in accordance with the statute the award may be made a rule of the . . . court, it is obvious the parties have waived their common law right to a jury trial." *Koerner v. Leathe*, 149 Mo. 361, 51 S. W. 96.

[b] Parties electing to come within the provisions of the Workmen's Compensation Act agree "in the first instance to submit any dispute that may arise to a board of arbitrators without the intervention of any court or jury. . . . Either party feeling aggrieved at the award has the right to appeal to a court of record, where the matter is heard de novo and where either party has the right to demand a trial by jury. It will thus be seen that even though the employe should elect to come within the provisions of the act he is not wholly deprived of a trial by jury." *Deibeikis v. Link Belt Co.*, 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241.

40. *Rogers v. Davidson*, 4 Penny. (Pa.) 472.

41. **Ind.**—*Mahan v. Sherman*, 7 Blackf. 378. **Minn.**—*St. Paul & S. C. R. Co. v. Gardner*, 19 Minn. 132, 18 Am. Rep. 334. **Mo.**—*Reckendorfer v. Roberts*, 170 Mo. App. 176, 155 S. W.

495. **N. J.**—*Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 86 Atl. 451. **Okla.**—*Antonelli v. State*, 6 Okla. Crim. 157, 117 Pac. 654; *Dalton v. State*, 6 Okla. Crim. 85, 116 Pac. 954.

[a] "Where the parties have appeared and dispensed with a jury, it is the more correct practice to require them to sign a stipulation in writing to that effect, or to let the record show an express waiver. But in the absence of an affirmative showing in the bill of exceptions that a jury was demanded and refused, a judgment will not be reversed for such a cause." *Chapline v. Robertson*, 44 Ark. 202.

42. The purpose of such statute undoubtedly is to furnish record evidence of a consent which would otherwise rest merely on parol proof. *People v. Metropolitan Surety Co.*, 164 Cal. 174, 128 Pac. 324, Ann. Cas. 1914B, 1181.

[a] Under a statute requiring the waiver of a trial by jury to be entered of record, a waiver cannot be presumed where the record is silent on the subject. *Lipscomb v. Condon*, 56 W. Va. 416, 49 S. E. 392, 107 Am. St. Rep. 938, 67 L. R. A. 670.

43. **Ill.**—*Burgwin v. Babcock*, 11 Ill. 28. **Mo.**—*Tower v. Moore*, 52 Mo. 118; *Powell v. Bosard*, 79 Mo. App. 627. **Ohio.**—*Bonewitz v. Bonewitz*, 50 Ohio St. 373, 34 N. E. 332, 40 Am. St. Rep. 671. **W. Va.**—*King v. Burdett*, 12 W. Va. 688.

44. *Wallace v. Smith*, 8 La. Ann. 376; *Bank of Monett v. Howell*, 79 Mo. App. 318. See *Tabler v. Anglo-American Assn.*, 17 Ky. L. Rep. 815, 32 S. W. 602.

45. *Hawes v. Clark*, 84 Cal. 272, 24 Pac. 116.

[a] Where a party agreed to waive

to trial before the court,<sup>46</sup> cannot take advantage of the fact that a waiver does not appear of record. But where the statute designates the manner in which the right to trial by jury may be waived the record should show that such statute has been complied with.<sup>47</sup>

(III.) **Effect of Waiver.**—(A.) **GENERALLY.**—The parties waiving a trial by jury thereby submit the cause to the determination of the trial judge,<sup>48</sup> and in such case it is immaterial whether the action in its nature is legal or equitable.<sup>49</sup>

A waiver of the right to trial by jury ordinarily does not affect the right to demand a jury on another trial of the cause,<sup>50</sup> and where the judgment rendered on the first trial, at which a jury was waived, is set aside, both parties are restored to their original right to trial by jury.<sup>51</sup> So too, the right to trial by jury at one term is not waived by a failure to demand a jury at preceding terms of the court.<sup>52</sup> In some cases, however, it is held that a waiver of the right to trial by jury refers to all proceedings which may be had in the cause,<sup>53</sup> and

a trial by jury provided that the cause be transferred to another department of the court, he cannot, after such transfer of the cause, take advantage of the fact that the waiver was not entered in the minutes. *Hawes v. Clark*, 84 Cal. 272, 24 Pac. 116.

46. *Phillips v. Preston*, 5 How. (U. S.) 278, 12 L. ed. 152.

47. **Ark.**—*Chapline v. Robertson*, 44 Ark. 202. **Ind.**—*Shaw v. Kent*, 11 Ind. 80. **Ind. Ter.**—*Warwick v. Kingman*, 2 Ind. Ter. 435, 51 S. W. 1076.

48. *Loring v. Whittemore*, 13 Gray (Mass.) 228.

[a] Where the parties waive trial by jury and consent to trial by the court, the court cannot, against the consent of either party, refer the trial to a referee, but must hear the evidence in open court and decide the case without the aid of a referee, unless it be a case of the class to be referred by compulsion. *State v. Pacific Guano Co.*, 28 S. C. 63, 5 S. E. 167.

49. *Smith v. Brannan*, 13 Cal. 107.

50. *Cochran v. Stewart*, 66 Minn. 152, 68 N. W. 972; *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440, 92 N. W. 609.

[a] "Each party is entitled to as many juries as there are trials, and a waiver of a jury on one trial is expended by that trial." *Carthage v. Buckner*, 8 Ill. App. 152.

51. **U. S.**—*Burnham v. North Chicago St. Ry. Co.*, 88 Fed. 627, 32 C. C. A. 64. **Ill.**—*Morton v. Robinson*, 256

Ill. 629, 100 N. E. 200; *Osgood v. Skinner*, 186 Ill. 491, 57 N. E. 1041; *Guyer's Estate v. Caldwell*, 98 Ill. App. 232. **Mich.**—*Hopkins v. Sanford*, 41 Mich. 243, 2 N. W. 39. **Minn.**—*Cochran v. Stewart*, 66 Minn. 152, 68 N. W. 972. **Neb.**—*Schumacher v. Crane-Churchill Co.*, 66 Neb. 440, 92 N. W. 609. **N. Y.**—*Freifeld v. Sire*, 84 N. Y. Supp. 144; *Manheim v. Seitz*, 36 App. Div. 352, 55 N. Y. Supp. 321. **N. C.**—*Benbow v. Robbins*, 72 N. C. 422. **Tenn.**—*Worthington v. Nashville, C. & St. L. R. Co.*, 114 Tenn. 177, 86 S. W. 307.

[a] **Upon New Trial.**—Where upon reversal of judgment a new trial is ordered, the parties are "relieved of any election . . . growing out of their original notices, to have all the issues tried at special term, and . . . either was entitled to move for a jury trial . . . provided the motion was made . . . before the action was restored to the calendar." *Midtown Con. Co. v. Goldsticker*, 169 App. Div. 21, 154 N. Y. Supp. 451.

52. *Smith v. Redmond*, 141 Iowa 105, 119 N. W. 271; *San Jacinto Oil Co. v. Culberson*, 100 Tex. 462, 101 S. W. 197.

53. **Ala.**—*Brook v. Louisville & N. R. Co.*, 122 Ala. 172, 26 So. 335. **Mass.**—*Thompson v. King*, 173 Mass. 439, 53 N. E. 910. **N. H.**—*Trainor v. Heath*, 67 N. H. 384, 29 Atl. 846, in case of express waiver.

[a] The "constitutional right to a jury trial may be waived, and where this occurs it cannot be retracted, but

extends to a new trial ordered upon reversal of a previous judgment.<sup>54</sup>

(B.) WHERE PLEADINGS ARE AMENDED. — A waiver of the right to trial by jury under the original pleadings does not constitute a waiver of a jury on the issues subsequently formed by amendments which materially change the nature of the action.<sup>55</sup> But where no new issues are raised by the amendment it is not error to refuse a trial by jury previously waived by the parties.<sup>56</sup> Under some statutes it is discretionary with the court to allow a demand for trial by jury made upon filing of an amended answer.<sup>57</sup>

(IV.) Waiver of Number of Jurors. — The parties to a civil case, as a rule, may consent to a trial before a jury consisting of less than twelve men,<sup>58</sup> though it has been held that the legal number of jurors cannot be dispensed with by consent.<sup>59</sup> Failure to object to a less<sup>60</sup>

remains good during the life of the litigation. . . . This rule, however, has no application to cases where, by the express language of the statute governing the action or proceeding, the waiver, though once occurring, is not conclusive upon the rights or remedies of the parties in subsequent stages of the action or proceeding." *Tracy v. Falvey*, 102 App. Div. 585, 92 N. Y. Supp. 625.

54. *Butterly v. Deering*, 158 App. Div. 181, 142 N. Y. Supp. 1050.

[a] Under a statute providing that the right to trial by jury shall be deemed waived unless a jury is duly demanded, a waiver arising out of the failure to demand a jury in the manner prescribed by the statute applies to a new trial ordered upon reversal of the judgment. *Brock v. Louisville & N. R. Co.*, 122 Ala. 172, 26 So. 335.

55. *Ill.*—*Gage v. Commercial Nat. Bank*, 86 Ill. 371. *Minn.*—*M'Geagh v. Nordberg*, 53 Minn. 235, 55 N. W. 117. *N. Y.*—*Fromme v. Davidow*, 71 Misc. 467, 128 N. Y. Supp. 745; *Stevenson v. Brooks*, 62 Misc. 489, 115 N. Y. Supp. 118. *Tenn.*—*Nashville, C. & St. L. Ry. Co. v. Foster*, 10 Lea 351.

[a] But where the waiver is in writing and on file in the case it applies to all issues of fact, whether then existing or raised by subsequent pleadings. *Thompson v. King*, 173 Mass. 439, 53 N. E. 910.

56. *Hanchet v. Ives*, 69 Ill. App. 83.

57. *State v. Gilmore*, 23 La. Ann. 606.

[a] Where the demand for a jury (1) should have been made in the an-

swer, it is within the discretion of the court to grant a jury trial upon demand in an amended answer and if the trial is thereby unnecessarily delayed it will be denied. *Davis' Heirs v. Prevost*, 6 Mart. N. S. (La.) 265. (2) But where the jury is discharged for the term and the granting of a trial by jury would delay the trial of the cause for a whole term, a demand made for the first time in an amended answer will be denied. *Green v. Bonduant*, 7 Mart. N. S. (La.) 229.

58. *Ind.*—*Beynon v. Brandywine B. & S. C. Tpk. Co.*, 39 Ind. 129; *Brown v. State*, 16 Ind. 496. *Ky.*—*Cravens v. Gant*, 2 Mon. 117. *Mich.*—*Borgman v. Detroit*, 102 Mich. 261, 60 N. W. 696. *Mo.*—*In re Essex Ave.*, 121 Mo. 98, 25 S. W. 891; *Vaughn v. Scade*, 30 Mo. 600. *N. Y.*—*Carman v. Newell*, 1 Denio 25. *S. D.*—*Huron v. Carter*, 5 S. D. 4, 57 N. W. 947. *Va.*—*Roach v. Blakey*, 89 Va. 767, 17 S. E. 228. *Wis.*—*Rindskopf v. State*, 34 Wis. 217; *Millett v. Hayford*, 1 Wis. 401.

[a] Verdict by Seven Jurors. Where under a statute providing that in civil actions a jury shall consist of twelve men and that three-fourths concurring may return a verdict, the parties stipulate to submit the cause to a jury of nine men, a verdict rendered by seven jurors is sufficient. *Lohnes v. Baker*, 156 Mo. App. 397, 137 S. W. 282. See generally the title "Verdict."

59. *Mitten v. Smock*, 3 N. J. L. 911.

60. *Ind.*—*Beynon v. Brandywine B. & S. C. Tpk. Co.*, 39 Ind. 129; *Mitchell v. Stephens*, 23 Ind. 466; *Durham v.*

or to a greater<sup>61</sup> number of jurors than prescribed by law, generally is held to be a waiver of any objection thereto, though in some jurisdictions the waiver in this respect, in courts of general jurisdiction, must be express and appear of record.<sup>62</sup> Where a party objects to a trial before a jury of less than twelve men, he does not waive his objection by proceeding to trial before a jury so constituted.<sup>63</sup>

(V.) **Withdrawal of Waiver.**—Upon waiving a jury the right there-to cannot be revived,<sup>64</sup> unless the court in its discretion grants leave to withdraw the waiver,<sup>65</sup> which will ordinarily be done where no prejudice will result thereby to the adverse party.<sup>66</sup>

b. *In Criminal Cases.*—(I.) **Generally.**—In criminal offenses in which the right to trial by jury existed under the common law the defendant ordinarily cannot waive his right to a jury trial.<sup>67</sup> Ac-

Hudson, 4 Ind. 501. Minn.—Clague v. Hodgson, 16 Minn. 329. Wis.—Millet v. Hayford, 1 Wis. 401.

[a] But before a waiver can be inferred, it must appear, at least, that the party had knowledge of the fact, that the jury was defective in point of numbers. Cowles v. Buckman, 6 Iowa 161.

61. Berry v. Kenney, 5 B. Mon. (Ky.) 120; Ross v. Neal, 7 Mon. (Ky.) 407.

62. Gillespie v. Benson, 18 Cal. 409; Vaughn v. Seade, 30 Mo. 600.

[a] In "all trials in courts of record, it is the constitutional right of a party to demand a jury of twelve men; and . . . if no exceptions are taken to the action of the court in proceeding to trial with a less number, the party may still take advantage of the error, by a motion in arrest of judgment. The defect will not be considered as waived or consent presumed unless entered of record." Scott v. Russell, 39 Mo. 407.

63. Eshelman v. Chicago, R. I. & P. R. Co., 67 Iowa 296, 25 N. W. 251.

[a] "The defendant objected to the jury at the proper time because of the absence of one juror. But the objection was overruled. It was not then required to abandon the defense of the case, but was authorized to contest it even before an unlawful jury and to insist upon all objections arising upon the trial." Eshelman v. Chicago, R. I. & P. Ry. Co., 67 Iowa 296, 25 N. W. 251.

64. See cases following.

[a] Having waived a jury before the commencement of the trial, the

right to trial by jury cannot be invoked by way of objection to the evidence on the ground that the complaint does not state facts sufficient to give the court equitable jurisdiction and thus deprive defendant of trial by jury. Glass v. Templeton, 184 Mo. App. 532, 170 S. W. 665.

65. Ferrea v. Chabot, 121 Cal. 233, 53 Pac. 689; Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 37 So. 62, 110 Am. Ct. Rep. 118, 67 L. R. A. 518.

66. Wittenberg v. Onsgard, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141.

[a] As "a general rule, a party should be relieved from a stipulation waiving a jury, where the same can be done without injury to the other side, and without disarranging the orderly conduct of the business of the court." Ferrea v. Chabot, 121 Cal. 233, 53 Pac. 689, 1092.

67. U. S.—United States v. Taylor, 11 Fed. 470. Ark.—Bond v. State, 17 Ark. 290; Wilson v. State, 16 Ark. 601. Conn.—State v. Maine, 27 Conn. 281. Ill.—Paulsen v. People, 195 Ill. 507, 63 N. E. 144; Brewster v. People, 183 Ill. 143, 55 N. E. 640; Morgan v. People, 136 Ill. 161, 26 N. E. 651; Harris v. People, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153. Ia.—State v. Rea, 126 Iowa 65, 101 N. W. 507; State v. Douglass, 96 Iowa 308, 65 N. W. 151; State v. Carman, 63 Iowa 130, 18 N. W. 691, 50 Am. Rep. 741. Kan.—State v. Simons, 61 Kan. 752, 60 Pac. 1052. La.—State v. Thompson, 104 La. 167, 28 So. 882. Mich.—Swart v. Kimball, 43 Mich. 443, 5 N. W. 635; People v. Smith, 9 Mich. 193. Neb.—Michaelson v. Beemer, 72 Neb. 761, 101

cordingly, a defendant charged with an offense which can be prosecuted only by indictment,<sup>68</sup> or which involves the possible infliction of a long term of imprisonment,<sup>69</sup> or other severe punishment,<sup>70</sup> has no

N. W. 1007; *Arnold v. State*, 38 Neb. 752, 57 N. W. 378. N. C.—*State v. Rogers*, 162 N. C. 656, 78 S. E. 293, 46 L. R. A. (N. S.) 38. Ohio.—*Williams v. State*, 12 Ohio St. 622. Okla. *In re McQuown*, 19 Okla. 347, 91 Pac. 689, 11 L. R. A. (N. S.) 1136. Tex. *Davis v. State*, 64 Tex. Crim. 8, 141 S. W. 264; *Jones v. State*, 52 Tex. Crim. 303, 106 S. W. 345, 124 Am. St. Rep. 1097. Va.—*Ford v. Com.*, 82 Va. 553; *Mays v. Com.*, 82 Va. 550. Wis.—*State v. Lockwood*, 43 Wis. 403.

[a] A defendant cannot by a waiver of trial by jury "confer jurisdiction to try him upon a tribunal which has no such jurisdiction by law. Jurisdiction of the subject-matter must always be derived from the law and not from the consent of the parties. . . . For the trial of felonies the judge alone is not the court. The judicial functions brought into exercise in such trials are parceled out between him and the jury." *Harris v. People*, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153. To the same effect, *Michaelson v. Beemer*, 72 Neb. 761, 101 N. W. 1007.

[b] A statute providing that an issue of fact in criminal cases must be tried by a jury excludes "the jurisdiction of the court without a jury to try such issue. The question presented is not as to the waiver of a mere statutory privilege, but an imperative provision based . . . upon the soundest conception of public policy. Life and liberty are too sacred to be placed at the disposal of any one man, and always will be, so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safeguards. There is no resemblance between such a case and that of a person pleading guilty. In the latter case there is no trial, but mere judgment upon the plea." *State v. Carman*, 63 Iowa 130, 18 N. W. 691, 50 Am. Rep. 741.

[c] As to Place of Trial.—But a defendant may waive his right to be tried by a jury in the county or dis-

trict in which the offense is alleged to have been committed. *State v. Potter*, 16 Kan. 80. To the same effect, *Oborn v. State*, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966.

[d] The "legislature . . . may authorize a waiver of a jury trial by a person accused of crime, and where such authority has been conferred, a defendant who consents to be tried by the court cannot afterwards complain on the ground that he was not tried by a jury. But in the absence of such authority the court has no jurisdiction to try the accused on a plea of not guilty, otherwise than by jury; and consent cannot give jurisdiction." *Mays v. Com.*, 82 Va. 550.

68. Ark.—*Bond v. State*, 17 Ark. 290. Ill.—*Paulsen v. People*, 195 Ill. 507, 63 N. E. 144. Wis.—*State v. Lockwood*, 43 Wis. 403.

[a] "Trial by jury in cases of felony is in the highest sense an institution of public policy. It was not ordained solely, nor even in its largest purpose, for the advantage of the accused. The state is interested in the lives and liberties of its citizens. . . . In order that its humane and gracious, as well as its punitive policy may be effectuated, it has ordained the institution of a trial by jury, not merely as a matter of favor to an accused, but that through the guaranty of right to him its considerate care for the lives and liberties of its citizens may be exercised. A statutory or even constitutional provision by which rights in the nature of mere privileges are guaranteed may be waived, but not so constitutional provisions prompted by high motives of public policy, and which are, therefore, of concern to the social whole. These are inviolate against an improvident renunciation by the individual concerned, as well as against an assault by the state itself." *State v. Simons*, 61 Kan. 752, 60 Pac. 1052.

69. *Low v. United States*, 169 Fed. 86, 94 C. C. A. 1.

70. *State v. Jackson*, 106 La. 189, 30 So. 309; *State v. Thompson*, 104 La. 167, 28 So. 882.

right to waive trial by jury. And some statutes expressly prohibit a defendant in a felony case<sup>71</sup> or capital case<sup>72</sup> to waive a trial by jury. But where the right to trial by jury did not obtain prior to the adoption of the constitution a trial by jury may be waived by the defendant in a criminal action.<sup>73</sup> Hence, the right of a defendant in a misdemeanor case to waive his right to trial by jury is generally recognized by the statutes.<sup>74</sup> A statute authorizing a waiver should

71. *State v. Simons*, 61 Kan. 752, 60 Pac. 1052.

[a] In California a jury cannot be waived in felony cases pursuant to a constitutional provision. *In re Fife*, 110 Cal. 8, 42 Pac. 299.

72. *Wartner v. State*, 102 Ind. 51, 1 N. E. 65.

73. *U. S.*—*Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. ed. 99. *La.*—*State v. White*, 33 La. Ann. 1218. *Mo.*—*State v. Mansfield*, 41 Mo. 470; *Neales v. State*, 10 Mo. 498. *P. R.*—*People v. Sutton*, 17 Porto Rico 327. *Tenn.*—*Metzner v. State*, 128 Tenn. 45, 157 S. W. 69.

But see *State v. Tucker*, 96 Iowa 276, 65 N. W. 152.

[a] Under the federal constitution a jury cannot be waived except in cases of "petty offenses." If "the offense for which the defendants were tried amounts to a crime, as distinguished from a 'petty offense,' it could . . . be tried only by a jury; and, if not so tried, the judgment would be a nullity and require reversal. On the other hand, if the offense is merely a 'petty offense,' the trial under waiver of jury would amount to an arbitration as to the questions of fact involved; and it would result that the court's conclusions of fact could not be reviewed here, and we would have no power to inquire into the sufficiency of the evidence to support the conviction, nor any question of law arising out of or upon the evidence." *Frank v. United States*, 192 Fed. 864, 113 C. C. A. 188.

74. *U. S.*—*Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. 105, 36 L. ed. 986. *Ala.*—*McClellan v. State*, 118 Ala. 122, 23 So. 732; *Connelly v. State*, 60 Ala. 89, 31 Am. Rep. 34; *Ireland v. State*, 11 Ala. App. 155, 65 So. 443. *Ark.*—*Warwick v. State*, 47 Ark. 568, 2 S. W. 335. *Conn.*—*State v. Worden*, 46 Conn. 349, 33 Am. Rep. 27. *Ga.*—*Moore v. State*, 124 Ga. 30, 52 S. E. 81; *Hollis v. State*, 118 Ga. 760, 45

S. E. 617; *Logan v. State*, 86 Ga. 266, 12 S. E. 406. *Ill.*—*Brewster v. People*, 183 Ill. 143, 55 N. E. 640; *Hamel v. People*, 97 Ill. App. 527; *Austin v. People*, 63 Ill. App. 298. *Ind.*—*Murphy v. State*, 97 Ind. 579. *Kan.*—*State v. Wells*, 69 Kan. 792, 77 Pac. 547. *La.*—*State v. Robinson*, 43 La. Ann. 383, 8 So. 937; *State v. White*, 33 La. Ann. 1218. *Md.*—*League v. State*, 36 Md. 257. *Mo.*—*State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317; *State v. Larger*, 45 Mo. 510; *State v. Wiley*, 82 Mo. App. 61. *Neb.*—*Grimes v. State*, 88 Neb. 848, 130 N. W. 760. *N. H.*—*State v. Almy*, 67 N. H. 274, 28 Atl. 372, 22 L. R. A. 744. *N. J.*—*Edwards v. State*, 45 N. J. L. 419. *Pa.*—*Lavery v. Com.*, 101 Pa. 560. *P. R.*—*People v. Sutton*, 17 Porto Rico 327. *Tenn.*—*Metzner v. State*, 128 Tenn. 45, 157 S. W. 69. *Tex.*—*Langbein v. State*, 37 Tex. 162; *Mackey v. State*, 68 Tex. Crim. 539, 151 S. W. 802; *Otto v. State* (Tex. Crim.), 87 S. W. 698. *W. Va.*—*State v. Alderton*, 50 W. Va. 101, 40 S. E. 350; *State v. Griggs*, 34 W. Va. 78, 11 S. E. 740.

[a] Where the indictment charges a felony, but the state's attorney joins with the defendant in a consent that a jury be waived and the cause tried by the court, the state's attorney will be deemed to have consented to reduce the charge to a misdemeanor. *Dallman v. People*, 113 Ill. App. 507.

[b] **Punishment Limited.** — But where the constitution confers upon a jury the exclusive right to assess a fine in excess of \$50, the waiver of a jury trial by defendant in a misdemeanor case does not give the court the power to inflict a fine exceeding that amount. *Metzner v. State*, 128 Tenn. 45, 157 S. W. 69.

[c] The fact that upon a second conviction of petit larceny a person is punished by imprisonment in the penitentiary has no bearing upon the right of a defendant charged for the first time with such crime to waive

be strictly construed, however, and not extended beyond its express terms.<sup>75</sup>

But in some jurisdictions the right to trial by jury may be waived by the defendant in all criminal cases.<sup>76</sup> And the rule that a defendant in a criminal case in which the right to trial by jury is secured by the constitution cannot waive such right does not apply to pleas of guilty,<sup>77</sup> even though the statute provides for an examination of witnesses after the plea of guilty to ascertain the degree of the crime.<sup>78</sup>

a jury. "Surely one cannot be heard to claim a legal benefit because he may some time in the future commit the same kind of an offense again." *People v. Cohen*, 171 Ill. App. 612.

[d] A minor may avail himself of the privilege to waive a jury "and in case he should see fit to do so, be bound thereby. . . . The procedure in criminal cases is the same whether the accused is an adult or a minor." *People v. McDonald*, 178 Ill. App. 159. But see *supra*, II, F, 4, a, (I).

75. *Wartner v. State*, 102 Ind. 51, 1 N. E. 65, a statute authorizing a waiver of a jury does not authorize a waiver of the full number of jurors if the case is tried by jury.

76. *Belt v. United States*, 4 App. Cas. (D. C.) 25; *State v. Woodling*, 53 Minn. 142, 54 N. W. 1068.

[a] And if "a defendant in a criminal case is without power under the constitution to waive a trial by jury, it would be prohibitory in all cases, for clearly the legislature could not violate the constitution by simply creating a different court, and if a defendant cannot waive a trial by jury, no legislation could confer upon him that power. . . . We are of opinion that . . . a defendant who has been indicted for a crime may waive his right to a jury trial and consent that the facts may be determined by a court, which has jurisdiction over the trial and punishment of the crime described in the indictment." *State v. Stevens*, 84 N. J. L. 561, 87 Atl. 118.

[b] A statute authorizing a waiver is not unconstitutional. *Belt v. United States*, 4 App. Cas. (D. C.) 25.

[c] **Struck Jury.**—Where under a statute a struck jury is demandable by either the defendant or the state, this right may be waived by the parties for whose benefit the statute was enacted. *Whitehead v. State*, 10 Ohio St. 449.

77. **U. S.**—*West v. Gammon*, 98 Fed. 426, 39 C. C. A. 271. **Cal.**—*People v. Lennox*, 67 Cal. 113, 7 Pac. 260. **Idaho.** *In re Dawson*, 20 Idaho 178, 117 Pac. 696, 35 L. R. A. (N. S.) 1146. **Neb.** *McCarty v. Hopkins*, 61 Neb. 550, 85 N. W. 540. **N. H.**—*State v. Almy*, 67 N. H. 274, 28 Atl. 372, 22 L. R. A. 744. **Wyo.**—*Hollibaugh v. Hehn*, 13 Wyo. 269, 79 Pac. 1044.

[a] **Refusal To Plead.**—Where a defendant after overruling of his demurrer to the indictment refuses to plead further, there is no issue triable by a jury, and the judgment is not erroneous on the ground that defendant had no right to waive a trial by jury. "When a defendant demurs generally to an indictment, he admits all the facts alleged against him and rests his defense on the judgment of the court whether those facts as pleaded constitute the crime charged. The plaintiff in error, by his demurrer to the indictment, declared in effect that he was guilty of the offense charged. . . . After the demurrer was overruled, he had his right either to plead over or to stand on his demurrer, and thereby continue in the attitude of admitting to the court that he was guilty of committing the acts which were charged against him. He chose the latter course." *Summers v. United States*, 204 Fed. 976, 123 C. C. A. 298.

78. *Craig v. State*, 49 Ohio St. 415, 30 N. E. 1120, 16 L. R. A. 358.

[a] "The proceeding to determine the degree of the crime of murder after a plea of guilty is not a trial. No issue was joined upon which there could be a trial. There is no provision of the constitution or of any statute which prevents a defendant from pleading guilty instead of having a trial by jury. If he elects to plead guilty to the indictment, the provision of the statute for determining the degree of the guilt, for the purpose of fixing the punishment, does not deprive him of

(II.) **Mode of Waiver.**—Under some statutes a jury trial in a criminal case can be waived only by a formal waiver in writing.<sup>79</sup> In other jurisdictions no particular form of waiver is required,<sup>80</sup> and the failure of a defendant in a case in which a jury may be waived, to make a timely demand for a trial by jury, constitutes a waiver thereof.<sup>81</sup> But it has been held that a statute requiring a waiver before a jury may be dispensed with, requires some affirmative action by the defendant other than a mere failure to demand a jury.<sup>82</sup> A defendant interposing a demurrer to an indictment does not thereby waive his right to trial by jury.<sup>83</sup>

(III.) **Effect of Waiver.**—A waiver of trial by jury in criminal cases ordinarily applies only to the particular trial at which it is

any right of trial by jury." *People v. Noll*, 20 Cal. 164.

[b] **Where Jury Fixes Punishment.** But where the statute expressly provides that a defendant charged with a felony and pleading guilty shall be punished "in the discretion of the jury," the defendant is not authorized to consent to waive an assessment of punishment by a jury. *Wartner v. State*, 102 Ind. 51, 1 N. E. 65.

79. Ga.—*Wadkins v. State*, 127 Ga. 45, 56 S. E. 74. Ill.—*Swan v. Mulherin*, 67 Ill. App. 77. Ohio.—*Iekes v. State*, 63 Ohio St. 549, 59 N. E. 233.

[a] **Where the defendant wrote his waiver** on a printed form containing the words: "puts himself upon the country," these words are surplusage and the waiver is valid. *Logan v. State*, 86 Ga. 266, 12 S. E. 406.

80. *People v. Weeks*, 99 Mich. 86, 57 N. W. 1091; *State v. Larger*, 45 Mo. 510.

[a] **But a waiver made by defendant's attorney** without being consulted is not sufficient even though defendant was present in court. *Brown v. State*, 16 Ind. 496.

81. Ala.—*Red v. State*, 167 Ala. 96, 52 So. 885; *Stafford v. State*, 154 Ala. 71, 45 So. 673; *Merriweather v. State*, 153 Ala. 52, 45 So. 420; *McClellan v. State*, 118 Ala. 122, 23 So. 732; *Wren v. State*, 70 Ala. 1; *Ireland v. State*, 11 Ala. App. 155, 65 So. 443. Ia. *State v. Ill*, 74 Iowa 441, 38 N. W. 143. Mo.—*State ex inf. Major v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145; *State v. Wiley*, 82 Mo. App. 61. N. J.—*State v. Mills*, 39 N. J. L. 587. N. Y.—*People v. Halwig*, 41 Misc. 227, 84 N. Y. Supp. 221;

*People v. Cook*, 45 Hun 34. S. C. *Clinton v. Leake*, 71 S. C. 22, 50 S. E. 541; *State v. Mays*, 24 S. C. 190. Wash.—*State v. Packenham*, 40 Wash. 403, 82 Pac. 597. Wis.—*State v. Clark*, 67 Wis. 229, 30 N. W. 122.

[a] Under a statute authorizing the trial of misdemeanors by the judge without the intervention of a jury, unless the defendant in writing demands a trial by jury, a defendant neglecting to make such demand of his own volition waives a jury and he cannot afterwards claim the right to trial by jury. *McClellan v. State*, 118 Ala. 122, 23 So. 732.

82. *Simmons v. State*, 75 Ohio St. 346, 79 N. E. 555.

[a] **Silence Insufficient.**—Where the statute provides that all issues of fact in a criminal case shall be tried by a jury but that the defendant and prosecuting attorney with the assent of the court may submit the trial of misdemeanors to the court, the mere silence of defendant does not authorize the court to try the case without the intervention of a jury. *State v. McAnally*, 147 Mo. App. 130, 125 S. W. 1174.

[b] **Statute as to Civil Cases Inapplicable.**—And under a statute declaring that a trial by jury shall be deemed waived "in all civil actions" unless demanded in the manner prescribed by law, it is manifest that such statute "in its application to criminal cases does not authorize any implied waiver of a jury from the silence of a defendant, or his mere failure to demand a jury." *Ward v. People*, 30 Mich. 116.

83. *State v. Bardin*, 64 S. C. 206, 41 S. E. 959.

made,<sup>84</sup> and upon retrial of a cause a party, notwithstanding his waiver of a trial by jury on a former trial is entitled to a jury.<sup>85</sup>

(IV.) **Withdrawal of Waiver.**—Where a jury may be waived in a criminal case, a defendant ordinarily cannot subsequently retract his waiver.<sup>86</sup> But the court may permit the defendant to withdraw his waiver of trial by jury provided that a timely application is made therefor.<sup>87</sup> And in some cases it is held that the statutes authorizing a waiver of trial by jury in criminal cases are merely declaratory and that the court notwithstanding a waiver may call a jury.<sup>88</sup>

(V.) **Record of Waiver.**—Where the record in a criminal case is silent as to a waiver of trial by jury, assent to the submission of the cause to the court without a jury will be assumed,<sup>89</sup> though it has been held to the contrary, that a waiver must affirmatively appear.<sup>90</sup>

(VI.) **Number of Jurors.**—The question of the right to waive a trial by jury has most frequently arisen where a defendant to a criminal prosecution has waived a trial by a full panel and has consented to be tried by a smaller number of jurors than provided by law.<sup>91</sup> In

84. *Town of Carthage v. Buckner*, 8 Ill. App. 152.

[a] A waiver of trial by jury in a criminal action "is a renunciation of a valuable constitutional right and must be strictly construed. It may well be supposed, that a defendant would be perfectly willing for a particular judge to try him, when he would not risk his successor; or, that he would be willing to be tried the first time by a judge, when he would not submit to a second trial by the same judge after such officer had convicted him." *Cross v. State*, 78 Ala. 430.

85. *Ga.*—*Brown v. State*, 89 Ga. 340, 15 S. E. 462. *Ill.*—*Town of Carthage v. Buckner*, 8 Ill. App. 152. *Tenn.*—*Worthington v. Nashville, C. & St. L. Ry.*, 114 Tenn. 177, 86 S. W. 307.

*Compare supra*, II, F, 4, a.

[a] *Compare State v. Touchet*, 33 La. Ann. 1154, where it is held that a waiver by defendant "of jury as to the first trial may be presumed to continue as to the new trial, unless timely application be made to revoke the same."

86. *State v. Bannock*, 53 Minn. 419, 55 N. W. 558.

87. *Cain v. State*, 102 Ga. 610, 29 S. E. 426.

[a] Where defendant before any testimony is taken upon the trial, demands a jury, it is error to refuse a trial by jury on the ground that defendant when arraigned waived a trial

by jury. *People v. Molinet*, 13 Misc. 301, 34 N. Y. Supp. 1114.

88. *Ickes v. State*, 63 Ohio St. 549, 59 N. E. 233.

[a] **Compelling Trial by Jury.**—But under a statute providing that all criminal cases in the city court shall be tried by the judge thereof without a jury, except when the accused in writing shall demand a jury, it is error to compel defendant to be tried by a jury where no demand therefor is made by him. *Wadkins v. State*, 127 Ga. 45, 56 S. E. 74.

89. *State v. Finley*, 162 Mo. App. 134, 144 S. W. 120; *State v. Wiley*, 82 Mo. App. 61.

[a] "In misdemeanor cases, the statute does not require any express waiver of a jury in order to authorize a trial by the court. . . . It is not required that such submission shall be entered on the minutes, or that it shall in any manner become a matter of record. It is not to be presumed, therefore, from the silence of the record that the court proceeded irregularly and without authority." *State v. Larger*, 45 Mo. 510.

90. *People v. Mallon*, 39 How. Pr. (N. Y.) 454. See *Warwick v. State*, 47 Ark. 568, 2 S. W. 335. *Compare supra*, II, F, 4, b, (II).

91. *Harris v. People*, 128 Ill 585, 21 N. E. 563, 15 Am. St. Rep. 153.

As to right to waive a jury, see *supra*, II, F, 4, b, (I).

some jurisdictions it has been held that a jury in a criminal action must within the meaning of the constitution consist of twelve men and that the defendant cannot consent to a trial by a jury of a less number of men,<sup>92</sup> while in others the right to waive a trial by jury is deemed to carry with it the right to agree to a trial by a jury composed of less than twelve men.<sup>93</sup> Hence, in a number of jurisdictions a defendant in a misdemeanor case may waive a trial by a common-law jury and consent to a less number of jurors.<sup>94</sup> Generally in felony

92. Ala.—*Bell v. State*, 44 Ala. 393. Cal.—*People v. O'Neil*, 48 Cal. 257. Ind.—*Moore v. State*, 72 Ind. 358; *Allen v. State*, 54 Ind. 461; *Jackson v. State*, 6 Blackf. 461. Mich.—*Hill v. People*, 16 Mich. 351. N. Y.—*Cancemi v. People*, 18 N. Y. 128, 7 Abb. Pr. 271. N. C.—*State v. Scruggs*, 115 N. C. 805, 20 S. E. 720.

[a] **Verdict of Twelve.**—The "fact that the jury . . . had the required number of twelve up to the stage in the trial when the cause was to be submitted to them under the instructions of the court cannot operate to satisfy the constitutional demand. . . . Without the verdict of a jury of twelve it cannot be said to be a verdict of the jury required by the constitution. Such a verdict is illegal and insufficient to support a judgment." *Jennings v. State*, 134 Wis. 307, 114 N. W. 492, 14 L. R. A. (N. S.) 862.

[b] Where the trial of one accused of an infamous crime though not a felony commences before a jury of twelve men, the defendant cannot thereafter consent to two jurors being excused and to abide by the verdict of the remaining ten jurors. *Dickinson v. United States*, 159 Fed. 801, 86 C. C. A. 625.

[c] **Notwithstanding a defendant has the right to waive a jury trial**, he cannot consent to be tried by a less number of jurors than provided by law, as by so doing he consents to the creation of a tribunal not known to the law for the determination of his guilt. *People v. Bent*, 136 N. Y. Supp. 276.

93. Ia.—*State v. Grossheim*, 79 Iowa 75, 44 N. W. 541. Minn.—*State v. Sackett*, 39 Minn. 69, 38 N. W. 773. Pa.—*Com. v. Sweet*, 4 Pa. Dist. 136. Tex.—*Schulman v. State* (Tex. Crim.), 173 S. W. 1195; *Mackey v. State* (Tex. Crim.), 151 S. W. 802.

[a] Conceding that a jury contemplated by the constitutional provision

should consist of twelve persons the "question for determination is whether a defendant in a criminal action, with the consent of the state and court, can waive the . . . constitutional provision and is bound thereby. The first impression would be, we think, that a constitutional provision could be waived as well as a statute. Both, in this respect, have equal force and were enacted for the benefit and protection of persons charged with crime. If one can be waived, why not the other? A conviction can only be legally obtained in a criminal action upon competent evidence; yet, if the defendant fails at the proper time to object to such as is incompetent, he cannot afterwards do so. He has a constitutional right to a speedy trial and yet he may waive this provision by obtaining a continuance. A plea of guilty ordinarily dispenses with a jury trial and it is thereby waived. . . . So in the case at bar. The defendant may have consented to be tried by eleven jurors because his witnesses were then present; and he might not be able to get them again, or that it was best he should be tried by the jury as thus constituted. Why should he not be permitted to do so? . . . The right to dispense with one or more jurors cannot be exercised without the consent of the court and state and it may safely . . . be left to them as to when or to what extent it may be exercised." *State v. Kaufman*, 51 Iowa 578, 2 N. W. 275, 33 Am. Rep. 148.

[b] **Under a statute providing for a waiver of trial by jury**, a defendant may waive the legal number of jurors. *Territory v. Soga*, 20 Haw. 71. But see *contra*, *Wartner v. State*, 102 Ind. 51, 1 N. E. 65.

94. U. S.—*United States v. Shaw*, 59 Fed. 110. Ark.—*Warwick v. State*, 47 Ark. 568, 2 S. W. 335; *State v. Cox*,

cases the right to a trial by a jury consisting of twelve men cannot be waived.<sup>95</sup>

**G. DENIAL OR IMPAIRMENT OF RIGHT BY ACTION OF COURT.**<sup>96</sup> — **1. Rules of Court.**—While courts may make reasonable rules regulating the exercise of the right to trial by jury and refuse a demand for a jury in case of failure to comply therewith,<sup>97</sup> such rules

8 Ark. 436. **Ill.**—*People v. McDonald*, 178 Ill. App. 159; *Jacobs v. People*, 117 Ill. App. 195. **Ia.**—*State v. Grossheim*, 79 Iowa 75, 44 N. W. 541; *State v. Kaufman*, 51 Iowa 578, 2 N. W. 275, 33 Am. Rep. 148. **Kan.**—*State v. Wells*, 69 Kan. 792, 77 Pac. 547. **La.**—*State v. Wright*, 45 La. Ann. 57, 12 So. 129. **Mass.**—*Com. v. Dailey*, 12 Cush. 80. **Minn.**—*State v. Sackett*, 39 Minn. 69, 38 N. W. 773. **Mo.**—*State v. Mansfield*, 41 Mo. 470. **Okla.**—*Dalton v. State*, 6 Okla. Crim. 85, 116 Pac. 954. **R. I.**—*State v. Battey*, 32 R. I. 475, 80 Atl. 10.

[a] "In prosecutions for misdemeanors, where the penalty imposed is merely a fine, an agreement by the defendant to be tried by a jury constituted of a less number than twelve persons, is not inconsistent with any rule of law or with public policy. Nor does it tend to defeat public justice; but, on the contrary, may tend to promote it, by facilitating the dispatch of business in court." *Murphy v. Com.*, 1 Mete. (Ky.) 365.

[b] And under a constitutional provision declaring that a jury in courts not of record may consist of less than twelve men, a defendant may consent to a trial by less than six jurors even though it is provided by a statute that a jury shall not consist of less than six persons. *People v. Lane*, 124 Mich. 271, 82 N. W. 896.

[c] But a failure to object to a jury consisting of less than twelve men is not a waiver of trial by a jury of twelve men. It "does not affirmatively appear from this record that the defendant ever consented to be tried by eleven men. True, he objected to taking the case from the eleven, swearing another juror and rehearing the evidence and instructions before the augmented body . . . But . . . the jury being illegally constituted, without the defendant's consent, he was in no peril even of suffering the punishment denounced by the law against petty offenders. The proper course to

pursue was to discharge the eleven jurors and award a venire de novo." *Warwick v. State*, 47 Ark. 568, 2 S. W. 335.

**95. Kan.**—*State v. Simons*, 61 Kan. 752, 60 Pac. 1052. **Miss.**—*Jones v. State*, 27 So. 382; *Hunt v. State*, 61 Miss. 577. **Mo.**—*State v. Mansfield*, 41 Mo. 470. **Mont.**—*Territory v. Ah Wah*, 4 Mont. 149, 1 Pac. 732, 47 Am. Rep. 341. **Nev.**—*State v. Borowsky*, 11 Nev. 119. **N. M.**—*Territory v. Ortiz*, 8 N. M. 154, 42 Pac. 87. **Ohio.**—*Williams v. State*, 12 Ohio St. 622. **Okla.**—*Queenan v. Territory*, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324. **Wash.**—*State v. Ellis*, 22 Wash. 129, 60 Pac. 136.

[a] "In case of misdemeanors created by statute, the legislature may provide for their prosecution in a summary way and without the formality of indictment and the accused may waive a jury or agree on a certain number; but in those offenses, including capital crimes and felonies, which under the constitution can only be proceeded with by indictment and presentment of a grand jury, and can only be tried by a petit jury, the jury must be composed of twelve persons, and their verdict must be unanimous." *State v. Mansfield*, 41 Mo. 471.

**96. Denial or impairment by action of legislature**, see *supra*, II, D.

**97. U. S.**—*Fidelity & D. Co. v. United States*, 187 U. S. 315, 23 Sup. Ct. 120, 47 L. ed. 194. **Cal.**—*People v. Metropolitan Surety Co.*, 164 Cal. 174, 128 Pac. 324, Ann. Cas. 1914B, 1181. **D. C.**—*Simmons v. Morrison*, 13 App. Cas. 161; *Cropley v. Vogeler*, 2 App. Cas. 28. **N. Y.**—*Cohen v. Cohen*, 160 App. Div. 240, 145 N. Y. Supp. 652. **Tenn.**—*Stadler & Co. v. Hertz & Co.*, 13 Lea 315. **Vt.**—*Jones v. Spear*, 21 Vt. 426.

[a] **Requiring Demand.**—A rule of court providing that misdemeanor cases shall be called on the first Monday after arrest and that, if a jury is desired, a written demand therefor

must not burden the exercise of the constitutional right to trial by jury with unreasonable restrictions.<sup>98</sup> Rules of court requiring the deposit of jury fees as a condition precedent to a trial by jury generally have been upheld.<sup>99</sup> But a rule of court which is in anywise inconsistent with a statute upon the same is unenforceable.<sup>1</sup> Thus where the manner of waiving a jury is prescribed by the statute, non-compliance with a rule of court cannot be made by rule, a waiver of the right to trial by jury.<sup>2</sup>

Rules of court making the right to trial by jury in actions on contract dependent upon the filing of a verified answer have been

must be filed on said day or the cause will be placed on the nonjury docket is reasonable and may be deemed essential to an orderly and expeditious administration of the law. *Stafford v. State*, 154 Ala. 71, 45 So. 673.

As to necessity for demand, see *supra*, II, F, 2.

As to waiver of right, see *supra* II, F, 4.

98. *Jones v. Spear*, 21 Vt. 426.

99. *People v. Metropolitan Surety Co.*, 164 Cal. 174, 128 Pac. 324, Ann. Cas. 1914B, 1181; *Naphtaly v. Rovegno*, 130 Cal. 639, 63 Pac. 66; *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488; *Conneau v. Geis*, 73 Cal. 176, 14 Pac. 580, 2 Am. St. Rep. 785; *Reliance Auto Repair Co. v. Nugent*, 159 Wis. 488, 149 N. W. 377.

[a] "A rule requiring the fee to be paid in advance is a reasonable precaution to prevent the jurors from being defrauded by unscrupulous parties, and to prevent the demand of a jury being used as a pretext to obtain continuances, and thus trifle with justice. The right to bring suit, and the right to appeal to a higher court are as fully secured by the constitution as the right to a trial by jury; yet it has always been the practice to collect the fees therefor before the suit is commenced or the record on appeal is filed. And we do not see how such a proceeding impairs the right in the one case any more than in the other. If the court has a right to require the payment of a jury fee in advance, the refusal to pay it is the refusal to have a jury trial; and since this is the party's own act, he cannot be said to be deprived of anything." *Conneau v. Geis*, 73 Cal. 176, 14 Pac. 580, 2 Am. St. Rep. 785.

1. *Nichols v. Cherry*, 22 Utah 1, 60 Pac. 1103.

2. *Colo.*—*Peeps Fixture Co. v. Gove*, 24 Colo. App. 149, 133 Pac. 143. *N. J.* *Ten Eyck v. Farlee*, 16 N. J. L. 348; *Hinchly v. Machine*, 15 N. J. L. 476. *N. Y.*—*Wilcox v. Wilcox*, 116 App. Div. 423, 101 N. Y. Supp. 828; *Conderman v. Conderman*, 44 Hun 181, 7 N. Y. St. 789.

[a] "When the law-making authority expressly enumerates the modes by which an object may be accomplished, a body to which it delegates its power, with an inhibition against exercising it inconsistently with written law, may not alter the provision by increasing the number of modes. . . . The rule . . . was unauthorized in so far as it was an attempt to limit the constitutional right to a trial by jury of the issue of adultery in an action for divorce by prescribing a mode of waiver not included in a statutory provision legislating upon the same subject-matter." *Halgren v. Halgren*, 160 App. Div. 477, 145 N. Y. Supp. 987.

[b] Where the statute prescribes the manner in which a jury may be waived in certain actions and a failure to demand a jury at the time of setting the cause is not included as a mode of waiver, a rule of court declaring that, if a jury is not demanded at the time of setting the cause for trial, the right to trial by jury shall be deemed waived cannot be enforced and it is error to deny the right to a jury by reason of such rule. *Biggs v. Lloyd*, 70 Cal. 447, 11 Pac. 831.

[c] Where Statute Requires Express Waiver.—Under a statute providing that the parties shall be entitled to a trial by jury unless a jury is expressly waived, a rule of court requiring the parties to demand a jury within a certain time is invalid. *Ten Eyck v. Farlee*, 16 N. J. L. 348.

upheld,<sup>3</sup> and the same is true of rules of court regulating the exercise of the right to peremptory challenges.<sup>4</sup>

**2. Constitution and Selection of Jury.**—An order of court to summon a jury from one particular part of the county to the exclusion of another part constitutes a denial of the right to trial by jury,<sup>5</sup> as does a trial by jurors who are not able to speak the English language.<sup>6</sup>

**3. Impartiality of Jury.**—The right to trial by jury implies a trial by an impartial jury, and where the court permits the jurors to sit under conditions which might affect their impartiality the right to trial by jury is impaired thereby.<sup>7</sup> But the exclusion of the jury from the courtroom during an argument on the admissibility of evidence does not violate the constitutional right of trial by jury.<sup>8</sup> Nor is the constitutional guaranty of the right to trial by jury violated by permitting a juror to testify as a witness,<sup>9</sup> or to act as interpreter.<sup>10</sup>

**4. Directing Verdict.**—Where there is some evidence tending to prove the material facts necessary to entitle a party to a verdict, it is

**3. U. S.**—*Fidelity & D. Co. v. United States*, 187 U. S. 315, 23 Sup. Ct. 120, 47 L. ed. 194. **D. C.**—*Cropley v. Vogeler*, 2 App. Cas. 28. **Vt.**—*Jones v. Spear*, 21 Vt. 426.

[a] **Requiring Affidavit of Defense.** A rule of court authorizing the rendition of judgments in actions ex contractu where no affidavit of defense is filed does not deprive defendant of his constitutional right to trial by jury. "It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses and to defeat attempts to use formal pleading as means to delay the recovery of just demands." *Fidelity & Deposit Co. v. United States*, 187 U. S. 315, 23 Sup. Ct. 120, 47 L. ed. 194.

**4. St. Clair v. United States**, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. ed. 936.

[a] "Trial by jury is guaranteed by the constitution, the right of challenge is secured by legislative enactment, and the mode in which jurors are presented to the prisoner, in his exercise of that right, depends upon practice or is regulated by rule of court." *State v. Boatwright*, 10 Rich. L. (S. C.) 407.

**5. Shaffer v. State**, 1 How. (Miss.) 238; *Zanone v. State*, 97 Tenn. 101, 36 S. W. 711, 35 L. R. A. 556.

[a] **Order Specifying Townships.** An order of the court directing the

jury to be drawn from eleven specified townships out of twenty-five townships is not sanctioned by law. *People v. Hall*, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477.

**6. Lyles v. State**, 41 Tex. 172, 19 Am. Rep. 38.

**7. See cases following.**

[a] **Where the trial judge on an application for a continuance in the presence of the jury examines the defendant and by the character of the questions asked brings defendant's cause in contempt, it is a denial of the constitutional right of trial by jury.** *Collins v. State*, 99 Miss. 47, 54 So. 665.

[b] **Where a large crowd hostile to defendant was assembled in the court room and within the bar immediately around the jury, the jury was not so safeguarded against extraneous influences as to allow the defendants the right of trial by an impartial jury guaranteed by the constitution.** *State v. Weldon*, 91 S. C. 29, 74 S. E. 43, Ann. Cas. 1913E, 801, 39 L. R. A. (N. S.) 667.

**8. People v. Becker**, 215 N. Y. 126, 109 N. E. 127, Ann. Cas. 1917A, 600.

**As to exclusion of jury during argument, see *infra*, IX, C.**

**9. Howser v. Com.**, 51 Pa. 332.

**Jurors as witnesses, see 14 ENCY. OF EV. 603.**

**10. People v. Thiede**, 11 Utah 241, 39 Pac. 837.

a denial of the constitutional right to trial by jury to direct a verdict against such party,<sup>11</sup> but where the evidence with all reasonable inferences to be drawn therefrom cannot support any other verdict, the court may direct a verdict.<sup>12</sup>

**5. Nonsuit.**—The constitutional guaranty of the right to trial by jury is not applicable to the action of the trial court in sustaining a demurrer to the evidence.<sup>13</sup>

**6. New Trial.**—The constitutional right to trial by jury is not infringed by the granting of a new trial by the court upon the ground that the verdict of the jury is excessive.<sup>14</sup> Nor does an order of court making the denial of a new trial dependent upon a remission of part of the verdict impair the constitutional guaranty of trial by jury.<sup>15</sup> It has been held, however, that the power of the court to set aside a verdict cannot be exercised where several verdicts have been rendered in the cause in favor of the same party.<sup>16</sup> An order of

11. *Gibbs v. Village of Girard*, 88 Ohio St. 34, 102 N. E. 299.

As to directing verdict, see generally the title "Verdict."

As to legislative power to authorize a directed verdict, see *supra*, II, D.

[a] "There can be no constitutional exercise of the power to direct a verdict in any case in which there is a dispute as to any material evidence or any legal doubt as to the conclusion to be drawn from the whole evidence, upon the issues to be tried. . . . That is, if there is any dispute as to any material fact, the case must go to the jury." *Tennessee Cent. R. Co. v. Morgan*, 132 Tenn. 1, 175 S. W. 1148.

12. *Randall v. Baltimore & O. R. R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. ed. 1003; *People v. Damskey*, 180 Mich. 664, 147 N. W. 585.

[a] Under the federal practice an order of the court directing a verdict after the jury has deliberated and has been unable to agree is not in violation of the constitutional right to trial by jury. *Cloquet Lumber Co. v. Burns*, 207 Fed. 40.

13. *Smith v. Glynn (Mo.)*, 177 S. W. 848; *Meade v. Meade*, 111 Va. 451, 69 S. E. 330.

See *Coughran v. Bigelow*, 164 U. S. 301, 17 Sup. Ct. 117, 41 L. ed. 442.

As to legislative power to authorize a nonsuit, see *supra*, II, D, 4, k.

14. *Ky.*—*Louisville & N. R. Co. v. Fox*, 11 Bush 495. *Mo.*—*Devine v. City of St. Louis*, 257 Mo. 470, 165 S. W. 1014, 51 L. R. A. (N. S.) 860. *S. C.* *Southern Power Co. v. White*, 92 S. C. 219, 75 S. E. 459.

15. *U. S.*—*Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. ed. 110. *Fla.*—*Atlantic Coast Line R. Co. v. Pipkin*, 64 Fla. 24, 59 So. 564. *Wis.* *Heimlich v. Tabor*, 123 Wis. 565, 102 N. W. 10, 68 L. R. A. 669.

[a] "The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection certainly does not deprive the defendant of any right, or give him any cause for complaint. Notwithstanding such remission, it is still open to him to show in the court which tried the case that the plaintiff was not entitled to a verdict in any sum and to insist, either in that court, or in the appellate court, that such errors of law were committed as entitled him to have a new trial of the whole case." *Arkansas Val. Land & Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. ed. 554.

16. *Hazzard v. Mayor of Savannah*, 77 Ga. 54.

[a] Where three successive verdicts of the jury in a cause are set aside by the court on the ground that the verdict is not supported by the evidence, the order setting aside the last verdict will be reversed. "Unless the system of trial by jury is to be entirely overthrown, there must be a point where the determination of a

court denying a new trial, upon a motion made either on the ground that the verdict is against the evidence<sup>17</sup> or on the ground of newly discovered evidence<sup>18</sup> cannot be said to be a denial of the constitutional right to trial by jury. Nor is it an infringement upon the constitution for the court in awarding a new trial to limit the issues to be submitted to the jury at such trial.<sup>19</sup>

**7. Review of Questions of Fact on Appeal.** — An appellate court cannot without violating the constitutional guaranty of trial by jury weigh conflicting evidence as long as there is any evidence to support the verdict,<sup>20</sup> but it may upon undisputed facts direct the entry of a judgment in accordance therewith without infringing the constitutional guaranty of trial by jury.<sup>21</sup> So too, where it appears as a matter of law that plaintiff cannot recover in the action, the appellate court may reverse a judgment in his favor without remanding the cause.<sup>22</sup> The provision of the constitution of the United States that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law applies to cases brought up from the state courts;<sup>23</sup> and the only

jury on questions of fact shall no longer be interfered with by the court. The power vested in a trial court to set aside a manifestly unjust verdict, where it is clearly the result of passion, prejudice or corruption, was not intended to establish the proposition that the verdict of a jury on questions of fact shall not be permitted to stand unless it is in harmony with the views of the justice presiding." *Perlman v. Brooklyn Heights R. Co.*, 78 Misc. 168, 137 N. Y. Supp. 917.

[b] And in *Dale v. St. Louis, K. & N. Ry. Co.*, 63 Mo. 455, it is said: "The verdict in this case on the first trial was set aside on account of the damages being in the opinion of the court, excessive. A second verdict was for the same amount which the court refused to set aside, and any interference by this court would be a usurpation of the province of the jury."

17. *Devine v. City of St. Louis*, 257 Mo. 470, 165 S. W. 1014, 51 L. R. A. (N. S.) 860.

18. *Sanborn v. Boston & M. R. R.*, 77 N. H. 307, 91 Atl. 865.

19. *Yazoo & M. V. R. Co. v. Scott*, 108 Miss. 371, 67 So. 491.

20. *Southern Product Co. v. Franklin Coil Hoop Co.*, 183 Ind. 123, 106 N. E. 872; *Peterson v. Ocean Elec. Ry. Co.*, 161 App. Div. 720, 146 N. Y. Supp. 604.

21. *Middleton v. Whitridge*, 213 N.

Y. 499, 108 N. E. 192, Ann. Cas. 1916C, 856; *Peterson v. Ocean Elec. Ry. Co.*, 161 App. Div. 720, 146 N. Y. Supp. 604.

22. *Kinkaid v. Kinkaid*, 256 Ill. 548, 100 N. E. 217.

[a] "The right of a trial by jury, as enjoyed prior to the adoption of the constitution, is subject to the power of a court of review to reverse a judgment for the plaintiff without remanding the cause, in cases where it clearly appears, as a question of law, that in the end there can be no recovery which could be permitted to stand. But the fact that the trial court might have directed a verdict for the plaintiff does not empower the appellate court to reverse a judgment for defendant and enter a judgment for the plaintiff's damages and costs." *Kinkaid v. Kinkaid*, 256 Ill. 548, 100 N. E. 217.

23. *Justices v. Murray*, 9 Wall. (U. S.) 274, 19 L. ed. 658.

[a] "It is admitted that the clause applies to the appellate powers of the supreme court of the United States in all common law cases coming up from an inferior Federal court and also to the circuit court in like cases, in the exercise of its appellate powers. And why not, as it respects the exercise of these powers in cases of Federal cognizance coming up from a state court? The terms of the amendment are general, and contain no qualification in

modes of review under this constitutional provision are by granting a new trial by the court where the cause was tried or by reversing the judgment on appeal.<sup>24</sup>

**II. EFFECT OF DENIAL OF RIGHT.**—A judgment rendered by a court sitting without a jury in a case where a jury cannot be waived is void,<sup>25</sup> while a denial of a jury trial in a case where a jury can be waived is error only and not an action in excess of jurisdiction.<sup>26</sup> So too, a verdict found by a jury consisting of less than twelve men in a case in which a common-law jury cannot be waived is void.<sup>27</sup> And a verdict rendered by a jury consisting of more than twelve likewise must be set aside.<sup>28</sup> The denial of the right to a jury trial will be deemed prejudicial even though no prejudice is shown, and requires a reversal.<sup>29</sup>

**III. SELECTING AND DRAWING JURORS.**<sup>1</sup>—**A. THE JURY LIST.**—**1. In General.**—At common law there was no procedure similar to what is now known as the making of the jury list, but the selection and summoning of the array of jurors for a particular session of court was confided almost wholly to the sheriff, or other proper officer.<sup>2</sup>

respect to the restriction upon the appellate jurisdiction of the courts, except as to the class of cases, namely, suits at common law, where the trial has been by jury. The natural inference is that no other was intended. Its language, upon any reasonable, if not necessary, interpretation we think, applies to this entire class, no matter from what court the case comes, of which cognizance can be taken by the appellate court. It seems to us also that cases of Federal cognizance, coming up from state courts, are not only within the words but are also within the reason and policy of the amendment." *Justices v. Murray*, 9 Wall (U. S.) 274, 19 L. ed. 658.

24. *Justices v. Murray*, 9 Wall. (U. S.) 274, 19 L. ed. 658; *Parsons v. Bedford*, 3 Pet. (U. S.): 433, 7 L. ed. 732.

25. *Paulsen v. People*, 195 Ill. 507, 63 N. E. 144.

[a] "Where a tribunal for the trial of criminal prosecutions is provided for and a jury is made an essential part of it, such tribunal cannot be changed by permitting the accused to consent to the elimination of the jury therefrom. In such cases the accused would, by waiver of a jury trial and consent to a trial before the judge alone, confer jurisdiction upon a tribunal which had no such jurisdiction under the law." *Brewster v. People*, 183 Ill. 143, 55 N. E. 640.

26. *Goodman v. Superior Court*, 8 Cal. App. 232, 96 Pac. 395.

27. *Ind.*—*Moore v. State*, 72 Ind. 358; *Brown v. State*, 8 Blackf. 561. *Minn.*—*State v. Everett*, 14 Minn. 439. *Miss.*—*Ex parte Scott*, 70 Miss. 247, 11 So. 657, 35 Am. St. Rep. 649. *N. J.* *Briant v. Russell*, 2 N. J. L. 146. *N. M.* *Territory v. Ortiz*, 8 N. M. 154, 42 Pac. 87. *Tex.*—*Jester v. State*, 26 Tex. App. 369, 9 S. W. 616. *Wis.*—*May v. Milwaukee & M. R. Co.*, 3 Wis. 219.

[a] A trial by a jury of less than twelve men because one of the jurors was excused by reason of illness, is illegal and the verdict of such jury is void. *Com. v. Byers*, 5 Pa. Co. Ct. 295. To the same effect, *Denman v. Baldwin*, 3 N. J. L. 945.

28. *N. C.*—*Whitehurst v. Davis*, 3 N. C. 113. *Tex.*—*Bullard v. State*, 38 Tex. 504, 19 Am. Rep. 30. *W. Va.* *State v. Hudkins*, 35 W. Va. 247, 13 S. E. 367.

29. *King Co. v. Louisville & N. R. Co.*, 131 Ky. 46, 114 S. W. 308; *Payne v. Ellwood* (Tex. Civ. App.), 163 S. W. 93.

1. **Selecting the trial jury**, see *infra*, VII.

2. See the following: *Dak.*—*United States v. Beebe*, 2 Dak. 292, 11 N. W. 505. *Ga.*—*Carter v. State*, 143 Ga. 632, 85 S. E. 884. *Ky.*—*Deaton v. Com.*, 157 Ky. 308, 163 S. W. 204. *Md.*—*State v. McNay*, 100 Md. 622, 60 Atl. 273;

This method is still used in special instances, in the absence of a statute covering the procedure.<sup>3</sup> The method of the selection of jurors is now, however, almost entirely regulated by statute, owing to the abuses of the common law procedure.<sup>4</sup> These statutes are merely directory;<sup>5</sup> yet

**Cooper v. State**, 64 Md. 40, 20 Atl. 986. **Mich.**—**Gott v. Brigham**, 45 Mich. 424, 8 N. W. 41. **N. C.**—**State v. Daniels**, 134 N. C. 641, 46 S. E. 743. **S. C.**—**State v. McQuaige**, 5 S. C. 429. **W. Va.**—**State v. Medley**, 66 W. Va. 216, 66 S. E. 358. **Wyo.**—**State v. Bolln**, 10 Wyo. 439, 70 Pac. 1. **Can.**—**In re Sheriff**, 26 U. C. Q. B. 346; **Harris v. McKenzie**, 3 Nova Scotia 242.

[a] **Selection Discretionary With Sheriff.**—The sheriff selected, at his discretion, from the body of freeholders in a county or from the body of citizens in a city, the persons whom he would have assembled for this purpose, and brought them into court under authority of a writ of venire facias in civil cases, and a precept in criminal cases, and entered the names of those summoned on a paper. **Carter v. State**, 143 Ga. 632, 85 S. E. 884; **State v. Daniels**, 134 N. C. 648, 46 S. E. 743. See also *infra*, IV, B, 1.

3. See **Deaton v. Com.**, 157 Ky. 308, 163 S. W. 204.

[a] **In Kentucky**, the common law method of having the sheriff select the jury becomes operative where a jury is directed to be selected from an adjoining county. **Deaton v. Com.**, 157 Ky. 308, 163 S. W. 204.

4. See generally the statutes, and **Mich.**—**People v. Harding**, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95, reviewing legislation upon subject of selecting the jury. **N. Y.**—**Dolan v. People**, 64 N. Y. 485, reviewing legislation in New York on subject. **N. C.**—**State v. Daniels**, 134 N. C. 641, 46 S. E. 743.

[a] **A person has no vested right in the manner provided for the selection of juries**, except that a change may not make it more difficult for him to be guaranteed an impartial jury. **State v. Barlow**, 70 Ohio St. 363, 71 N. E. 726.

[b] **The object of statutes (1) regulating the selection of jurors is to establish a mode of distributing jury duties among persons in the respective counties, subject to that kind of service (Ga.—Rafe v. State, 20 Ga. 60. Ia. State v. Wilson, 166 Iowa 309, 144 N. W. 47, 147 N. W. 739. Miss.—Sumrall**

**v. State**, 29 Miss. 202. **Mo.**—**State v. Breen**, 59 Mo. 413. **Ohio.**—**State v. Barlow**, 70 Ohio St. 363, 71 N. E. 726. **S. C.**—**Rhodes v. Southern Ry. Co.**, 68 S. C. 494, 47 S. E. 689, and (2) to guard against unjust political prejudice in the selection. **Klemmer v. Mount Penn Gravity R. Co.**, 163 Pa. 521, 30 Atl. 274; **Bucks County Jurors**, 20 Pa. Co. Ct. 36.

**As to selection**, see *infra*, III, A, 5. 5. **Ala.**—**Jury Com. v. State**, *ex rel.* Attorney General, 178 Ala. 412, 59 So. 594; **Griffin v. State**, 165 Ala. 29, 50 So. 962; **Thompson v. State**, 122 Ala. 12, 26 So. 141; **Childs v. State**, 97 Ala. 49, 12 So. 441 (Code 1885, §4314); **Woodward v. State**, 5 Ala. App. 202, 59 So. 688. **Cal.**—**People v. Durrant**, 116 Cal. 179, 48 Pac. 75. **Ga.**—**Rafe v. State**, 20 Ga. 60. **Ia.**—**State v. Wilson**, 166 Iowa 309, 144 N. W. 47, 147 N. W. 739; **State v. Pierce**, 90 Iowa 506, 58 N. W. 891; **State v. Ansaleme**, 15 Iowa 44. **Miss.**—**Cook v. State**, 90 Miss. 137, 43 So. 618. **Mo.**—**State v. Austin**, 183 Mo. 478, 82 S. W. 5; **State v. Gleason**, 88 Mo. 582; **State v. Knight**, 61 Mo. 373; **State v. Breen**, 59 Mo. 413. **N. J.**—**Gardner v. State**, 55 N. J. L. Union Nat. Bank, 40 N. J. L. 563, 17, 26 Atl. 30; **Stephens v. State**, 53 N. J. L. 245, 21 Atl. 1038; **Poulson v. N. C.**—**State v. Teachey**, 138 N. C. 587, 50 S. E. 232; **State v. Daniels**, 134 N. C. 641, 46 S. E. 743; **State v. Perry**, 122 N. C. 1018, 29 S. E. 384; **State v. Durham Fertilizer Co.**, 111 N. C. 658, 16 S. E. 231; **State v. Hensley**, 94 N. C. 1021; **State v. Martin**, 82 N. C. 672; **State v. Griffice**, 74 N. C. 316. **Ohio.**—**State v. Barlow**, 70 Ohio St. 363, 71 N. E. 726; **Huling v. State**, 17 Ohio St. 583. **S. C.**—**State v. Smith**, 77 S. C. 248, 57 S. E. 868; **Hutto v. Southern Ry.**, 75 S. C. 295, 55 S. E. 245; **Rhodes v. Southern Ry.**, 68 S. C. 494, 47 S. E. 689. **Wyo.**—**State v. Bolln**, 10 Wyo. 439, 70 Pac. 1.

[a] "The law prescribes in detail and with much particularity how the jury list of the county shall be annually prepared and revised by the board of county commissioners. It is highly conducive to the fair and im-

even so, the courts are agreed that the provisions of the statutes must be substantially conformed to.<sup>6</sup>

**2. By Whom Selected.**<sup>7</sup> — a. *In General.* — The various statutes differ as to the body or board upon whom the power of selecting and preparing the jury list is conferred.<sup>8</sup> A great number of the statutes, however, provide a jury commission for this purpose.<sup>9</sup> The board of

partial administration of justice, that these details should be strictly observed and followed, and any intentional non-observance of them is the subject of censure, if not of punishment. But it is well settled that they are only rules and regulations which are directory only, and have never been held to be mandatory, where the persons summoned are qualified jurors in other respects. It is clear from the statute itself that these rules are not mandatory, as they are nowhere declared to be, and no penalty is affixed for a violation of them. So far from regarding as fatal an omission to follow strictly these regulations so prescribed, the statute expressly provides that irregularities shall not vitiate." *State v. Haywood*, 73 N. C. 437.

**6. Cal.**—*People v. Sowell*, 145 Cal. 292, 78 Pac. 717; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Davis*, 73 Cal. 355, 15 Pac. 8. **Ia.**—*State v. Wilson*, 166 Iowa 309, 144 N. W. 47, 147 N. W. 739; *State v. Hassan*, 149 Iowa 518, 128 N. W. 960; *State v. Edgerton*, 100 Iowa 63, 69 N. W. 280. **Kan.**—*State v. Jenkins*, 32 Kan. 477, 4 Pac. 809. **Mo.**—*Jerabek v. St. Joseph*, 159 Mo. App. 505, 141 S. W. 456. **Mont.**—*State v. Tighe*, 27 Mont. 327, 71 Pac. 3. **N. C.**—*State v. Hensley*, 94 N. C. 1021; *State v. Haywood*, 73 N. C. 437. **P. E.**—See *Zurzinach v. Aran*, 5 Porto Rico Fed. 33. **Wyo.**—*Meldrum v. State*, 23 Wyo. 12, 146 Pac. 596; *State v. Bolln*, 10 Wyo. 439, 70 Pac. 1.

[a] Material departures from the mode of selection prescribed by the law are only such as affect the substantial rights of a defendant in securing an impartial jury. *People v. Sowell*, 145 Cal. 292, 78 Pac. 717.

**7. By whom jury-panel drawn**, see *infra*, III, B, 1, d.

**8.** See generally the statutes.

**9.** See generally the statutes, and the following: **Ala.**—*Nelson v. State ex rel. Blackwell*, 182 Ala. 449, 62 So. 189; *West v. State*, 118 Ala. 100, 24 So.

48; *Wilkinson v. State*, 106 Ala. 23, 17 So. 458. **Ga.**—*Carter v. State*, 143 Ga. 632, 85 S. E. 884. **Ill.**—*People v. Onahan*, 170 Ill. 449, 48 N. E. 1003. **Ky.**—*Deaton v. Com.*, 157 Ky. 308, 163 S. W. 204; *Louisville H. & St. L. Ry. Co. v. Schwab*, 127 Ky. 82, 105 S. W. 110. **La.**—*State v. Gallot*, 138 La. 224, 70 So. 106; *State v. McClendon*, 118 La. 792, 43 So. 417. **Md.**—*State v. McNay*, 100 Md. 622, 60 Atl. 273. **Mich.**—*Eberts v. Mount Clemens Sugar Co.*, 182 Mich. 449, 148 N. W. 810; *People v. Tonnelier*, 167 Mich. 638, 133 N. W. 510; *People v. Harding*, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95. **Mo.**—*State v. Ryan*, 232 Mo. 77, 133 S. W. 8; *State v. Breen*, 59 Mo. 413. **Mont.**—*State v. Tighe*, 27 Mont. 327, 71 Pac. 3. **N. Y.**—*Allison v. Welde*, 172 N. Y. 421, 65 N. E. 263; *Matter of Brenner*, 170 N. Y. 185, 63 N. E. 133. **Pa.**—*Klemmer v. Mount Penn Gravity R. Co.*, 163 Pa. 521, 30 Atl. 274 (commission and president judge); *Com. v. Manfredi*, 162 Pa. 144, 29 Atl. 404. **S. C.**—*State v. Mills*, 79 S. C. 187, 60 S. E. 664 (designated county officials); *State v. McQuaige*, 5 S. C. 429. **Tenn.**—*Turner v. State*, 111 Tenn. 593, 69 S. W. 774. **Tex.**—*Columbo v. State*, 65 Tex. Crim. 608, 145 S. W. 910; *O'Bryan v. State*, 12 Tex. App. 118. **Wash.**—Such was case in this state previous to 1909. *State v. Vance*, 29 Wash. 435, 70 Pac. 34; *State v. Straub*, 16 Wash. 111, 47 Pac. 227; *State v. Bokien*, 14 Wash. 403, 44 Pac. 889. For rule now, see *infra*, note 13. **W. Va.**—*State v. Scott*, 36 W. Va. 704, 15 S. E. 405. **Wis.**—*State ex rel. Gubbins v. Anson*, 132 Wis. 461, 112 N. W. 475. **Wyo.**—*Comp. St.*, 1910, §983; *Meldrum v. State*, 23 Wyo. 12, 146 Pac. 596; *State v. Bolln*, 10 Wyo. 439, 70 Pac. 1, commissioners are designated county officers.

[a] In United States courts (1) the selection is made by a jury commissioner and a clerk of court. *United States v. Murphy*, 224 Fed. 554; *United States v. Chaires*, 40 Fed. 820. (2) In

supervisors,<sup>10</sup> or county commissioners,<sup>11</sup> or county board,<sup>12</sup> is sometimes named as the selecting body. Other statutes designate certain county or city officials, such as the county clerk,<sup>13</sup> or assessor,<sup>14</sup> or district or superior court judges,<sup>15</sup> or judge and assessor,<sup>16</sup> or judges of the election boards,<sup>17</sup> or council,<sup>18</sup> or other designated city officials.<sup>19</sup> The sheriff under the statutes of some jurisdictions is required to prepare the list.<sup>20</sup>

**Delegation of Power.**—The power of selecting the jury list, confided by statute to certain designated boards or officials, cannot be delegated by them, in whole or in part, to others.<sup>21</sup>

the event that the clerk of the court is incapacitated, absent, sick, or disabled, and cannot perform the duty which the law imposes upon him, the deputy clerk may act for him in the placing of names in the jury lists. *United States v. Rockefeller*, 221 Fed. 462.

10. *Ariz.*—*Ubillos v. Territory*, 9 *Ariz.* 171, 80 *Pac.* 363. *Cal.*—*Code Civ. Proc.*, §204; *People v. Sowell*, 145 *Cal.* 292, 78 *Pac.* 717. *Fla.*—*Woodward v. State*, 33 *Fla.* 508, 15 *So.* 252. *Ill.* *People v. Hubert*, 251 *Ill.* 514, 96 *N. E.* 294. *Miss.*—*Lewis v. State*, 91 *Miss.* 505, 45 *So.* 360; *Farrow v. State*, 91 *Miss.* 509, 45 *So.* 619; *Cook v. State*, 90 *Miss.* 137, 43 *So.* 618; *Dixon v. State*, 74 *Miss.* 271, 20 *So.* 839.

11. *Idaho.*—*Heitman v. Morgan*, 10 *Idaho* 562, 79 *Pac.* 225. *Minn.*—*State v. Peterson*, 61 *Minn.* 73, 63 *N. W.* 171, 28 *L. R. A.* 324. *N. C.*—*State v. Daniels*, 134 *N. C.* 641, 46 *S. E.* 743; *State v. Dixon*, 131 *N. C.* 808, 42 *S. E.* 944; *State v. Haywood*, 73 *N. C.* 437. *Ore.* *State v. Holman*, 68 *Ore.* 546, 137 *Pac.* 771.

12. *Poole v. Lansden*, 183 *Ill. App.* 609.

13. See generally the statutes, and *State v. Leroy*, 61 *Wash.* 405, 112 *Pac.* 635; *Cathey v. Seattle Elec. Co.*, 58 *Wash.* 176, 108 *Pac.* 443 (county clerk makes up list since law of 1909); *In re McNab*, 22 *U. C. Q. B.* 170, clerk of the recorder's court selects jurors for the city.

14. *Hewitt v. Gage*, 71 *Mich.* 287, 39 *N. W.* 56 (by special act in Saginaw county); *Stevens v. Richer*, 1 *How. (Miss.)* 522.

15. See generally the statutes.

[a] Majority of superior court judges make the selection in counties where the population is 100,000 or over in California. *Cal. Code Civ. Proc.*,

§204; *People v. Durrant*, 116 *Cal.* 179, 48 *Pac.* 75.

16. *State v. Weingarth* (*Minn.*), 159 *N. W.* 789 (two judges of the municipal court and the president of the council); *State v. Squires*, 2 *Nev.* 226.

17. See generally the statutes.

[a] In Iowa, (1) the auditor is required to furnish the judges of election with a statement of the number of persons apportioned to their respective precincts to be returned for the jury list, and the judges are required to make the requisite selection and return the list of names so selected to the auditor. *State v. Wilson*, 166 *Iowa* 309, 144 *N. W.* 47, 147 *N. W.* 739. *State v. Edgerton*, 100 *Iowa* 63, 69 *N. W.* 280; *State v. Pierce*, 90 *Iowa* 506, 58 *N. W.* 891; *State v. Brandt*, 41 *Iowa* 593; *State v. Ansalem*, 15 *Iowa* 44. (2) The board of supervisors makes such list and returns it to the auditor, if the judges of election fail to prepare it. *State v. Wilson*, 166 *Iowa* 309, 144 *N. W.* 47, 147 *N. W.* 739; *State v. Brandt*, 41 *Iowa* 593.

18. *McGann v. Hamilton*, 58 *Conn.* 69, 19 *Atl.* 376.

19. *Page v. Inhab. of Danvers*, 7 *Metc. (Mass.)* 326; *People v. Wennerholm*, 166 *N. Y.* 567, 60 *N. E.* 259; *Carpenter v. People*, 64 *N. Y.* 483; *Dolan v. People*, 64 *N. Y.* 485; *People v. Walker*, 23 *Barb. (N. Y.)* 304, 2 *Abb. Pr.* 421.

20. See generally the statutes, and *Gardner v. State*, 55 *N. J. L.* 17, 26 *Atl.* 30; *Poulson v. Union Nat. Bank*, 40 *N. J. L.* 563, selection to be made by the sheriff before the court of common pleas and in the presence of the county clerk. See also *Stephens v. State*, 53 *N. J. L.* 245, 21 *Atl.* 1038, the deputy county clerk may act for the county clerk.

21. *Louisville, H. & St. L. Ry. Co.*

**De Facto Commissioners.**—A list prepared by de facto jury commissioners is not irregular.<sup>22</sup>

A commissioner whose term of office has expired may act until his successor has been appointed and qualified.<sup>23</sup>

**Majority May Act.**—It is sufficient if a majority of the commissioners are present and act in the selection.<sup>24</sup>

b. *Qualifications of Commissioners.*—Certain qualifications are sometimes imposed upon jury commissioners, such as that they must have no suit requiring a jury trial pending in the court at the time the list is drawn,<sup>25</sup> or that they should hold no office under the state, county, or municipality,<sup>26</sup> and should not act as practicing attorneys at

*v. Schwab*, 127 Ky. 82, 105 S. W. 110.

22. **Ga.**—*Cox v. State*, 64 Ga. 374, 37 Am. Rep. 76, not ground for challenge. **N. Y.**—*Dolan v. People*, 64 N. Y. 485; *Thompson v. People*, 6 Hun 135. **Pa.**—*Com. v. Clemmer*, 190 Pa. 202, 42 Atl. 675; *Com. v. Valsalka*, 181 Pa. 17, 37 Atl. 405. **S. C.**—*State v. Lee*, 35 S. C. 192, 14 S. E. 395; *State v. McJunkin*, 7 S. C. 21. **W. Va.**—*Hudson v. Jones*, 68 W. Va. 492, 69 S. E. 980; *State v. Medley*, 66 W. Va. 216, 66 S. E. 358.

23. *Roby v. State*, 74 Ga. 812; *State v. Lee*, 35 S. C. 192, 14 S. E. 395; *State v. McJunkin*, 7 S. C. 21.

[a] Such commissioner becomes a de facto officer in the interval between the expiration of his term of office and the appointment and qualification of his successor. *State v. Lee*, 35 S. C. 192, 14 S. E. 395; *State v. McJunkin*, 7 S. C. 21.

[b] But after the appointment and qualification of the succeeding commissioner, the retiring one has no authority to prepare a list of jurors. *State v. Bryce*, 11 S. C. 342.

**Duration of office of commissioner**, see *infra*, III, A, 2, d.

24. **Ala.**—*Woodward v. State*, 5 Ala. App. 202, 59 So. 688. **Ga.**—*Roby v. State*, 74 Ga. 812. **La.**—*State v. Bouvy*, 124 La. 1054, 50 So. 849; *State v. McClendon*, 118 La. 792, 43 So. 417. **Minn.** *State v. Weingarth*, 159 N. W. 789. **Mo.**—*State v. Ryan*, 232 Mo. 77, 133 S. W. 8. **Mont.**—*State v. Osnes*, 14 Mont. 553, 37 Pac. 13. **Pa.**—*Com. v. Manfredi*, 162 Pa. 144, 29 Atl. 404. **S. C.**—*State v. Merriman*, 34 S. C. 16, 12 S. E. 619. **Tenn.**—*Turner v. State*, 111 Tenn. 593, 69 S. W. 774.

25. See generally the statutes, and the following: **Ind. Ter.**—*Burch v. United States*, 7 Ind. Ter. 284, 104 S.

W. 619. **Ky.**—*Louisville, H. & St. L. Ry. Co. v. Schwab*, 127 Ky. 82, 105 S. W. 110. **Mont.**—*State v. McHatton*, 10 Mont. 370, 25 Pac. 1046. **Tenn.**—*Turner v. State*, 111 Tenn. 593, 69 S. W. 774. **Tex.**—*Veramendi v. Hutchins*, 56 Tex. 414; *Columbo v. State*, 65 Tex. Crim. 608, 145 S. W. 910; *Whittle v. State*, 43 Tex. Crim. 468, 66 S. W. 771.

[a] In the absence of statute so requiring, see *Northeastern Neb. R. Co. v. Frazier*, 25 Neb. 42, 40 N. W. 604.

[b] **Disqualification of One Member.**—The fact that one member of a board of jury commissioners is so disqualified does not render the board's action invalid, the majority of the members being competent to act. *Turner v. State*, 111 Tenn. 593, 69 S. W. 774.

[c] **Commissioner Prosecuting Witness.**—It is not ground for quashing the venire in a trial for arson, that the owner of the burned building was one of the jury commissioners, in the absence of a showing that he discharged his duties with reference to the prosecution of the particular defendant. *Prater v. State*, 107 Ala. 26, 18 So. 238.

26. **Ga.**—*McLain v. State*, 71 Ga. 279. **La.**—*State v. Ardoin*, 136 La. 1085, 68 So. 133; *State v. McClendon*, 118 La. 792, 43 So. 417; *State v. Scott*, 110 La. 369, 34 So. 479; *State v. Fuselier*, 51 La. Ann. 1317, 26 So. 264; *State v. Newhouse*, 29 La. Ann. 824. **Tenn.**—*Turner v. State*, 111 Tenn. 593, 69 S. W. 774.

[a] **Presumption of Resignation of Former Office.**—An officer who accepts an appointment as jury commissioner is presumed to have resigned his former office. *State v. Fuselier*, 51 La. Ann. 1317, 26 So. 264. See *State v. Nockum*, 41 La. Ann. 689, 6 So. 729;

law.<sup>27</sup> Relationship alone of a jury commissioner to a party to an action or proceeding does not disqualify him from selecting a jury.<sup>28</sup> Nor is a commissioner disqualified by the fact that he is a merchant doing business with the defendants.<sup>29</sup>

**Statutes Directory.**—The statutes specifying certain qualifications to be necessary in a jury commissioner are directory only.<sup>30</sup>

c. *Appointment and Oath of Persons Selecting.*—(I.) **Generally.** The jury selectors are sometimes appointed by the judge or court,<sup>31</sup>

State v. Riley, 41 La. Ann. 693, 6 So. 730.

[b] **Membership in a committee of a political party** is not an office within the meaning of the provision of such a statute. State v. Ardoin, 136 La. 1085, 68 So. 133.

[c] **A county school commissioner** is not such a county officer as is rendered incompetent by the statute to act on the jury commission. McLain v. State, 71 Ga. 279.

27. Turner v. State, 111 Tenn. 593, 69 S. W. 774.

[a] **It will vitiate a jury list if an attorney aids in its preparation.** United States v. Murphy, 224 Fed. 554; State v. Austin, 183 Mo. 478, 82 S. W. 5.

28. Humphrey v. Palmer, 89 S. C. 401, 71 S. E. 977; Veramendi v. Hutchins, 56 Tex. 414.

[a] **The general rule is thus stated in State v. Perry, 73 S. C. 199, 53 S. E. 169:** "The correct rule is that the consanguinity or affinity must be such as would reasonably lead to the presumption that the jury commissioner would thereby be affected in such manner as to impair the proper discharge of his duties, and this fact must be determined by the presiding judge in the exercise of a sound discretion. It may be well to remark that the trial judge in exercising his discretion is not restricted to the consideration of the degree of relationship only. The court may inquire whether the case had arisen and whether the officer knew of its pendency when the jury was drawn. These and other pertinent inquiries in addition to the fact of relationship may well enter into the exercise of the discretion of the court." Quoted in Humphrey v. Palmer, 89 S. C. 401, 71 S. E. 977.

[b] **Duty of Litigant Where Commissioner Related.**—Where the statute confers on the jury commissioner the

right of rejection, it is the duty of a litigant to use reasonable diligence to ascertain before the selecting whether one of the commissioners is related to the parties in interest, so that he may be present at the drawing and protect his rights. Humphrey v. Palmer, 89 S. C. 401, 71 S. E. 977.

[c] **Where Selection Before Cause of Action Accrued.**—Where it appears that the names in the jury box had been selected and placed therein before the cause of action had arisen, there was no abuse of discretion in holding that the defendant could not have been prejudiced by the participation in such selection of a commissioner who was the son-in-law of the plaintiff. Humphrey v. Palmer, 89 S. C. 401, 71 S. E. 977.

29. Veramendi v. Hutchins, 56 Tex. 414.

30. United States v. Chaires, 40 Fed. 820; Whittle v. State, 43 Tex. Crim. 468, 66 S. W. 771.

31. **U. S.**—United States v. Chaires, 40 Fed. 820. **Ga.**—Carter v. State, 143 Ga. 632, 85 S. E. 884; Edge v. Holcomb, 135 Ga. 765, 70 S. E. 644; Rawlins v. State, 124 Ga. 31, 52 S. E. 1. **Ill.** People v. Onahan, 170 Ill. 449, 48 N. E. 1003; McCaffery v. McAndrews, 174 Ill. App. 391. **Ind. Ter.**—Burch v. United States, 7 Ind. Ter. 284, 104 S. W. 619. **Ky.**—Louisville, H. & St. L. Ry. Co. v. Schwab, 127 Ky. 82, 105 S. W. 110; Risner v. Com., 95 Ky. 539, 26 S. W. 388. **La.**—State v. Jordan, 136 La. 476, 67 So. 337; State v. McClendon, 118 La. 792, 43 So. 417; State v. Scott, 110 La. 369, 34 So. 479; State v. Batson, 108 La. 479, 32 So. 478; State v. Jean, 42 La. Ann. 946, 8 So. 480; State v. Nockum, 41 La. Ann. 689, 6 So. 729. **Mo.**—State v. Coreoran, 206 Mo. 1, 103 S. W. 1044. **Mont.** State v. McHatton, 10 Mont. 370, 25 Pac. 1046. **N. Y.**—Allison v. Welde,

sometimes by the governor,<sup>32</sup> and sometimes it is an elective office.<sup>33</sup>

(II.) **Oath.**—The commissioners are required by statute to take an oath before entering upon their duties.<sup>34</sup> But a failure to do so will not render acts of the commissioners performed in accordance with the provisions of the statute objectionable as they are de facto officers and as such competent to act,<sup>35</sup> though upon this proposition the authorities are not in accord.<sup>36</sup> Where the sheriff or his deputy is required to

172 N. Y. 421, 65 N. E. 263. **Okla.**—Munn v. State, 5 Okla. Crim. 245, 114 Pac. 272; Remer v. State, 3 Okla. Crim. 706, 109 Pac. 247. **Tenn.**—Turner v. State, 111 Tenn. 593, 69 S. W. 774, Acts 1901, ch. 124. **Tex.**—Veramendi v. Hutchins, 56 Tex. 414; Columbo v. State, 65 Tex. Crim. 608, 145 S. W. 910; Irvin v. State, 57 Tex. Crim. 331, 123 S. W. 331; Western Union Tel. Co. v. Everheart, 10 Tex. Civ. App. 468, 32 S. W. 90; O'Bryan v. State, 12 Tex. App. 118. **Utah.**—Kennedy v. Oregon Short Line R. Co., 18 Utah 325, 54 Pac. 988. **W. Va.**—State v. Scott, 36 W. Va. 704, 15 S. E. 405; State v. Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243. **Wis.**—State ex rel. Gubbins v. Anson, 132 Wis. 461, 112 N. W. 475.

32. **La.**—State v. Pierre, 121 La. 465, 46 So. 574. **Md.**—State v. McNay, 100 Md. 622, 60 Atl. 273. **Mich.**—People v. Tonnelier, 167 Mich. 638, 133 N. W. 510; People v. Reilly, 53 Mich. 260, 18 N. W. 849; People v. Harding, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95, appointment made by senate on nomination of governor.

33. **Com. v. Clemmer**, 190 Pa. 202, 42 Atl. 675; Bucks County Jurors, 20 Pa. Co. Ct. 36; **Com. v. Smith**, 16 Pa. Co. Ct. 577.

34. See generally the statutes and the following: **Ala.**—Linnehan v. State, 116 Ala. 471, 22 So. 662. **Ill.**—Ann. St., 1913, §6856. **Ind. Ter.**—Burch v. United States, 7 Ind. Ter. 284, 104 S. W. 619. **Ky.**—Louisville, H. & St. L. Ry. Co. v. Schwab, 127 Ky. 82, 105 S. W. 110. **La.**—State v. McClendon, 118 La. 792, 43 So. 417; State v. Batson, 108 La. 479, 32 So. 478; State v. Flint, 52 La. Ann. 62, 26 So. 913; State v. Thompson, 32 La. Ann. 879. **Mich.**—People v. Harding, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95. **Mo.**—State v. Breen, 59 Mo. 413. **Pa.**—Com. v. Val-salka, 181 Pa. 17, 37 Atl. 405; Klem-

mer v. Mount Penn G. R. Co., 163 Pa. 521, 30 Atl. 274.

[a] **Presumption as to Oath.**—In the absence of proof to the contrary, it will be presumed that the jury commissioners took the prescribed oath. **Linnehan v. State**, 116 Ala. 471, 22 So. 662.

[b] **Where the clerk of court is a member of the jury commission**, it is not necessary that he take the oath required of those who are appointed on the commission in addition to his oath as clerk. **State v. Bradley**, 120 La. 248, 45 So. 120; **State v. Starr**, 52 La. Ann. 610, 26 So. 998; **State v. Noekum**, 41 La. Ann. 689, 6 So. 729; **State v. Riley**, 41 La. Ann. 693, 6 So. 730. But see *contra*, **State v. Vance**, 31 La. Ann. 398; **State v. Williams**, 30 La. Ann. 1028.

[c] **The president judge who helps the commissioners make the selection need not take an additional oath before entering on this duty.** **Com. v. Shew**, 8 Pa. Dist. 484; **Com. v. Smith**, 16 Pa. Co. Ct. 577.

35. **Linnehan v. State**, 116 Ala. 471, 22 So. 662; **Hudson v. Jones**, 68 W. Va. 492, 69 S. E. 980; **State v. Medley**, 66 W. Va. 216, 66 S. E. 358.

**As to effect of list prepared by de facto commissioners**, see *supra*, III, A, 2, a.

36. **State v. Kellogg**, 104 La. 580, 29 So. 285; **State v. Flint**, 52 La. Ann. 62, 26 So. 913, both holding that all members of the jury commission must qualify by taking the oath prescribed before any official act can be taken.

[a] **The omission of one commissioner to take the oath to support the constitution of the United States**, although he takes an oath to faithfully perform his duties as commissioner, bars him from entering upon the discharge of his duties, and because of such omission the jury commission does not come into existence and cannot perform any of the functions assigned

select the jurors by reason of the exhaustion of the list prepared by the commissioners,<sup>37</sup> a failure to administer the statutory oath to such officers is error.<sup>38</sup>

The oath is to be taken in open court,<sup>39</sup> or filed with certain prescribed officers.<sup>40</sup>

d. *Duration of Office*.—The jury commissioners generally hold office for a period of time fixed by statute.<sup>41</sup> In some jurisdictions, the term of office is within the discretion of the judge appointing them or his successor.<sup>42</sup>

e. *Remuneration*.—The compensation of the jury commissioners is wholly regulated by statute.<sup>43</sup>

3. *Time of Selection*.<sup>44</sup>—The time for making selections or revisions of the jury list varies in different jurisdictions, some, annually,<sup>45</sup>

to it. *State v. McClendon*, 118 La. 792, 43 So. 417.

37. See *supra*, III, A, 2, a.

38. *Sewall v. State*, 67 Tex. Crim. 105, 148 S. W. 569; *Wyers v. State*, 22 Tex. App. 258, 2 S. W. 722; *Hicks v. State*, 5 Tex. App. 488.

[a] *Only Administered Once During Term*.—If the oath is administered to the sheriff and his deputies on the first day of the term, and the same officers act throughout the term, it is not necessary to have the oath repeated every time new or additional talesmen are to be summoned. *Deon v. State*, 37 Tex. Crim. 506, 40 S. W. 266; *Adams v. State*, 35 Tex. Crim. 285, 33 S. W. 354; *Shaw v. State*, 32 Tex. Crim. 155, 22 S. W. 588; *Habel v. State*, 28 Tex. App. 588, 13 S. W. 1001.

39. *Louisville, H. & St. L. Ry. Co. v. Schwab*, 127 Ky. 82, 105 S. W. 110.

40. *People v. Harding*, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95 (county clerk); *Com. v. Valsalka*, 181 Pa. 17, 37 Atl. 405, prothonotary of the county.

[a] *Failure to file oath* does not vitiate list selected as requirement is merely directory. *Com. v. Valsalka*, 181 Pa. 17, 37 Atl. 405.

41. See generally the statutes, and *Ga.*—*Carter v. State*, 143 Ga. 632, 85 S. E. 884; *Edge v. Holcomb*, 135 Ga. 765, 70 S. E. 644. *Ky.*—*Risner v. Com.*, 95 Ky. 539, 26 S. W. 388. *Mo.* *State v. Corcoran*, 206 Mo. 1, 103 S. W. 1044. *N. M.*—*Territory v. Emilio*, 14 N. M. 147, 89 Pac. 239. *W. Va.*—*State v. Scott*, 36 W. Va. 704, 15 S. E. 405; *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243.

42. *State v. Jordan*, 136 La. 476, 67

So. 337; *State v. Bradley*, 120 La. 248, 45 So. 120; *State v. McClendon*, 118 La. 792, 43 So. 417; *State v. Jean*, 42 La. Ann. 946, 8 So. 480.

[a] *The mere election of a new judge does not vacate* the appointments made by the latter to membership on the jury commission, which retains its authority until its members are removed by the succeeding judge. *State v. Jordan*, 136 La. 476, 67 So. 337; *State v. Bradley*, 120 La. 248, 45 So. 120.

43. See generally the statutes, and *Ill.*—*People v. Onahan*, 170 Ill. 449, 48 N. E. 1003. *Mo.*—*State ex rel. Major v. Ryan*, 232 Mo. 77, 133 S. W. 8. *Pa.*—*Fees v. Lebanon*, 1 Pa. Co. Ct. 428. *W. Va.*—*State v. Scott*, 36 W. Va. 704, 15 S. E. 405; *State v. Mounts*, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243.

44. *Time of drawing jury panel*, see *infra*, III, B, 1, c, (I).

45. See generally the statutes, and the following: *Ariz.*—*Ubillos v. Territory*, 9 Ariz. 171, 80 Pac. 363. *Conn.* *McGann v. Hamilton*, 58 Conn. 69, 19 Atl. 376; *Colt v. Eves*, 12 Conn. 243. *Fla.*—*Woodward v. State*, 33 Fla. 508, 15 So. 252; *Reeves v. State*, 29 Fla. 527, 10 So. 901; *White v. State*, 26 Fla. 602, 7 So. 857. *Idaho.*—*Heitman v. Morgan*, 10 Idaho 562, 79 Pac. 225. *Ill.*—*Ann. St.*, 1913, §6856 (selection made every four years; revision and amendment made annually in discretion of commissioners); *People v. Onahan*, 170 Ill. 449, 48 N. E. 1003. *Mich.* *Eberts v. Mount Clemens Sugar Co.*, 182 Mich. 449, 148 N. W. 810; *People v. Harding*, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95. *Miss.*—*Cook v.*

and in others biennially;<sup>46</sup> in other jurisdictions, such selection or revision is made biannually,<sup>47</sup> or when the list is exhausted,<sup>48</sup> or so far depleted that it will probably be exhausted at the next drawing of jurors.<sup>49</sup> In others, it is made as often as necessary to keep the list up to a definite number.<sup>50</sup> The time fixed by the statutes for selecting or revising the jury list is merely directory, and it does not invalidate the list if the jurors are not selected at the statutory time.<sup>51</sup> The selection or revision may be made at an adjourned meeting of the selecting body at which all members are present,<sup>52</sup> or at a meeting subsequent to the one named in the statute.<sup>53</sup>

State, 90 Miss. 137, 43 So. 618; Dixon v. State, 74 Miss. 271, 20 So. 839; Sumrall v. State, 29 Miss. 202. **S. C.** Hutto v. Southern Ry., 75 S. C. 295, 55 S. E. 445. **Wash.**—State v. Leroy, 61 Wash. 405, 112 Pac. 635; Cathey v. Seattle Elec. Co., 58 Wash. 176, 108 Pac. 443. **Wyo.**—Comp. St., 1910, §983; Meldrum v. State, 23 Wyo. 12, 146 Pac. 596; State v. Bolln, 10 Wyo. 439, 70 Pac. 1.

[a] **The object of the annual lists** is not to annul or supersede the lists previously returned, but to return the names of such persons as may have been previously omitted, or may have become from any cause subject to the duty since the previous return. Sumrall v. State, 29 Miss. 202.

46. Poole v. Lansden, 183 Ill. App. 609.

[a] **In Georgia**, the statute provides that biennially, or, if the judge of the superior court shall direct, triennially, the jury list shall be revised, except in certain counties where the revision may be annual. Carter v. State, 143 Ga. 632, 85 S. E. 884.

47. State v. McClendon, 118 La. 792, 43 So. 417; State v. Daniels, 134 N. C. 641, 46 S. E. 743.

48. Nelson v. State *ex rel.* Blackwell, 182 Ala. 449, 62 So. 189; Jury Com. v. State, 178 Ala. 412, 59 So. 594; West v. State, 118 Ala. 100, 24 So. 48; Steele v. State, 111 Ala. 32, 20 So. 648; Johnson v. State, 102 Ala. 1, 16 So. 99; Poole v. Lansden, 183 Ill. App. 609. See People v. Hubert, 251 Ill. 514, 96 N. E. 294, wherein the court refused to allow a challenge to the array based upon the ground that the board of supervisors selected a new jury list before the old one was exhausted, because the record did not show from which list the jurors were drawn.

**Refilling box before names therein**

exhausted as ground of challenge, see *infra*, VII, E.

49. Nelson v. State *ex rel.* Blackwell, 182 Ala. 449, 62 So. 189; Jury Com. v. State, 178 Ala. 412, 59 So. 494.

50. State v. Gallot, 138 La. 224, 70 So. 106; State v. Batson, 108 La. 479, 32 So. 478; State v. White, 46 La. Ann. 1273, 15 So. 623.

51. **Conn.**—Colt v. Eves, 12 Conn. 243. **Fla.**—Reeves v. State, 29 Fla. 527, 10 So. 901. **N. Y.**—People v. Wennerholm, 166 N. Y. 567, 60 N. E. 259. **N. C.**—State v. Teachey, 138 N. C. 587, 50 S. E. 232; State v. Dixon, 131 N. C. 808, 42 S. E. 944; Moore v. Navassa Guano Co., 130 N. C. 229, 41 S. E. 293; State v. Smarr, 121 N. C. 669, 28 S. E. 549. **S. C.**—State v. Smith, 77 S. C. 248, 57 S. E. 868; Hutto v. Southern Ry., 75 S. C. 295, 55 S. E. 245; State v. Lee, 35 S. C. 192, 14 S. E. 395. **Utah.**—Kennedy v. Oregon Short Line R. Co., 18 Utah 325, 54 Pac. 988; Nelson v. Southern Pacific Co., 18 Utah 244, 55 Pac. 364. **W. Va.**—State v. Medley, 66 W. Va. 216, 66 S. E. 358. **Wis.**—Burlingame v. Burlingame, 18 Wis. 285. **Wyo.**—State v. Bolln, 10 Wyo. 439, 70 Pac. 1.

[a] **Mere Irregularity.**—It is at most but a mere irregularity that the jury list is not revised at the statutory time. State v. Teachey, 138 N. C. 587, 50 S. E. 232; Moore v. Navassa Guano Co., 130 N. C. 229, 41 S. E. 293.

[b] **Dilatory Selection.**—That the jury board occupied two months in the process of selecting jurors and putting their names in the wheel may indicate unnecessary deliberation, but is no ground of complaint for want of care and diligence. Com. v. Manfredi, 162 Pa. 144, 29 Atl. 404.

52. People v. Baldwin, 117 Cal. 244, 49 Pac 186.

53. Reeves v. State, 29 Fla. 527, 10

**Exhaustion of Authority.**—After the jury roll has been made up and the jury box filled, the power, authority and duty of the jury commission is exhausted;<sup>54</sup> and cannot be called into activity again until the exhaustion or depletion of the box.<sup>55</sup>

**4. Place of Selection.**—The place of meeting of the jury commission is usually designated by statute.<sup>56</sup> The commissioners,<sup>57</sup> or the clerk,<sup>58</sup> are sometimes authorized to designate the place of meeting. The statute is merely directory as to the place of revising the jury list.<sup>59</sup>

**5. The Selection.**—a. *In General.*—The board or commissioners are invested with large discretionary powers in regard to the selection and rejection of the individuals who are prospective jurors,<sup>60</sup> and in the absence of an illegal purpose, fraud or corruption in the selection, the discretionary action of the commissioners will not usually be set aside.<sup>61</sup> Where, however, the jury commissioners act in open dis-

So. 901; *Poole v. Lansden*, 183 Ill. App. 609.

[a] **Power of Correction After Completion of List.**—But the jury commission or its members have no power or authority, at a subsequent meeting, to correct errors or mistakes made in the deposit of names in the jury box, or in their entry upon the jury list. *Jury Com. v. State*, 178 Ala. 412, 59 So. 594.

54. *Jury Com. v. State*, 178 Ala. 412, 59 So. 594.

55. *Jury Com. v. State*, 178 Ala. 412, 59 So. 594; *Steele v. State*, 111 Ala. 32, 20 So. 648. See also the cases cited *supra*, note 48.

56. See generally the statutes, and Ala.—*Jury Com. v. State*, 178 Ala. 412, 59 So. 594. Mich.—*Eberts v. Mount Clemens Sugar Co.*, 182 Mich. 449, 148 N. W. 810. Wyo.—Comp. St., 1910, §883; *Meldrum v. State*, 23 Wyo. 12, 146 Pac. 596; *State v. Bolln*, 10 Wyo. 439, 70 Pac. 1.

57. *State ex rel. Major v. Ryan*, 232 Mo. 77, 133 S. W. 8.

58. *State v. Johnson*, 47 La. Ann. 1092, 17 So. 480.

59. *State v. Teachey*, 138 N. C. 587, 50 S. E. 232; *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293.

60. Ala.—*Green v. State*, 73 Ala. 26; *State v. Brooks*, 9 Ala. 9; *Woodward v. State*, 5 Ala. App. 202, 59 So. 688. Fla.—*Reeves v. State*, 29 Fla. 527, 10 So. 901. Ga.—*Carter v. State*, 143 Ga. 622, 85 S. E. 884; *Dickens v. State*, 137 Ga. 523, 73 S. E. 826; *Thomas v. State*, 67 Ga. 460. La.—*State v. Evans*, 137 La. 379, 68 So. 732; *State v. Chase*, 37

La. Ann. 165. Miss.—*Lewis v. State*, 91 Miss. 505, 45 So. 360.

[a] **Judicial Function.**—(1) The determination of the qualifications of prospective jurors involves the judicial function of the jury commission. *Nelson v. State ex rel. Blackwell*, 182 Ala. 449, 62 So. 189. (2) But the selection of the jurors is not an essentially judicial function, making an act conferring upon the jury commissioners the power of selecting jurors, unconstitutional as conferring upon them the exercise of judicial power. *State v. McNay*, 100 Md. 622, 60 Atl. 273.

[b] **Commissioners may omit from the jury list** without abusing their discretion all persons whose business is such that it is reasonably probable that an excuse from jury service would be granted. *Carter v. State*, 143 Ga. 632, 85 S. E. 884; *Dickens v. State*, 137 Ga. 523, 73 S. E. 826; *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1; *State v. Tighe*, 27 Mont. 327, 71 Pac. 3, wherein the commissioners purposely excluded persons exempt from liability to act as jurors. As to excusing jurors from jury service, see *infra*, VI.

61. Fla.—*Reeves v. State*, 29 Fla. 527, 10 So. 901. La.—*State v. Evans*, 137 La. 379, 68 So. 732; *State v. Bradley*, 120 La. 248, 45 So. 120; *State v. Chase*, 37 La. Ann. 165; *State v. Foster*, 32 La. Ann. 34. N. Y.—*People v. Jewett*, 3 Wend. 314. N. C.—*State v. Daniels*, 134 N. C. 641, 46 S. E. 743; *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293; *State v. Perry*, 122 N. C. 1018, 29 S. E. 384.

[a] **The court cannot in any collateral proceeding inquire whether or**

obedience of the law in the selection of the jurors and the preparation of the jury list, no fraud or improper purpose need be shown;<sup>62</sup> nor need the challenging party show that he was thereby substantially prejudiced.<sup>63</sup> The fact that some of the jurors selected do not possess the requisite qualifications,<sup>64</sup> or are exempt by law from service,<sup>65</sup> does not, of itself, vitiate the list, unless the statute specifically prescribes the class or list of persons from which the jurors are to be selected.<sup>66</sup>

b. *Number Selected.*<sup>67</sup>—The statutes generally designate the number of names to be selected for the jury list,<sup>68</sup> though this matter is sometimes left to the discretion of the jury commissioners.<sup>69</sup> Where a statute directs that a certain number of names be on the list, it will not constitute a ground of objection to the panel that a less number,<sup>70</sup>

not the jury commission have judiciously selected a jury list of persons possessing the requisite qualifications. *Green v. State*, 73 Ala. 26.

[b] **Discretion Not Disturbed.**—(1) The jury list will not be set aside because the jurors selected owned but a small percentage of the wealth of the county (*Carter v. State*, 143 Ga. 632, 85 S. E. 884; *Davis v. Arthur*, 139 Ga. 74, 76 S. E. 676), (2) or because a majority of them belonged to a particular religious sect. *Carter v. State*, 143 Ga. 632, 85 S. E. 884; *Davis v. Arthur*, 139 Ga. 74, 76 S. E. 676.

**Intentional omission of names of negro citizens** as ground for quashing venire, see *infra*, VII, E, 3.

62. *Louisville, H. & St. L. Ry. Co. v. Schwab*, 127 Ky. 82, 105 S. W. 110; *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293.

63. *Louisville, H. & St. L. Ry. Co. v. Schwab*, 127 Ky. 82, 105 S. W. 110.

64. Cal.—*People v. Searecy*, 121 Cal. 1, 53 Pac. 359, 41 L. R. A. 157 (name not on assessment roll); *People v. Durrant*, 116 Cal. 179, 43 Pac. 75; *People v. Young*, 108 Cal. 8, 41 Pac. 281, not on assessment roll. La.—*State v. Batson*, 108 La. 479, 32 So. 478. N. C. *State v. Griffice*, 74 N. C. 316. Wyo. *Meldrum v. State*, 23 Wyo. 12, 146 Pac. 596; *State v. Bolln*, 10 Wyo. 439, 70 Pac. 1.

[a] **Qualifications Not Passed Upon.** It was not intended by the legislature that the qualifications of each person selected by the board should be passed upon. If their names appear upon the assessment roll, no further inquiries need be made. *State v. Squaires*, 2 Nev. 226.

65. *State v. Brooks*, 9 Ala. 9; *State*

*v. Merriman*, 34 S. C. 16, 12 S. E. 619.

66. *State v. Jenkins*, 32 Kan. 477, 4 Pac. 809, in which event a failure to select from such class or list is sufficient ground for quashing the panel.

**Grounds for quashing panel**, see generally *infra*, VII, E, 3.

67. **Number of jury**, see *supra*, II, B, 2.

68. See generally the statutes, and the following: Fla.—*Reeves v. State*, 29 Fla. 527, 10 So. 901 (three hundred persons or less when such number cannot be procured); *White v. State*, 26 Fla. 602, 7 So. 857. Idaho.—*Heitman v. Morgan*, 10 Idaho 562, 79 Pac. 225, one hundred and fifty or less when such number cannot be secured. La. *State v. Batson*, 108 La. 479, 32 So. 478. Mich.—*Hewitt v. Gage*, 71 Mich. 287, 39 N. W. 56.

69. *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1.

[a] **The commissioners, in determining the number of jurors to be selected**, should take into consideration the whole number of persons liable to jury service, the volume of business to be transacted in the various courts which require the presence of jurors, as well as the facilitation of business in such courts. *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1.

70. *People v. Sowell*, 145 Cal. 292, 73 Pac. 717. See *State v. Batson*, 108 La. 479, 32 So. 478, holding that if the number in the box falls one short of that contemplated by statute, it does not justify the quashing of the venire, in the absence of proof of fraud or actual injury. Compare *State v. Love*, 106 La. 658, 31 So. 289, holding that where the number is far below the statutory requirement it is

or that a much greater number,<sup>71</sup> is designated.

c. *Presumption of Regularity*.—In the absence of a showing to the contrary, it will be presumed that the board or commission making the selection properly discharged its duty in good faith.<sup>72</sup>

d. *Mandamus To Compel*.<sup>73</sup>—Mandamus is the appropriate remedy to compel the commissioners to perform their duty where they have failed to act.<sup>74</sup> The allegations of the petition in such case must be positive, and not on information and belief.<sup>75</sup>

6. **Signing and Returning Jury List**.—The jury list is signed,<sup>76</sup>

sufficient to cause a quashal.

**Grounds for challenge to array generally**, see *infra*, VII, E, 3.

71. *Hewitt v. Gage*, 71 Mich. 287, 39 N. W. 56 (holding that a list having an excessive number of jurors may be corrected by striking off all names listed in excess of the proper number); *Rizzolo v. Com.*, 126 Pa. 54, 17 Atl. 520, holding that the fact that there was a slight excess in the number of names on the list was a mere irregularity of a harmless nature.

**As ground for challenge to array**, see *infra*, VII.

72. **Cal.**—*People v. Sowell*, 145 Cal. 292, 78 Pac. 717. **Fla.**—*Woodward v. State*, 33 Fla. 508, 15 So. 252. **Ga.**—*Carter v. State*, 143 Ga. 632, 85 S. E. 884; *Davis v. Arthur*, 139 Ga. 74, 76 S. E. 676. **Idaho.**—*Heitman v. Morgan*, 10 Idaho 562, 79 Pac. 225. **Ia.**—*State v. Wilson*, 166 Iowa 309, 144 N. W. 47, 147 N. W. 739; *State v. Ansaleme*, 15 Iowa 44. **Ky.**—*Louisville, H. & St. L. Ry. Co. v. Schwab*, 127 Ky. 82, 105 S. W. 110. **Mich.**—*People v. Coughlin*, 67 Mich. 466, 35 N. W. 72. **N. Y.**—*Dolan v. People*, 64 N. Y. 485. **N. C.**—*State v. Wilcox*, 104 N. C. 847, 10 S. E. 453. **Pa.**—*Com. v. Valsalka*, 181 Pa. 17, 37 Atl. 405; *Roland v. Com.*, 82 Pa. 306, 22 Am. Rep. 758; *Com. v. Hughes*, 33 Pa. Super. 90. **Tex.**—*Woodward v. State*, 50 Tex. Crim. 294, 97 S. W. 499. **Wyo.**—*State v. Bolln*, 10 Wyo. 439, 70 Pac. 1.

[a] This presumption cannot be overcome by an *ex parte* order of the judge, reciting that in his opinion the jury lists are not a fair representation of the intelligence of the county. *Carter v. State*, 143 Ga. 632, 85 S. E. 884.

[b] **Presumption Where No Jurors Selected From Township**.—Where the law directs that a proportionate number of jurors be selected from each township and it appears that no jurors

were selected from one township, it will be presumed that there were no persons in such township, suitable and qualified to act as jurors. *People v. Sowell*, 145 Cal. 292, 78 Pac. 717. See also *People v. Searcey*, 121 Cal. 1, 53 Pac. 359, 41 L. R. A. 157.

73. **As to mandamus generally**, see the title "Mandamus."

74. *Davis v. Arthur*, 139 Ga. 74, 76 S. E. 676. See *Kennedy v. Oregon Short Line Co.*, 18 Utah 325, 54 Pac. 988.

75. *Davis v. Arthur*, 139 Ga. 74, 76 S. E. 676. See generally the title "Mandamus."

76. See generally the statutes, and **Fla.**—*Young v. State*, 63 Fla. 55, 58 So. 188; *Reeves v. State*, 29 Fla. 527, 10 So. 901. **Minn.**—*State v. Peterson*, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324; *State v. Schumm*, 47 Minn. 373, 50 N. W. 362; *State v. Greenman*, 23 Minn. 209. **N. J.**—*Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30; *Poulson v. Union Nat. Bank*, 40 N. J. L. 563. **Wyo.**—*State v. Bolln*, 10 Wyo. 439, 70 Pac. 1.

[a] The list cannot be deemed complete until it is certified, signed, and attested as required by statute, when it is then in the nature of a record. *State v. Greenman*, 23 Minn. 209.

[b] **Failure To Sign List**.—An objection that the chairman of the county commissioners failed to sign the jury list before handing it to the clerk for recordation should not avail where it affirmatively appears that no possible injury accrued to the defendant by reason of such irregularity. *Young v. State*, 63 Fla. 55, 58 So. 188.

[c] In the absence of statute, the list need not be signed, however. *State v. Weingarth* (Minn.), 159 N. W. 789.

[d] **Signature as County Commissioners**.—The fact that the commissioners returned the list signed by them as county commissioners instead

after completion, and certified,<sup>77</sup> and turned over to the clerk or other keeper named by the statute to be recorded or filed.<sup>78</sup> The time for returning the lists is not important, and it is not necessary that the statutory time for returning it be followed.<sup>79</sup> It is immaterial whether the return is made voluntarily,<sup>80</sup> upon request,<sup>81</sup> or upon the order of court.<sup>82</sup>

Where the jury list returned is illegal, the court under some statutes may direct the return of a new list.<sup>83</sup>

of as jury commissioners did not vitiate the return as the county commissioners constituted the board of jury commissioners. *Linnehan v. State*, 116 Ala. 471, 22 So. 662.

77. See generally the statutes, and the following: Fla.—*Reeves v. State*, 29 Fla. 527, 10 So. 901. Ga.—*Carr v. State*, 76 Ga. 592. Minn.—*State v. Peterson*, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324; *State v. Schumm*, 47 Minn. 373, 50 N. W. 362 (failure to certify is a material defect); *State v. Greenman*, 23 Minn. 209. N. J.—*Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30; *Poulson v. Union Nat. Bank*, 40 N. J. L. 563. Pa.—*Com. v. Valsalka*, 181 Pa. 17, 37 Atl. 405.

[a] Statutes are mandatory as to the certificate. *Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30; *Poulson v. Union Nat. Bank*, 40 N. J. L. 563. But see *Coker v. State*, 7 Tex. App. 83, where the court questioned whether the section requiring the jury list to be certified would be construed as mandatory, in the absence of a showing that defendant was prejudiced thereby.

[b] The fact that the list was not certified when returned to the county clerk may be rectified by attaching the certificate where there is no question but that the list of jurors, as drawn by the board of supervisors, was the same list that went into possession of the county clerk, and from which the names were taken and placed in the trial jury box. *People v. Young*, 108 Cal. 8, 41 Pac. 281. See *McLain v. State*, 71 Ga. 279.

[c] Sufficient Certification.—*Carter v. State*, 56 Ga. 463; *State v. Peterson*, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324.

[d] Matters which do not affect the essence of the certificate will not vitiate the list. *State v. Brooks*, 9 Ala. 9. And see also *Brinkley v. State*, 54 Ga. 371.

78. See generally the statutes, and the following: Ala.—Code, 1907, §7239 (judge of probate court); *Johnson v. State*, 102 Ala. 1, 16 So. 99. Ariz. *Ubillos v. Territory*, 9 Ariz. 171, 80 Pac. 363. Cal.—Code Civ. Proc., §208; *People v. Crowey*, 56 Cal. 36. Fla. *Reeves v. State*, 29 Fla. 527, 10 So. 901; *White v. State*, 26 Fla. 602, 7 So. 857 (recorded in minutes of commissioners); *Keech v. State*, 15 Fla. 591. Minn.—*State v. Peterson*, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324. Mont.—*State v. Tighe*, 27 Mont. 327, 71 Pac. 3. Pa.—*Com. v. Valsalka*, 181 Pa. 17, 37 Atl. 405. Wyo.—*State v. Bolln*, 10 Wyo. 439, 70 Pac. 1.

Failure to do so as ground of challenge, see *infra*, VII, E.

[a] Statutes Directory.—The statutes requiring the list to be “forthwith delivered to the clerk” are directory only. *State v. Gut*, 13 Minn. 341.

[b] List may be recorded after the ballots are placed in the box, or the jury drawn. The omission to record it is not an irregularity in respect to the selection, summoning or empanelling of jurors. *Keech v. State*, 15 Fla. 591.

79. *People v. Fuhrman*, 103 Mich. 593, 61 N. W. 865; *Thomas v. People*, 39 Mich. 309.

[a] Return After Termination of Office.—Where the body making the selection goes out of office before making a return to the clerk, the succeeding body can make the return. *McGann v. Hamilton*, 58 Conn. 69, 19 Atl. 376.

80. *People v. Fuhrman*, 103 Mich. 593, 61 N. W. 865.

81. *People v. Fuhrman*, 103 Mich. 593, 61 N. W. 865.

82. *People v. Fuhrman*, 103 Mich. 593, 61 N. W. 865.

83. *Smaltz v. Boyce*, 109 Mich. 382, 69 N. W. 21, on its own motion.

7. **The Jury Box or Wheel.**—a. *In General.*—Statutes generally provide for a jury box or wheel or other receptacle in which the slips or ballots containing the names of persons selected for jury duty are deposited.<sup>84</sup> Separate boxes for grand jurors and trial jurors are sometimes provided.<sup>85</sup>

b. *Preparation of Ballots.*—Statutes sometimes direct that the ballots or slips be prepared in a certain way,<sup>86</sup> as for instance, that they be so folded as to make the name invisible,<sup>87</sup> or that the names selected from each ward be separately wrapped and sealed,<sup>88</sup> and that the occupation,<sup>89</sup> and residence,<sup>90</sup> of the juror be stated after his name.<sup>91</sup>

c. *Depositing Ballots and Locking Box.*—The ballots or slips, after preparation, are placed in the jury box or wheel, or other receptacle,<sup>92</sup>

84. See generally the statutes, and *infra*, III, A, 7, c.

85. See generally the statutes, and **Cal.**—Code Civ. Proc., §209. **Ga.**—Carter v. State, 143 Ga. 632, 85 S. E. 884. **Ill.**—People v. Onahan, 170 Ill. 449, 48 N. E. 1003.

86. See generally the statutes, and the following: **Jury Com. v. State**, 178 Ala. 412, 59 So. 594; **Wilkinson v. State**, 106 Ala. 23, 17 So. 458; **Johnson v. State**, 102 Ala. 1, 16 So. 99; **Humphrey v. Palmer**, 89 S. E. 401, 71 S. E. 977.

[a] **Commissioners To Write Names.** The statutory provision is mandatory that the commissioners shall personally write the names of the jurors on the ballots. **Louisville, H. & St. L. Ry. Co. v. Schwab**, 127 Ky. 82, 105 S. W. 110.

87. **Ala.**—Code, 1907, §7240; **Wilkinson v. State**, 106 Ala. 23, 17 So. 458; **Johnson v. State**, 102 Ala. 1, 16 So. 99. **Cal.**—Code Civ. Proc., §209; **People v. Crowley**, 56 Cal. 36. **Conn.**—McGann v. Hamilton, 58 Conn. 69, 19 Atl. 376. **N. J.**—Poulson v. Union Nat. Bank, 40 N. J. L. 563. **N. Y.**—Pringle v. Huse, 1 Cow. 432. **Pa.**—Com. v. Haines, 27 Pa. Co. Ct. 81. **S. C.**—Humphrey v. Palmer, 89 S. C. 401, 71 S. E. 977.

Failure to fold slips as grounds for challenge to array, see *infra*, VII, E, 3.

88. **People v. Tonnelier**, 167 Mich. 638, 133 N. W. 510.

89. **Ala.**—**Jury Com. v. State**, 178 Ala. 412, 59 So. 594; **Thompson v. State**, 122 Ala. 12, 26 So. 141 (failure to state occupation not ground for quashing venire, however); **Johnson v. State**, 102 Ala. 1, 16 So. 99. **Ill.**—**People v. Onahan**, 170 Ill. 449, 48 N. E.

1003. **Pa.**—**Com. v. Haines**, 27 Pa. Co. Ct. 81.

90. **Ala.**—**Jury Com. v. State**, 178 Ala. 412, 59 So. 594; **Wilkinson v. State**, 106 Ala. 23, 17 So. 458 (omission to give residence on a few of tickets and using abbreviation "Co." for county, not ground for quashing venire, however); **Johnson v. State**, 102 Ala. 1, 16 So. 99. **Ill.**—**People v. Onahan**, 170 Ill. 449, 48 N. E. 1003. **La.**—**State v. Batson**, 108 La. 479, 32 So. 478. **Pa.**—**Com. v. Haines**, 27 Pa. Co. Ct. 81.

91. Failure to state occupation and residence of juror as ground for quashing venire, see *infra*, VII, E, 3.

92. See generally the statutes, and the following: **Ala.**—**Jury Com. v. State**, 178 Ala. 412, 59 So. 594; **Johnson v. State**, 102 Ala. 1, 16 So. 99. **Ill.**—**People v. Onahan**, 170 Ill. 449, 48 N. E. 1003. **Ky.**—**Louisville, H. & St. L. Ry. Co. v. Schwab**, 127 Ky. 82, 105 S. W. 110. **La.**—**State v. Gallot**, 138 La. 224, 70 So. 106; **State v. Batson**, 108 La. 479, 32 So. 478. **Miss.**—**Sumrall v. State**, 29 Miss. 202. **Mo.**—**State v. Breen**, 59 Mo. 413. **Neb.**—**Northeastern Neb. R. Co. v. Frazier**, 25 Neb. 42, 40 N. W. 604. **N. J.**—**Poulson v. Union Nat. Bank**, 40 N. J. L. 563. **Pa.**—**Brown v. Com.**, 73 Pa. 321, 13 Am. Rep. 740; **Com. v. Haines**, 27 Pa. Co. Ct. 81; **Com. v. Smith**, 16 Pa. Co. Ct. 577. **Tenn.**—**Turner v. State**, 111 Tenn. 593, 69 S. W. 774. **Wash.**—**Cathey v. Seattle Elec. Co.**, 58 Wash. 176, 108 Pac. 443. **Wyo.**—**State v. Bolln**, 10 Wyo. 439, 70 Pac. 1.

[a] **Alabama.**—Under the local law in Pike county, the tickets are required to be deposited in fifteen boxes, one for each precinct in the county.

which receptacle is then sealed and locked,<sup>93</sup> and placed in proper custody.<sup>94</sup> It is sometimes prescribed that the key be kept in the custody of designated officers, other than those having the care of the box or wheel.<sup>95</sup> The statutory regulations concerning the locking, custody,

*Hornsby v. State*, 94 Ala. 55, 10 So. 522.

[b] **Commissioners To Place Names in Box.**—The selection will be vitiated if the commissioners delegate others to deposit the ballots in the jury box, the statute being mandatory that such act be performed by the commissioners personally. *Louisville, H. & St. L. Ry. Co. v. Schwab*, 127 Ky. 82, 105 S. W. 110.

[c] **The jury box need not be filled up** (1) before a jury can be drawn therefrom (*Johnson v. State*, 102 Ala. 1, 16 So. 99); (2) but if the process of filling the box had been carried on to only a very limited extent, or if the circumstances attending the drawing gave evidence that it had not been fairly and impartially conducted, then it might constitute ground for quashal of the venire. *Johnson v. State*, 102 Ala. 1, 16 So. 99. As to grounds for quashing venire generally, see *infra*, VII, E, 3.

[d] **A name not upon the jury roll** cannot legally be entered in the jury box. *Jury Com. v. State*, 178 Ala. 412, 59 So. 594.

93. **Ala.**—*Jury Com. v. State*, 178 Ala. 412, 59 So. 594; *Johnson v. State*, 102 Ala. 1, 16 So. 99. **Pa.**—*Klemmer v. Mount Penn Gravity R. Co.*, 163 Pa. 521, 30 Atl. 274; *Kittanning Ins. Co. v. Adams*, 110 Pa. 553, 1 Atl. 443; *Curley v. Com.*, 84 Pa. 151; *Brown v. Com.*, 73 Pa. 321, 13 Am. Rep. 740; *Com. v. Smith*, 16 Pa. Co. Ct. 577; *Com. v. Hughes*, 33 Pa. Super. 90. **S. C.**—*Humphrey v. Palmer*, 89 S. C. 401, 71 S. E. 977. **Tenn.**—*Turner v. State*, 111 Tenn. 593, 69 S. W. 774.

**Failure to lock** as ground of challenge, see *infra*, VII, E.

[a] **When Not Necessary To Lock and Seal Wheel.**—The requirement of the statute that the jury box be locked and sealed has reference to the preservation of the wheel from interference by unauthorized persons between the time when the wheel is filled and a later date when it becomes necessary to open it for the purpose of drawing a jury. And so where the exigency of a venire makes it necessary to draw

a jury as soon as the wheel is filled, it is not necessary that the wheel be locked and sealed and immediately reopened. Such an act would be a useless one. *Com. v. Hughes*, 33 Pa. Super. 90.

[b] **Sealing.**—The sheriff and each jury commissioner should have an individual seal, which is attached separately. *Kittanning Ins. Co. v. Adams*, 110 Pa. 553, 1 Atl. 443; *Curley v. Com.*, 84 Pa. 151; *Brown v. Com.*, 73 Pa. 321, 13 Am. Rep. 740; *Com. v. Shew*, 8 Pa. Dist. 484; *Com. v. Smith*, 16 Pa. Co. Ct. 577.

94. **Com. v. Valsalka**, 181 Pa. 17, 37 Atl. 405; *Rolland v. Com.*, 82 Pa. 306, 22 Am. Rep. 758.

[a] **It is a sufficient custody of the jury box** (1) if it is kept in the place set apart for it in the commissioners' safe, to which safe only the commissioners and their clerks have access. *Com. v. Valsalka*, 181 Pa. 17, 37 Atl. 405; *Curley v. Com.*, 84 Pa. 151 (box kept in vault of county treasurer); *Rolland v. Com.*, 82 Pa. 306, 22 Am. Rep. 758. (2) And under a statute which does not designate where the jury box shall be kept, it has been held a sufficient custody if one of the commissioners, with the consent of the other, kept the box at his residence. *Klemmer v. Mount Penn Gravity R. Co.*, 163 Pa. 521, 30 Atl. 274.

95. See generally the statutes, and the following: **Ala.**—*Jury Com. v. State*, 178 Ala. 412, 59 So. 594. **Ky.**—*Smith v. Com.*, 108 Ky. 53, 55 S. W. 718. **La.**—*State v. Gallot*, 138 La. 224, 70 So. 106. **Pa.**—*Com. v. Valsalka*, 181 Pa. 17, 37 Atl. 405; *Klemmer v. Mount Penn G. R. Co.*, 163 Pa. 521, 30 Atl. 274; *Kittanning Ins. Co. v. Adams*, 110 Pa. 553, 1 Atl. 443; *Brown v. Com.*, 73 Pa. 321, 13 Am. Rep. 740. **S. C.**—*Humphrey v. Palmer*, 89 S. C. 401, 71 S. E. 977 (three different locks, each having a key peculiar to itself, one key to be kept by the county auditor, one by the county treasurer and the third by the clerk of the court of common pleas); *State v. Smith*, 77 S. C. 248, 57 S. E. 868, wherein it was held not to be a

and safe keeping of the jury box are merely directory, however,<sup>96</sup> though upon this proposition there are authorities to the contrary.<sup>97</sup>

B. THE JURY PANEL.<sup>98</sup>—1. **Drawing Regular Panel.**—a. *In General.*—In the absence of a statute regulating the method of selecting and drawing jurors, the rules of the common law prevail;<sup>99</sup> but this matter is generally covered by statutes,<sup>1</sup> which are generally held to be directory only,<sup>2</sup> although some statutes, either in whole or as to certain requirements, are regarded as mandatory.<sup>3</sup> Generally it is

fatal defect because one key opened two of the locks.

96. *State v. Stanton*, 118 N. C. 1182, 24 S. E. 536; *State v. Hensley*, 94 N. C. 1021.

[a] **Substantial Compliance Sufficient.**—Where the essential provisions of an act for the security of the accused have been observed, it is not material if there has been a slight deviation from a direction as to the marking of the jury box. *State v. Potts*, 100 N. C. 457, 6 S. E. 657.

97. *Smith v. Com.*, 108 Ky. 53, 55 S. W. 718, holding that a statute providing that the key to the jury box or wheel shall be kept in the custody of persons other than those having the care of the box or wheel is mandatory and that it constitutes a valid objection to the jury that such is not done, although the key is kept in a sealed envelope.

98. **Selecting jury list**, see *supra*, III, A.

99. *United States v. Beebe*, 2 Dak. 292, 11 N. W. 505; *Territory v. Carmody*, 8 N. M. 376, 45 Pac. 881.

1. See generally the statutes.

2. **Ala.**—*Wilkinson v. State*, 106 Ala. 23, 17 So. 458; *Long v. State*, 86 Ala. 36, 5 So. 443; *Sale v. State*, 68 Ala. 530; *Dotson v. State*, 62 Ala. 141, 34 Am. Rep. 2. See *Steele v. State*, 111 Ala. 32, 20 So. 648; *Johnson v. State*, 102 Ala. 1, 16 So. 99. **Cal.** *People v. Richards*, 1 Cal. App. 566, 82 Pac. 691. **Fla.**—*Reeves v. State*, 29 Fla. 527, 10 So. 901. **Ga.**—*Rafe v. State*, 20 Ga. 60. **Ill.**—*Wilhelm v. People*, 72 Ill. 468; *Mapes v. People*, 69 Ill. 523; *Ochs v. People*, 25 Ill. App. 379. **Ia.**—*State v. Wilson*, 166 Iowa 209, 144 N. W. 47, 147 N. W. 739; *State v. Rockwell*, 82 Iowa 429, 48 N. W. 721; *Brentner v. Chicago, M. & St. P. R. Co.*, 68 Iowa 530, 23 N. W. 245, 27 N. W. 605; *State v. Harris*, 64 Iowa 287, 20 N. W. 439. **La.**—*State v. Sheppard*, 115 La. 942, 40 So. 363.

**Mo.**—*State v. Jackson*, 167 Mo. 291, 66 S. W. 938; *State v. Gleason*, 88 Mo. 582; *State v. Knight*, 61 Mo. 373; *Berry v. Trunk*, 185 Mo. App. 495, 172 S. W. 629. **Nev.**—*State v. Johnny*, 29 Nev. 203, 87 Pac. 3; *State v. Squaires*, 2 Nev. 226. **N. J.**—*Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30; *Poulson v. Union Nat. Bank*, 40 N. J. L. 563. **N. Y.**—*Friery v. People*, 2 Abb. Dec. 215; *People v. Ransom*, 7 Wend. 417; *People v. Ferris*, 1 Abb. Pr. (N. S.) 193. See *People v. Rogers*, 13 Abb. Pr. (N. S.) 370. **N. C.**—*State v. Teachey*, 138 N. C. 587, 50 S. E. 232; *State v. Brogden*, 111 N. C. 656, 16 S. E. 170; *State v. Haywood*, 73 N. C. 437. See *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293. **Ohio.** *State v. Barlow*, 70 Ohio St. 363, 71 N. E. 726; *McHugh v. State*, 42 Ohio St. 154. **Okla.**—*Sharp v. United States*, 13 Okla. 522, 76 Pac. 177. **Ore.**—*Hart v. Territory*, 1 Ore. 122. **S. C.**—*State v. Smith*, 77 S. C. 248, 57 S. E. 868; *State v. Smalls*, 73 S. C. 516, 53 S. E. 976; *Rhodes v. Southern Ry. Co.*, 68 S. C. 494, 47 S. E. 689; *State v. Campbell*, 35 S. C. 28, 14 S. E. 292. **Tenn.** See *Hardwick v. State*, 6 Lea 103, 106. **Tex.**—*Howard v. State* (Tex. Crim.), 178 S. W. 506; *Charles v. State*, 13 Tex. App. 658. **Wash.**—*State v. Straub*, 16 Wash. 111, 47 Pac. 227; *State v. Bokien*, 14 Wash. 403, 44 Pac. 889. **W. Va.**—*State v. Clark*, 51 W. Va. 457, 41 S. E. 204. **Wis.**—*Ullman v. State*, 124 Wis. 602, 103 N. W. 6.

As to whether statutes are directory as to time and place, see *infra*, III, B, 1, c.

[a] While the statutes are directory, the essential provisions of the statute cannot be disregarded. *State v. Austin*, 183 Mo. 478, 82 S. W. 5.

3. **Ala.**—*Morris v. State*, 146 Ala. 66, 41 So. 274; *Allen v. State*, 145 Ala. 11, 40 So. 660; *Scott v. State*, 141 Ala. 39, 37 So. 366. **Conn.**—*State v. McGee*, 80 Conn. 614, 69 Atl. 1059. See

sufficient if there is a substantial compliance with the provisions of the statute, however.<sup>4</sup>

**Effect of Change in Statute.**—A jury panel properly drawn under the law in force at that time is valid notwithstanding a subsequent change in the law.<sup>5</sup> And a panel drawn under the existing law instead of the law in force at the time of the commission of the offense will be sustained.<sup>6</sup>

b. *Notice of Drawing.*—The statutes sometimes provide that notice must be given of the time of drawing the jury panel;<sup>7</sup> but the appearance of the parties to be notified amounts to a waiver of the prescribed notice.<sup>8</sup> A statute prescribing due notice contemplates a notification in due time to afford the parties opportunity to be present at the drawing.<sup>9</sup>

c. *Time and Place of Drawing.*—(I.) **Time.**<sup>10</sup>—The statutes fixing the time when the drawing shall take place vary,<sup>11</sup> some fixing the time

McGann v. Hamilton, 58 Conn. 69, 19 Atl. 376; Colt v. Eves, 12 Conn. 243.

Del.—*In re* Motion to Quash Panel of Petit Jurors, 5 Penne. 588, 65 Atl. 769.

Ga.—Shedd v. Stow (Ga. App.), 89 S. E. 352, statute relating to justice of the peace. Ind.—See Mitchell v. Lik-

ens, 3 Blackf. 258; Jones v. State, 3 Blackf. 37. Ky.—Louisville, H. & St.

L. Ry. Co. v. Schwab, 127 Ky. 82, 105 S. W. 110. La.—See State v. Conway,

35 La. Ann. 350; State *ex rel.* Maurice v. Judge, 30 La. Ann. 603. Md.—Green

v. State, 59 Md. 123, 43 Am. Rep. 542. Pa.—Com. v. Freeman, 166 Pa. 332, 31

Atl. 115. Va.—Hoback v. Com., 104 Va. 871, 52 S. E. 575.

As to whether statutes as to who shall draw are mandatory or not, see

*infra*, III, B, 1, d.

4. Cal.—People v. Wong Bin, 139 Cal. 60, 72 Pac. 505; People v. Rich-

ards, 1 Cal. App. 566, 82 Pac. 691. Md.—Green v. State, 59 Md. 123, 43

Am. Rep. 542. Okla.—Sharp v. United States, 13 Okla. 522, 76 Pac. 177; Mad-

dox v. State (Okla. Crim.), 158 Pac. 883. Wash.—Jennings v. Puget Sound

T. L. & P. Co., 76 Wash. 15, 135 Pac. 468.

[a] A strict compliance is recommended, however. People v. Davis, 73 Cal. 355, 15 Pac. 8.

[b] Where jurors free from challenge for cause are drawn and selected by the proper officers the law is satisfied. Dotson v. State, 62 Ala. 141, 34

Am. Rep. 2.

5. Neb.—See Neal v. State, 32 Neb. 120, 49 N. W. 174. N. J.—State v.

Shupe, 86 N. J. L. 410, 92 Atl. 53.

Wis.—Ray v. Lake Superior, etc. Co., 99 Wis. 617, 75 N. W. 420.

**Change in statute** under which jury panel is drawn as ground for challenge to array, see *infra*, VII, E, 3.

6. State v. Barlow, 70 Ohio St. 363, 71 N. E. 726, where the statute increased the number of commissioners to draw the panel from three to four.

7. See generally the statutes, and State v. Bouvy, 124 La. 1054, 50 So. 849.

**Failure to give notice as ground for challenge or quashal**, see *infra*, VII, E.

8. Williams v. State, 45 Tex. Crim. 218, 75 S. W. 859.

9. State v. Woodward, 136 La. 291, 67 So. 7, holding that where a member of a jury commission was notified by mail to attend a meeting next day, and the notice was delivered to his wife who gave it to him too late to enable him to attend, the notice was sufficient.

[a] The length of time of notice is of minor importance and where the persons are present on shorter notice the purpose of the statute is served. State v. Yordi, 30 Kan. 221, 2 Pac. 161.

[b] Four days' notice has been held sufficient although Sunday was an intervening day. State v. Wheeler, 64 Me. 532.

10. Time of selection of jury list, see *supra*, III, A, 3.

11. See generally the statutes.

[a] **At Time of Order Therefor.**—In Michigan in condemnation proceedings the jury must be drawn on the order of the judge, in his presence, and at

at the sitting of the court,<sup>12</sup> others at the term preceding the regular term,<sup>13</sup> or a certain number of days before the holding of court,<sup>14</sup> or at a certain day and month of the year.<sup>15</sup> The statutes are usually held directory as to the time of drawing,<sup>16</sup> and where a drawing is directed a certain time before holding of court, the period may be either longer,<sup>17</sup> or shorter,<sup>18</sup> than the prescribed period.

(II.) **Place.**—Statutes sometimes provide that the drawing shall take place in open court,<sup>19</sup> in the presence of the judge,<sup>20</sup> or in the clerk's office,<sup>21</sup> but these statutes are regarded as directory only.<sup>22</sup>

d. *Who May Draw.*<sup>23</sup>—Statutes variously provide that the jury panel shall be drawn by the clerk,<sup>24</sup> or, in his absence, by the deputy

the time of making the order. *Matter of Convers*, 18 Mich. 459.

12. *Stevens v. Richer*, 1 How. (Miss.) 522.

13. *State v. Pratt*, 15 Rich. L. (S. C.) 47.

14. **La.**—*State v. Aspara*, 113 La. 940, 37 So. 940. See *State v. Red*, 32 La. Ann. 819; *Lyon v. Commercial Ins. Co.*, 2 Rob. 266. **Mass.**—*Amherst v. Hadley*, 1 Pick. 38. **N. Y.**—*Powell v. People*, 5 Hun 169.

[a] **Computation of Time.**—Where the statute provides that the jury shall be drawn not less than fourteen nor more than twenty days before holding each trial term, the day appointed for holding the term must be excluded, and the day of the drawing may be included. *People v. Burgess*, 153 N. Y. 561, 47 N. E. 889.

15. *Colt v. Eves*, 12 Conn. 243.

16. See the following: **Conn.**—*Colt v. Eves*, 12 Conn. 243. **Fla.**—*Reeves v. State*, 29 Fla. 527, 10 So. 901. **Mo.**—*State v. Pitts*, 58 Mo. 556. **N. C.**—*Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293.

And see generally the cases cited in succeeding notes, and *supra*, III, B, 1, a.

[a] **But where monthly drawings** are provided for by the statute, they must be so made, and the court cannot try a case at one term with a panel drawn for the preceding term. *Covington & C. Bridge Co. v. Smith*, 118 Ky. 74, 80 S. W. 440; *South Covington & C. St. Ry. Co. v. Schilling*, 26 Ky. L. Rep. 1, 80 S. W. 510.

17. **Ala.**—*Daughdrill v. State*, 113 Ala. 7, 21 So. 378. **Mass.**—*Amherst v. Hadley*, 1 Pick. 38. **Miss.**—*Cook v. State*, 90 Miss. 137, 43 So. 618.

[a] **"At Least Fourteen Days."** Where the statute prescribes that the

drawing must be at least fourteen days before the sitting of the court, the length of time is in some degree in the discretion of the clerk, and this discretion cannot be said to have been abused when the panel was drawn fifty-two days before court day. *Crane v. Dygert*, 4 Wend. (N. Y.) 675.

18. *Babcock v. People*, 13 Colo. 515, 22 Pac. 817 (twenty-eight instead of thirty days); *State v. Pitts*, 58 Mo. 556.

19. See generally the statutes, and *Colson v. State*, 51 Fla. 19, 40 So. 183; *Cook v. State*, 90 Miss. 137, 43 So. 618.

[a] **What Is Open Court.**—A jury drawn while court was in session, in the presence of the court and its officers, is in open court whether it was done in the room where the court usually sits or in any other room in the courthouse. *State v. Millain*, 3 Nev. 409. As to what is open court, see generally the title "Judicial Officers."

20. *Matter of Convers*, 18 Mich. 459 (jury in condemnation proceedings); *Patterson v. State*, 48 N. J. L. 381, 4 Atl. 449.

21. See generally the statutes, and *State v. Green*, 43 La. Ann. 402, 9 So. 42.

[a] **Drawing the jury in an adjoining room** which opens into the clerk's office and is a part thereof is a compliance with a statute designating the place of drawing as the clerk's office. *State v. Green*, 43 La. Ann. 402, 9 So. 42.

22. *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293. See generally *supra*, III, B, 1, a.

23. **By whom jury list selected**, see *supra*, III, A, 2.

24. See generally the statutes, and

clerk,<sup>25</sup> by a child under ten years,<sup>26</sup> by the jury<sup>27</sup> or county commissioners,<sup>28</sup> or by the presiding judge,<sup>29</sup> by the judge, clerk, and sheriff,<sup>30</sup> or by the jury commission with the assistance of the clerk of the court,<sup>31</sup> or sheriff.<sup>32</sup>

**Statute Mandatory.**—The statutes prescribing who shall draw the jury are usually regarded as mandatory,<sup>33</sup> and if another acts, the jury is illegal.<sup>34</sup> The law intends that the officer directed to perform this duty shall do so by his own hand;<sup>35</sup> he cannot delegate his author-

the following: **Conn.**—*State v. Rosa*, 87 Conn. 585, 89 Atl. 163. **Ill.**—*Mapes v. People*, 69 Ill. 523, a de facto county clerk may act. **Ind.**—*Doolittle v. State*, 93 Ind. 272 (the clerk alone draws the names, and the presence or assistance of any other person is not required); *Jones v. State*, 3 Blackf. 37. **Kan.**—*State v. Bohan*, 19 Kan. 28. **Mich.**—*Fornia v. Frazer*, 140 Mich. 631, 104 N. W. 147; *People v. Labadie*, 66 Mich. 702, 33 N. W. 806. **Ore.**—*Hart v. Territory*, 1 Ore. 122. **Tex.**—*Brogden v. State*, 47 Tex. Crim. 121, 80 S. W. 378; *Pocket v. State*, 5 Tex. App. 552. **Va.**—*Hobaek v. Com.*, 104 Va. 871, 52 S. E. 575. **Wash.**—*State ex rel. Murphy v. Superior Court*, 82 Wash. 284, 144 Pac. 32; *State v. Payne*, 6 Wash. 563, 34 Pac. 317.

25. **U. S.**—*United States v. Matthews*, 26 Fed. Cas. No. 15,741b. **Conn.**—*State v. Rosa*, 87 Conn. 585, 89 Atl. 163. **Ia.**—*State v. Turner*, 114 Iowa 426, 87 N. W. 287. **N. Y.**—*People v. Fuller*, 2 Park. Crim. 16.

26. *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293.

27. *Louisville, H. & St. L. Ry. Co. v. Schwab*, 127 Ky. 82, 105 S. W. 110; *State v. Sheppard*, 115 La. 942, 40 So. 363 (without the least suggestion on the part of any one); *State v. Feazell*, 114 La. 533, 38 So. 444.

[a] In **Texas** (1) the sheriff may be ordered by the court to select a number of jurors when those selected by the jury commission have been exhausted (*Sewall v. State*, 67 Tex. Crim. 105, 148 S. W. 569), (2) or where, through inadvertence or oversight, the jury commissioners have not selected a jury for the ensuing term (*Hurt v. State*, 51 Tex. Crim. 338, 101 S. W. 806), (3) or where the jury commissioners have not been appointed. *Smith v. Bates* (Tex. Civ. App.), 27 S. W. 1044, 28 S. W. 64. (4) But wherever the statute with reference to appointing jury commissioners has been de-

liberately set aside, or overlooked or disregarded, it will constitute ground for reversal of judgment. *Hurt v. State*, 51 Tex. Crim. 338, 101 S. W. 806; *Bickham v. State*, 51 Tex. Crim. 150, 101 S. W. 210; *White v. State*, 45 Tex. Crim. 597, 78 S. W. 1066.

28. *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21; *State v. Teachey*, 138 N. C. 587, 50 S. E. 232; *State v. Wilcox*, 104 N. C. 847, 10 S. E. 453.

29. *Morris v. State*, 146 Ala. 66, 41 So. 274; *Green v. State*, 59 Md. 123, 43 Am. Rep. 542.

[a] By the judge, or in his absence by the clerk. *Colson v. State*, 51 Fla. 19, 40 So. 183.

30. *Dotson v. State*, 62 Ala. 141, 34 Am. Rep. 2.

31. *State v. Conway*, 35 La. Ann. 350.

As to necessity for clerk acting, see *infra*, note 38.

32. *Com. v. Chiemilewski*, 243 Pa. 171, 89 Atl. 964.

[a] A sheriff is not disqualified from serving upon such a commission by the fact that his name is indorsed on the information as a witness. *People v. Summers*, 115 Mich. 537, 73 N. W. 818.

33. *State v. McGee*, 80 Conn. 614, 69 Atl. 1059; *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293.

34. *Fornia v. Wayne Circ. Judge*, 140 Mich. 631, 104 N. W. 147; *State v. Austin*, 183 Mo. 478, 82 S. W. 5.

As ground for challenge to array, see *infra*, VII, E, 3.

35. *State v. McGee*, 80 Conn. 614, 69 Atl. 1059; *Fornia v. Wayne Circ. Judge*, 140 Mich. 631, 104 N. W. 147; *People v. Labadie*, 66 Mich. 702, 33 N. W. 806.

[a] But where the statute directs that the sheriff shall draw the jury, a deputy sheriff may act in his stead. *Sturgis v. Mt. Clemens Sugar Co.*, 184 Mich. 456, 151 N. W. 746. *Contra*,

ity.<sup>36</sup> or direct another to draw the ballots in his presence.<sup>37</sup> The statutes providing for a drawing by several persons usually allow a majority to act, however.<sup>38</sup>

A *de facto* officer may act.<sup>39</sup>

e. *From What List Drawn.*<sup>40</sup> — The jurors must be drawn from the list prescribed by law.<sup>41</sup> It is proper to draw jurors for different courts from the same list.<sup>42</sup> Where a new list has not yet been filed, the jury must be drawn from the old list.<sup>43</sup>

f. *In Whose Presence Drawn.* — Where the statute does not require it, the drawing need not be secret.<sup>44</sup> The statutes sometimes require that the drawing be had in the presence of certain persons, however,<sup>45</sup> such as disinterested witnesses,<sup>46</sup> or the sheriff.<sup>47</sup> A statute providing for a drawing in the presence of certain persons does not, however, entitle the public to be present.<sup>48</sup> Under some statutes, the drawing is done by the clerk alone, and the presence of anyone else is not necessary.<sup>49</sup>

Pennsylvania R. Co. v. Heister, 8 Pa. 445.

36. State v. McGee, 80 Conn. 614, 69 Atl. 1059.

37. State v. McGee, 80 Conn. 614, 69 Atl. 1059.

**Drawing by person other than one designated as ground of challenge, see *infra*, VII, E, b.**

38. Ala.—Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2. La.—State v. Thomas, 50 La. Ann. 148, 23 So. 250; State v. Magee, 48 La. Ann. 901, 19 So. 933; State v. Wells, 33 La. Ann. 1407; State v. Hornsby, 33 La. Ann. 1110. Pa.—Com. v. Chiemilewski, 243 Pa. 171, 89 Atl. 964. S. C.—State v. Nelson, 80 S. C. 373, 61 S. E. 897; State v. Merriman, 34 S. C. 16, 12 S. E. 619.

[a] The clerk (1) is an indispensable member of the majority, however, under a statute making him a member of the commission to do the drawing. State v. Conway, 35 La. Ann. 350. (2) If he has neglected to take the special oath before participating in the drawing the drawing is thereby vitiated. State v. Williams, 30 La. Ann. 1028.

39. People v. Conklin, 175 N. Y. 333, 67 N. E. 624.

40. As to jury list, see *supra*, III, A.

41. State v. Jenkins, 32 Kan. 477, 4 Pac. 809, a failure to do so is a ground for quashing the panel.

42. State v. Lawrence, 38 Iowa 51.

**Necessity for separate drawings for different courts, see *infra*, III, B, 1, i.**

43. Cargain v. Everett, 62 Hun 620, 16 N. Y. Supp. 668, 42 N. Y. St. 618.

44. State v. Aspara, 113 La. 940, 37 So. 883.

[a] It is immaterial that two deputy sheriffs or criers were present when it appears that they did not participate in the proceeding. State v. Aspara, 113 La. 940, 37 So. 883.

45. See generally the statutes.

**As to drawing by several persons, see *supra*, III, B, 1, d.**

46. State v. Feazell, 114 La. 533, 38 So. 444.

47. Com. v. Baranowski, 5 Pa. Co. Ct. 642, his absence is cause for challenge to the array.

**Sheriff as person to draw jury panel, see *supra*, III, B, 1, d.**

[a] **Deputy Sheriff May Act.**—State v. Aspara, 113 La. 940, 37 So. 883. *Contra*, State v. Payne, 6 Wash. 563, 34 Pac. 317.

[b] **Temporary Absences.** — Where the statute directs that both the sheriff and commissioners should be present, it is immaterial that the sheriff from time to time left the room where the drawing was done where nothing material was done during his absence. His absence cannot vitiate the proceedings provided he be present at the actual doing of the business. Com. v. Lippard, 6 Serg. & R. (Pa.) 395.

48. State v. Merriman, 34 S. C. 16, 12 S. E. 619. For present law in South Carolina, see State v. Turner, 63 S. C. 548, 41 S. E. 778, however.

49. Doolittle v. State, 93 Ind. 272.

**Interested Persons.** — Under the common law rule, only disinterested parties could take part in the drawing of the jury panel.<sup>50</sup> and statutes do not usually change this rule.<sup>51</sup> Persons interested cannot be represented nor have any voice in the drawing of the panel.<sup>52</sup>

**g. Manner of Drawing.** — An essential element of the drawing of jury panels is that of selection by chance.<sup>53</sup> The names on the jury list having been written on slips or ballots,<sup>54</sup> and deposited in the jury wheel or box, or other receptacle,<sup>55</sup> are shaken up and then drawn out one by one by the proper officers until the panel is complete.<sup>56</sup> No names which have been drawn can be excluded,<sup>57</sup> except the names of unqualified jurors<sup>58</sup> and jurors who have died or removed their residences.<sup>59</sup>

**h. Number To Be Drawn.**<sup>60</sup> — In the absence of statute, the court may fix the number of jurors to be drawn and summoned;<sup>61</sup> but gen-

**Clerk as proper person to draw jury-panel,** see *supra*, III, B, 1, d.

50. **N. J.**—Peak *v. State*, 50 N. J. L. 179, 12 Atl. 701. **N. Y.**—Woods *v. Rowan*, 5 Johns. 133. **N. C.**—People *v. Teague*, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547. **Pa.**—Munshower *v. Patton*, 10 Serg. & R. 334, 13 Am. Dec. 678. **Va.**—Patrick *v. Com.*, 115 Va. 933, 78 S. E. 628.

51. See generally the statutes, and Patrick *v. Com.*, 115 Va. 933, 78 S. E. 628.

[a] In South Carolina, the statute of 1898 now makes the drawing public, and no person who desires to be present may be excluded. State *v. Turner*, 63 S. C. 548, 41 S. E. 778.

52. State *v. Conway*, 35 La. Ann. 350; State *v. Merriman*, 34 S. C. 16, 12 S. E. 619, no error in refusing either party or his attorney right to be present and witness drawing in absence of statute to contrary.

[a] Permission to counsel on either side to take part in the drawing of jurors would be in disregard of both common law and statutory principles. Peak *v. State*, 50 N. J. L. 179, 12 Atl. 701; Patrick *v. Com.*, 115 Va. 933, 78 S. E. 628.

As ground for challenge to array, see *infra*, VII, E, 3.

53. **Miss.**—Cook *v. State*, 90 Miss. 137, 43 So. 618. **Wash.**—State *ex rel. Murphy v. Superior Court*, 82 Wash. 284, 144 Pac. 32; Mercereau *v. Maughlin Mill Co.*, 53 Wash. 475, 102 Pac. 232. **Wis.**—See Benaway *v. Conyne*, 3 Pin. 196, 3 Chand. 214.

54. See *supra*, III, A, 7, b.

55. See *supra*, III, A, 7, c.

56. **Ala.**—Morris *v. State*, 146 Ala. 66, 41 So. 274; Allen *v. State*, 145 Ala. 11, 40 So. 660. **Del.**—*In re Motion to Quash Panel of Petit Jurors*, 5 Penne. 588, 65 Atl. 769. **Ky.**—Stone *v. Saunders*, 106 Ky. 904, 51 S. W. 788. **Miss.**—Cook *v. State*, 90 Miss. 137, 43 So. 618. **Neb.**—Neal *v. State*, 32 Neb. 120, 49 N. W. 174. **N. J.**—Poulson *v. Union Nat. Bank*, 40 N. J. L. 563. **Tex.**—Howard *v. State* (Tex. Crim.), 178 S. W. 506; Pocket *v. State*, 5 Tex. App. 552.

[a] That the names were not well shaken is immaterial. Mapes *v. People*, 69 Ill. 523.

As to proper officers to draw, see *supra*, III, B, 1, d.

57. Moore *v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293; Anonymous, 1 Browne (Pa.) 121.

58. Lindley *v. Kindall*, 4 Blackf. (Ind.) 189.

Qualifications of jurors, see *infra*, VII, 7.

59. Marlow *v. State*, 49 Fla. 7, 38 So. 653; Jones *v. State*, 1 Ohio Dec. (Reprint) 390.

[a] Where the county commissioners while drawing the jurors laid aside the names of several persons otherwise qualified, because they did not know whether they were residents of the county and the list was completed by drawing other qualified jurors, if an irregularity, it did not affect the jurors so drawn and summoned. State *v. Wilcox*, 104 N. C. 847, 10 S. E. 453.

60. Number of jurors, see *supra*, II, B, 2.

61. United States *v. Insurgents*, 2 Dall. 335, 1 L. ed. 404, 26 Fed. Cas.

erally the statute limits the number of names to be drawn,<sup>62</sup> or fixes the number to be drawn unless the court orders a different number.<sup>63</sup> Every party to the suit or action has the right to have before him a full panel to select the trial jury from.<sup>64</sup> On the other hand no more than the prescribed number should be drawn.<sup>65</sup> After the required number has been drawn, the officer is without authority to add to the original panel.<sup>66</sup>

i. *Separate Drawings for Juries of Different Courts.*—The jury panels for two distinct courts may be drawn at the same time;<sup>67</sup> but the clerk cannot draw the names and then arbitrarily designate part as a panel for one court, and the rest for another court.<sup>68</sup>

j. *Separate Drawings for Grand and Petit Jurors.*—The statutes generally regulate the manner of drawing the grand and petit jury.<sup>69</sup>

No. 15,443; *United States v. Gardner*, 25 Fed. Cas. No. 15,187.

62. See generally the statutes and the following: Ala.—*Carmack v. State*, 191 Ala. 1, 67 So. 989; *Evans v. State*, 109 Ala. 11, 19 So. 535. Ky.—*Stone v. Saunders*, 106 Ky. 904, 51 S. W. 788. S. C.—*State v. Clyburn*, 16 S. C. 375. Tex.—*Burfey v. State*, 3 Tex. App. 519. 63. *Fifield v. Chick*, 39 Iowa 651.

64. Ia.—*Baker v. The Milwaukee*, 14 Iowa 214. La.—*Flower v. Livingston*, 12 Mart. (O. S.) 681. Mont. *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21.

Compare *Evans v. State*, 109 Ala. 11, 19 So. 535.

[a] Where the statute allows the selection of a lesser number in certain cases, the rule is otherwise. *State v. Straub*, 16 Wash. 111, 47 Pac. 227.

[b] *Waiver of Objection.*—The irregularity in drawing a less number than required will be deemed to have been waived where no objection thereto is made. *State v. Robertson*, 71 Mo. 446.

*Drawing of less number as ground for challenge*, see *infra*, VII, E.

65. Fla.—*Colson v. State*, 51 Fla. 19, 40 So. 183. Mich.—*Hewitt v. Circuit Judge*, 71 Mich. 287, 39 N. W. 56. Tex.—*Burfey v. State*, 3 Tex. App. 519; *Jones v. State*, 3 Tex. App. 575, the defendant cannot demand, nor can the court order the clerk to draw more names than the statute prescribes. Va. *Patrick v. Com.*, 115 Va. 933, 78 S. E. 628; *Looney v. Com.*, 115 Va. 921, 78 S. E. 625, reversible error to do so.

[a] A general order not made in any cause, but made on the court's own motion that thereafter the clerk shall draw a greater number than the

statutory number is not authorized by a statute providing that the court "for good cause shown in any felony case," may direct a drawing of a greater number. *Patrick v. Com.*, 115 Va. 933, 78 S. E. 628.

[b] *Who May Object.*—That the panel contained more names than prescribed by statute is not available to the accused because it is an error in his favor. The state only can object. *Anderson v. State*, 5 Ark. 444.

*Drawing more than the prescribed number as ground for quashing venire*, see *infra*, VII, E, 3.

66. *Evans v. State*, 52 N. J. L. 261, 19 Atl. 254.

67. *Crane v. Dygert*, 4 Wend. (N. Y.) 675, not ground for challenge that such is done.

*As ground for challenge to the array*, see *infra*, VII, E, 3.

68. *Gardner v. Turner*, 9 Johns. (N. Y.) 260, this being cause for challenge to the array.

69. See generally the statutes.

[a] Under the California statute there is no distinction between the selection of grand and petit jurors, but the names of all jurors are put in the same jury box. It is therefore unnecessary for the court in ordering jurors to designate separately the number of each class of jurors required to be drawn. *People v. Crowey*, 56 Cal. 36.

[b] In Georgia, after the clerk under the direction of the court has selected the grand jury, the persons remaining constitute the petit jurors; the latter are not selected or drawn at all, simply consisting of those not drawn as grand jurors. *Malone v. State*, 8 Ga. 408.

Under a statute requiring the commissioners to first draw the requisite number for grand jurors, and then the requisite number for petit jurors,<sup>70</sup> it is immaterial whether the grand or petit jury is drawn first where their qualifications are the same.<sup>71</sup> And it is not necessary that there be separate and successive drawings.<sup>72</sup>

k. *Certification, Recording and Publishing Lists Drawn.*—(I.)

**Certification and Recordation.**—Statutes requiring that the list of jurors drawn shall be certified and recorded<sup>73</sup> are mandatory,<sup>74</sup> although it has been held to be too late after verdict to raise the objection that there was no list made out and certified.<sup>75</sup>

The only person who may make the certificate is the person designated in the statute,<sup>76</sup> or his deputy,<sup>77</sup> although under some statutes the deputy cannot do so.<sup>78</sup>

Where the time within which the certificate shall be made is not stated in the statute, it is not too late to make it at the hearing of a motion to quash.<sup>79</sup>

**Form.**—A literal adherence to the form of certificate prescribed is not necessary,<sup>80</sup> but a substantial compliance is essential.<sup>81</sup> Under some statutes, the certificate should state how the drawing was actually done and not simply that it was conducted fairly and as provided

As to drawing grand jury, see generally the title, "Grand Jury."

70. *Peters v. State*, 100 Ala. 10, 14 So. 896 (those first drawn constituting the grand jury and the others the petit), following *Wells v. State*, 94 Ala. 1, 10 So. 656; *Murphy v. State*, 86 Ala. 45, 5 So. 432.

71. *Dotson v. State*, 62 Ala. 141, 34 Am. Rep. 2.

72. *Forney v. State*, 98 Ala. 19, 13 So. 540; *Murphy v. State*, 86 Ala. 45, 5 So. 432; *Dotson v. State*, 62 Ala. 141, 34 Am. Rep. 2.

**Fact that juries were drawn at same time as ground for challenge**, see *infra*, VII, E, 3.

73. See generally the statutes.

74. *Poulson v. Union Nat. Bank*, 40 N. J. L. 563. See *Coker v. State*, 7 Tex. App. 83, stating that the court is not prepared to say that upon proper objection it would hold the statute as mandatory, in the absence of a showing of prejudice.

**Failure to comply with statute as ground for challenge**, see *infra*, VII, E, 3.

75. *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401, 34 N. W. 243.

[a] The objection that the list had not been made out and certified is in the nature of a challenge to the array and cannot be made after verdict upon a motion for a new trial. *Heucke v.*

*Milwaukee City R. Co.*, 69 Wis. 401, 34 N. W. 243.

As to time for making challenges, see *infra*, VII, E.

76. *Berry v. Trunk*, 185 Mo. App. 495, 172 S. W. 629.

77. *United States v. Matthews*, 26 Fed. Cas. No. 15,741b; *People v. Fuller*, 2 Park. Crim. (N. Y.) 16.

78. *Berry v. Trunk*, 185 Mo. App. 495, 172 S. W. 629.

[a] **Statute Construed.**—That the deputy clerk cannot certify the list unless he has been named by the board of commissioners as clerk is evident from the statute which provides that "in the event of sickness, absence, or disability of the clerk of the board, the judge so ordering the jury shall draw and certify" the list. *Berry v. Trunk*, 185 Mo. App. 495, 172 S. W. 629.

79. *State v. Thomas*, 50 La. Ann. 148, 23 So. 250.

80. *Friend v. Hamill*, 34 Md. 298.

81. *Friend v. Hamill*, 34 Md. 298.

[a] **Substantial Compliance.**—Under a statute requiring a certificate "that said list of names has been duly selected in conformity with, and according to the spirit and intent of this Act" a certificate stating "I hereby certify that the foregoing list of names to serve as jurors were selected in conformity with acts of assembly

by law;<sup>82</sup> but under other statutes, it is sufficient to certify generally that the jurors were selected in all respects as required by law without specifying the particulars of the proceeding.<sup>83</sup> Statutes sometimes require that the certificate show that proper notice of the drawing was given.<sup>84</sup>

(II.) **Publication and Filing.**—In some jurisdictions the list drawn must be published,<sup>85</sup> or filed in the clerk's office, subject to the inspection of the public;<sup>86</sup> and in some jurisdictions, it is mandatory that the clerk record the names of the jurors drawn in the order book of the court before any venire shall issue thereon.<sup>87</sup>

1. **Objections and Waiver Thereof.**—(I.) **In General.**—Objections to irregularities in the manner of drawing the panel must be made in the manner prescribed by law.<sup>88</sup> Generally the objections must be made by challenges to the panel,<sup>89</sup> or by plea in abatement.<sup>90</sup> They are not available on a motion for a venire de novo,<sup>91</sup> or new trial;<sup>92</sup>

in such case made and provided this 14th day of November, 1868," is a substantial compliance with the statute. *Friend v. Hamill*, 34 Md. 298, 301.

82. *State v. Payne*, 6 Wash. 563, 34 Pac. 317.

83. *State v. Green*, 43 La. Ann. 402, 9 So. 42; *Poulson v. Union Nat. Bank*, 40 N. J. L. 563.

84. *State v. Thomas*, 50 La. Ann. 148, 23 So. 250.

As to notice of drawing, see *supra*, B, 1, b.

85. *State v. Voorhies*, 115 La. 200, 38 So. 964.

[a] **Construction of Statute.**—(1) The provisions of a statute requiring the publication of lists of jurors relate only to the original jurors drawn for service at the sessions of the court regularly fixed, and not to the jurors drawn to serve at special sessions ordered by the judge, or for the purposes of continuous regular sessions. *State v. Armstrong*, 118 La. 480, 43 So. 57; *State v. Winters*, 109 La. 3, 33 So. 47. See *State v. Wright*, 45 La. Ann. 57, 12 So. 129. (2) It does not require publication or posting for any particular length of time. *State v. Voorhies*, 115 La. 200, 38 So. 964.

86. *State v. Vegas*, 19 La. Ann. 105.

[a] Where the certificate of the drawing was deposited in the clerk's office, but not filed, it is not an irregularity of such a character as to necessitate the annulling and setting aside the general venire, or to quash an indictment found by the grand

jury. *State v. Hall*, 44 La. Ann. 976, 11 So. 574.

87. *Mitchell v. Denbo*, 3 Blackf. (Ind.) 259; *Mitchell v. Likens*, 3 Blackf. (Ind.) 258.

88. *People v. Morales*, 14 Porto Rico 227.

89. See the following: Cal.—*People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933. Fla.—*Green v. State*, 60 Fla. 22, 53 So. 610. Ia.—*Buford & Co. v. McGetchie*, 60 Iowa 298, 14 N. W. 790. La.—*State v. Da Rocha*, 20 La. Ann. 356. Mich.—*Robinson v. Mulder*, 81 Mich. 75, 45 N. W. 505. Neb.—*Brown v. State*, 9 Neb. 157, 2 N. W. 378. N. C.—*State v. Underwood*, 28 N. C. 96. P. R.—*People v. Morales*, 14 Porto Rico 227. Tex.—*Ray v. State*, 4 Tex. App. 450.

As to challenges to the array generally, see *infra*, VII, E, 3.

90. *Brown v. State*, 9 Neb. 157, 2 N. W. 378.

As to pleas in abatement, see the title "Abatement, Pleas of."

91. *Doolittle v. State*, 93 Ind. 272. See generally the title "Venire de Novo."

92. Fla.—*Green v. State*, 60 Fla. 22, 53 So. 610. N. D.—*Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003, wherein accused's attorney knowing the irregularity had not brought it forth until he made his motion for a new trial. Ohio.—*Ryan v. State*, 10 Ohio Cir. Ct. (N. S.) 497. Tex.—*McMahon v. State*, 17 Tex. App. 321; *Ray v. State*, 4 Tex. App. 450, except in certain cases affecting the qualifications of a particular juror. Wis.—*Birchard v. Booth*, 4 Wis. 67.

nor are they available on motion in arrest of judgment.<sup>93</sup>

The greatest accuracy and precision are required in pleas setting out irregularities in the selection or drawing of jurors.<sup>94</sup>

(II.) **Time of Objection.**—As a general rule, objections to the manner of drawing the jury must be made at the earliest opportunity,<sup>95</sup> before trial,<sup>96</sup> and the swearing of the jury,<sup>97</sup> and generally at the time of the impaneling of the jury.<sup>98</sup> The objection comes too late, if made the first time after trial, and verdict rendered,<sup>99</sup> or on ap-

See generally the title "**New Trial**," But see *Doolittle v. State*, 93 Ind. 272, holding an objection to the manner of selecting a juror is not available on appeal unless it is first raised on motion for new trial.

93. **Fla.**—*Green v. State*, 60 Fla. 22, 53 So. 610. **La.**—*State v. White*, 35 La. Ann. 96; *State v. Swift*, 14 La. Ann. 827. **Tex.**—*McMahon v. State*, 17 Tex. App. 321.

See generally the title "**Arrest of Judgment**."

94. *Jenkins v. State*, 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267; *Reeves v. State*, 29 Fla. 527, 10 So. 901; *State v. Green*, 49 La. Ann. 60, 21 So. 124.

[a] A statement of facts that make the irregularity merely probable is not sufficient. *State v. Green*, 49 La. Ann. 60, 21 So. 124.

95. *Hallett v. Boyer*, 114 N. Y. Supp. 559.

[a] **At Drawing.**—The objection that the sheriff instead of the clerk drew the names of the tales jurors should be made at the time of the drawing and such objection comes too late after verdict. *State v. Dorsey*, 138 La. 410, 70 So. 343.

[b] **On First Day of Term.**—(1) Statutes sometimes provide that any objections to the drawing shall be made on the first day of the term (*State v. Labauve*, 46 La. Ann. 548, 15 So. 172; *State v. Curtis*, 44 La. Ann. 320, 10 So. 784; *State v. Johnson*, 31 La. Ann. 368; *State v. Daniel*, 31 La. Ann. 91; *State v. Vegas*, 19 La. Ann. 105), (2) unless it is shown that it was impossible to have known the facts until after the commencement of the term. *State v. Curtis*, 44 La. Ann. 320, 10 So. 784.

[c] **Before Pleading to Indictment.** *State v. White*, 35 La. Ann. 96.

96. **Ala.**—*Howard v. State*, 108 Ala. 571, 18 So. 813. **Fla.**—*Green v. State*,

60 Fla. 22, 53 So. 610. **Ky.**—*Continental Coal Corp. v. Cole's Admr.*, 155 Ky. 139, 159 S. W. 668. **La.**—*State v. Jackson*, 36 La. Ann. 96. **N. D.**—*Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003.

97. **Ark.**—*Brown v. State*, 12 Ark. 623. **N. C.**—*State v. Underwood*, 28 N. C. 96. **Pa.**—*Com. v. Freeman*, 166 Pa. 332, 31 Atl. 115. **S. C.**—*State v. Stephens*, 11 S. C. 319. **Va.**—*Jones v. Com.*, 100 Va. 842, 41 S. E. 951; *Suffolk v. Parker*, 79 Va. 660, 52 Am. Rep. 640.

As to swearing jury, see generally *infra*, VIII.

98. *McMahon v. State*, 17 Tex. App. 321; *Ray v. State*, 4 Tex. App. 450.

As to impaneling the jury, see generally *infra*, VII.

99. **Ark.**—*Brown v. State*, 12 Ark. 623. **Cal.**—*People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933. **Fla.**—*Green v. State*, 60 Fla. 22, 53 So. 610. **Ga.**—*Mitchell v. Bradberry*, 76 Ga. 15; *Stewart v. State*, 66 Ga. 90. **Idaho.**—*People v. Ah Hop*, 1 Idaho 698. **Ky.**—*Continental Coal Corp. v. Cole's Admr.*, 155 Ky. 139, 159 S. W. 668. **La.**—*State v. Jackson*, 36 La. Ann. 96; *State v. Courtney*, 28 La. Ann. 794. **Mass.**—*Amherst v. Hadley*, 1 Pick. 38. **N. H.**—*Wileox v. School Dist.*, 26 N. H. 303. **R. I.**—*Oates v. Union R. Co.*, 27 R. I. 499, 63 Atl. 675. **Tex.**—*Brill v. State*, 1 Tex. App. 572. **Va.**—*Bristow v. Com.*, 15 Gratt. (56 Va.) 634.

See also *supra*, the cases cited in note 99.

[a] In South Carolina, the statute requires objections to the manner of drawing the jury to be made before the verdict unless the party making them was injured by the irregularity. *State v. Johnson*, 66 S. C. 23, 44 S. E. 58.

[b] After verdict the court will presume that the names were drawn according to law. *State v. Williams*,

peal,<sup>1</sup> even though the moving party does not know of the defect until after verdict.<sup>2</sup>

(III.) **Waiver.**—A party is held to have waived any defects or irregularities in the drawing of the panel where he fails to raise timely objections thereto,<sup>3</sup> or where he withdraws his objection,<sup>4</sup> appears and takes part in the trial,<sup>5</sup> or where he accepts the jury,<sup>6</sup> without having exhausted his peremptory challenges.<sup>7</sup>

2. **Special Venire or Panel.**—a. *In General.*—In the absence of statute providing the manner of obtaining additional jurors, the parties may proceed as at common law,<sup>8</sup> by applying for a tales, upon which bystanders may be summoned.<sup>9</sup> The manner of drawing additional jurors is generally regulated by statutes,<sup>10</sup> which must be followed,<sup>11</sup>

3 Stew. (Ala.) 454; *Collier v. State*, 2 Stew. (Ala.) 388.

1. **Ala.**—*Howard v. State*, 108 Ala. 571, 18 So. 813; *State v. Williams*, 3 Stew. 454; *Collier v. State*, 2 Stew. 388. **Idaho.**—*People v. Ah Hop*, 1 Idaho 698. **Mich.**—*Robinson v. Mulder*, 81 Mich. 75, 45 N. W. 505. **Mont.**—*Littrell v. Wilcox*, 11 Mont. 77, 27 Pac. 394. **S. C.**—*State v. Stephens*, 11 S. C. 319.

2. *Gormley v. Laramore*, 40 Ga. 253; *Mann v. Fairlee*, 44 Vt. 672.

3. **Ala.**—*Huguley v. State* (Ala. App.), 72 So. 764. **Ark.**—*Wells v. State* (Ark.), 16 S. W. 577. **Fla.**—*Green v. State*, 60 Fla. 22, 53 So. 610. **Neb.**—*Brown v. State*, 9 Neb. 157, 2 N. W. 378. **N. D.**—*Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003. **Tex.**—*McMahon v. State*, 17 Tex. App. 321.

[a] A failure to make the objection until after the jurors had been examined, talesmen drawn and summoned, and the jury sworn is a waiver of any irregularity in the drawing. *People v. McArron*, 121 Mich. 1, 79 N. W. 944.

4. *Pierson v. People*, 18 Hun (N. Y.) 239.

5. **Ala.**—*Smith v. State*, 1 Ala. App. 140, 55 So. 449. **N. Y.**—*Hallett v. Boyer*, 114 N. Y. Supp. 559. **R. I.**—*Sprague v. Brown*, 21 R. I. 329, 43 Atl. 636.

[a] Pleading the general issue and going to trial is a waiver of any defect in drawing, summoning, or returning juries. *Com. v. Chauncey*, 2 Ashm. (Pa.) 90.

6. **N. Y.**—*People v. Borgstrom*, 178 N. Y. 254, 70 N. E. 780. **Tex.**—*McMahon v. State*, 17 Tex. App. 321. **Wis.**

*Flynn v. State*, 97 Wis. 44, 72 N. W. 373.

7. *State v. White*, 40 Utah 342, 121 Pac. 579.

**Effect of failure to exhaust peremptory challenges**, see *infra*, VII, E.

8. *Lincoln v. Stowell*, 73 Ill. 246.

9. 5 Bacon's Abr. 335 et seq.

10. See generally the statutes, and *State v. Weingarth* (Minn.), 159 N. W. 789, construing act relating to the summoning of jurors for the city of St. Paul, Minn.

[a] **Selected by Lot.**—*Territory v. Prather*, 18 N. M. 195, 135 Pac. 83.

[b] **Drawing Under Statute Enacted Subsequent to Offense.**—That the jury was drawn and summoned under a statute passed after the commission of the offense is no valid objection to a special venire in a capital case. *Hawes v. State*, 88 Ala. 37, 7 So. 302.

[c] **In Georgia**, it is a matter of discretion for a trial judge whether the panels of jurors shall be filled by waiting for the return of jurors engaged in the trial of another case or by summoning tales jurors. *Benford v. State* (Ga. App.), 88 S. E. 747.

[d] **When the proper officers have failed to make lists**, the judge shall select a sufficient number of jurors for the term. *Ky. Gen. St.*, §4624; *State v. Allen*, 98 Kan. 778, 160 Pac. 795.

11. **Ill.**—*Healy v. People*, 177 Ill. 306, 52 N. E. 426; *Lincoln v. Stowell*, 73 Ill. 246. **N. M.**—*Territory v. Prather*, 18 N. M. 195, 135 Pac. 83. **S. C.**—*State v. Tidwell*, 100 S. C. 248, 84 S. E. 778; *State v. Briggs*, 27 S. C. 80, 2 S. E. 854.

[a] **Statute Is Mandatory.**—*State v. Edwards*, 64 Kan. 455, 67 Pac. 834;

until that method is exhausted,<sup>12</sup> although it has been held that the statutes relating to the writ of special venire are directory.<sup>13</sup>

Some statutes require additional jurors to be drawn in the manner provided for securing the regular panel,<sup>14</sup> while some require the names to be drawn from the jury box,<sup>15</sup> and if the jury is still incomplete, after the jury box is exhausted, the court may issue an open venire to summon the jurors from the body of the county or district.<sup>16</sup> Other statutes leave it to the court's discretion to draw the names from the box,<sup>17</sup> or to order them summoned from the body of the county,<sup>18</sup>

State *v.* Simons, 61 Kan. 752, 60 Pac. 1052.

12. United States *v.* Clawson, 4 Utah 34, 5 Pac. 689. See United States *v.* Rose, 6 Fed. 136.

13. Harrelson *v.* State, 60 Tex. Crim. 534, 132 S. W. 783.

14. Ill.—Lincoln *v.* Stowell, 73 Ill. 246. Ia.—State *v.* Rockwell, 82 Iowa 429, 48 N. W. 721; State *v.* Green, 20 Iowa 424.

Drawing regular panel, see *supra*, III, B, 1.

15. See generally the statutes, and the following: Ala.—Morris *v.* State, 146 Ala. 66, 41 So. 274; Allen *v.* State, 145 Ala. 11, 40 So. 660. Ariz.—Territory *v.* Clanton, 3 Ariz. 1, 20 Pac. 94. La.—State *v.* Ashworth, 139 La. 590, 71 So. 860; State *v.* Dorsey, 138 La. 410, 70 So. 343. See State *v.* Alphonse, 34 La. Ann. 9. But see State *v.* Revells, 35 La. Ann. 302. N. Y. People *v.* Kiernan, 101 N. Y. 618, 4 N. E. 130 (*affirming* 36 Hun 642); Pierson *v.* People, 79 N. Y. 424, 35 Am. Rep. 524. S. C.—State *v.* Briggs, 27 S. C. 80, 2 S. E. 854. Utah.—United States *v.* Clawson, 4 Utah 34, 5 Pac. 689. Wash.—State *v.* Cushing, 17 Wash. 544, 50 Pac. 512. Wyo.—Carter *v.* Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

[a] Where there were two jury boxes of names prepared by different persons under conflicting statutes, the defendant is entitled to have the names drawn from the legal jury box. Edson *v.* State, 134 Ala. 50, 32 So. 308.

[b] For offenses punishable by death or imprisonment in penitentiary, in Georgia, the court can draw the tales jurors from the jury boxes of the county, and he can therefore draw some names from the grand jury box and others from the petit jury box. Woolfolk *v.* State, 85 Ga. 69, 91, 11 S. E. 814.

16. U. S.—Clawson *v.* U. S., 114 U. S. 477, 5 Sup. Ct. 949, 29 L. ed. 179. Utah.—United States *v.* Clawson, 4 Utah 34, 5 Pac. 689. Wyo.—Carter *v.* Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

[a] In Louisiana, the statute allows the court, in criminal cases only, after the list of talesmen drawn by the commission is exhausted to order jurors to be summoned from the bystanders. Bradley *v.* Shreveport Gas, E. L. & P. Co., 139 La. 1029, 72 So. 725.

17. See generally the statutes, and the following: Cal.—People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093. Colo. Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221. D. C.—Milano *v.* United States, 40 App. Cas. 379. Fla.—Mendelhall *v.* State, 72 So. 202. Idaho.—State *v.* Steen, 158 Pac. 499; State *v.* Barber, 13 Idaho 65, 88 Pac. 418. Ia.—State *v.* John, 124 Iowa 230, 100 N. W. 193. Ky.—Morgan *v.* Com., 172 Ky. 684, 189 S. W. 943; Thurman *v.* Com., 154 Ky. 555, 157 S. W. 919. See Roberts *v.* Com., 94 Ky. 499, 22 S. W. 845. Mich. People *v.* Jones, 24 Mich. 215. N. C. State *v.* Smarr, 121 N. C. 669, 28 S. E. 549; State *v.* Stanton, 118 N. C. 1182, 24 S. E. 536.

[a] Drawing from the box is recommended though the requirement of the statute is not mandatory. State *v.* Whitson, 111 N. C. 695, 16 S. E. 332; State *v.* Brogden, 111 N. C. 656, 16 S. E. 170.

18. See generally the statutes, and the following: Cal.—People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495. Fla.—Mendenhall *v.* State, 72 So. 202; Jenkins *v.* State, 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267. Idaho.—State *v.* Steen, 158 Pac. 499; State *v.* Barber, 13 Idaho 65, 88 Pac. 418. Ia.—State *v.* John, 124 Iowa 230, 100 N. W. 193. Mont. Territory *v.* Reed, 5 Mont. 92, 1 Pac. 717. See Wykoff *v.* Loebner, 5 Mont. 535, 6 Pac. 363.

or to order them summoned from bystanders,<sup>19</sup> or to order the sheriff to select them.<sup>20</sup> Some statutes authorize the judge or court to make out a list of names sufficient to complete the panel,<sup>21</sup> or to order the summoning, without delay, of men having the proper qualifications,<sup>22</sup> from the bystanders.<sup>23</sup>

In some states, the court selects the names either by designating the persons and directing the sheriff to summon them,<sup>24</sup> or by directing the sheriff to summon a panel and adopting that panel.<sup>25</sup> while in others, the sheriff makes the list and summons the jurors.<sup>26</sup>

[a] **Notwithstanding the presence of names in the jury box,** the jury may be completed by ordering the sheriff to summon additional jurors from the body of the county. *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093; *People v. Sehorn*, 116 Cal. 503, 508, 48 Pac. 495; *People v. Durrant*, 116 Cal. 179, 195, 48 Pac. 75.

[b] **Order Construed.**—An order for drawing and summoning of a jury, according to law, made under a statute authorizing the court to order the jury drawn from the county at large or from specified townships, is in effect an order that such jurors be drawn from the county at large as specified and directed by statute. *People v. Coughlin*, 67 Mich. 466, 35 N. W. 72.

19. See generally the statutes, and the following: **Colo.**—*Nesbit v. People*, 19 Colo. 441, 36 Pac. 221. **Fla.** *Jenkins v. State*, 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267. **Ind.**—*Keyes v. State*, 122 Ind. 527, 23 N. E. 1097; *Heyl v. State*, 109 Ind. 589, 10 N. E. 916. **Ky.**—*Morgan v. Com.*, 172 Ky. 684, 189 S. W. 943; *Thurman v. Com.*, 154 Ky. 555, 157 S. W. 919.

[a] **The object** in such case is to enable the courts to proceed without the delay occasioned by summoning those drawn from the box and to facilitate the business of the court. *Thurman v. Com.*, 154 Ky. 555, 157 S. W. 919.

20. See generally the statutes, and the following: **Cal.**—*People v. Suesser*, 142 Cal. 354, 75 Pac. 1093. **D. C.** *Milano v. United States*, 40 App. Cas. 379, except in capital cases. **Mich.** *People v. Jones*, 24 Mich. 215. **Utah.** *United States v. Clawson*, 4 Utah 34, 5 Pac. 689.

21. See generally the statutes, and *State v. May*, 172 Mo. 630, 72 S. W. 918; *State v. Sansone*, 116 Mo. 1, 22 S. W. 617; *Williams v. Com.*, 85 Va.

607, 8 S. E. 470; *Waller v. Com.*, 84 Va. 492, 5 S. E. 364.

[a] **How List Made.**—Inasmuch as the statute does not prescribe how the judge shall acquire the information upon which he makes his order for additional jurors, the judge need not in the first instance make out the list from his own memory, and there is a substantial compliance when he directs the officer to summon a certain number of qualified jurors by a written order, and after their appearance the judge makes inquiry as to their qualifications, and then makes the list and orders the officer to finally summon them. *State v. Sansone*, 116 Mo. 1, 22 S. W. 617.

[b] **Application to Special Juries.** The fact that the jury ordered was a special jury does not render the statute inapplicable, but it must be given a more liberal construction, and held to apply to special and regular juries alike, that being the evident intent of the legislature. *State v. May*, 172 Mo. 630, 72 S. W. 918.

22. *McElvoy v. State*, 9 Neb. 157; *Dodge v. People*, 4 Neb. 220; *Emery v. State*, 101 Wis. 627, 78 N. W. 145.

23. **Ia.**—*State v. Rockwell*, 82 Iowa 429, 48 N. W. 721. **Va.**—*Robinson v. Com.*, 88 Va. 900, 14 S. E. 627; *Williams v. Com.*, 85 Va. 607, 8 S. E. 470; *Waller v. Com.*, 84 Va. 492, 5 S. E. 364. **Wis.**—*Emery v. State*, 101 Wis. 627, 78 N. W. 145.

[a] **The judge need not furnish the list of names in this event.** *Robinson v. Com.*, 88 Va. 900, 14 S. E. 627; *Williams v. Com.*, 85 Va. 607, 8 S. E. 470; *Waller v. Com.*, 84 Va. 492, 5 S. E. 364.

24. *Eason v. State*, 6 Baxt. (Tenn.) 431.

25. *Eason v. State*, 6 Baxt. (Tenn.) 431.

26. *Cavanah v. State*, 56 Miss. 299.

In some jurisdictions, the court may order talesmen summoned without a writ, or it may issue a special venire.<sup>27</sup>

b. *Order and Proceedings To Obtain.*—A special venire may be ordered on the court's own motion,<sup>28</sup> or on timely motion by the party desiring it.<sup>29</sup> The motion should be made sufficiently early to summon the jury and have it ready to be impaneled when the case is called for trial.<sup>30</sup> Under some statutes an order for a special venire may be made at a term previous to the trial term,<sup>31</sup> and in vacation.<sup>32</sup> The presence of the accused is not required when the order for a special venire,<sup>33</sup> or an order directing the clerk to issue a mandate to the sheriff,<sup>34</sup> is made; but it is otherwise when an order is made fixing the day of trial and directing the summoning of special jurors.<sup>35</sup>

[a] **Mode of Selection.**—Where the sheriff with the aid of his deputy and by the examination of the registration books of the county and the personal assessment roll, selected seven names from each supervisor's district and gave them to his bailiffs to be summoned, there can be no objection to his method of selection in the absence of prejudice or bad faith. *West v. State*, 80 Miss. 710, 32 So. 298.

[b] **Inquiries as to Qualifications.** Where there was an order of the court that the sheriff summon from an adjoining county seventy qualified citizens thereof, there was no impropriety in the sheriff inquiring of well informed persons as to fit and qualified persons for him to summons. *Bradford v. Com.*, 13 Ky. L. Rep. 154, 16 S. W. 710.

27. See generally the statutes, and *State v. Edwards*, 64 Kan. 455, 67 Pac. 834; *State v. Buchanan*, *Wright* (Ohio) 233, 238.

[a] **Neither party can prescribe to the court which method it shall pursue.** *State v. Buchanan*, *Wright* (Ohio) 233, 238. But see *State v. Simons*, 61 Kan. 752, 60 Pac. 1052, under express statute.

[b] **In capital cases, vacancies should be filled from bystanders unless a special venire containing names selected by the presiding judge is demanded.** *Bach v. State*, 38 Ohio St. 664; *McHugh v. State*, 38 Ohio St. 153.

[c] **How Names Selected.**—Where it became necessary to summon seven talesmen and summary application had been made to the court on behalf of the defendant to issue a venire therefor, the court complied with the statute in issuing a venire for the re-

quired number of names selected by him of his own motion and knowledge, the names not having been drawn from the box, or otherwise selected by the clerk and sheriff or either of them. In such case it is for the court to select the persons as well as to determine the number to be named. *Dayton v. State*, 19 Ohio St. 584.

28. *People v. Considine*, 105 Mich. 149, 63 N. W. 196.

[a] When an entire regular panel is in attendance and free from duty, the court cannot on its own motion, over objection, order a special panel. *McDaniel v. Railway Co.*, 88 Tenn. 542, 13 S. W. 76.

29. *Rose v. St. Charles*, 49 Mo. 509; *McDaniel v. Railway Co.*, 88 Tenn. 542, 13 S. W. 76.

30. *Rose v. St. Charles*, 49 Mo. 509.

[a] **Where the motion is not made until the day of trial the court may in its discretion refuse it.** *State v. Leabo*, 89 Mo. 247, 1 S. W. 288.

31. *Roberts v. State*, 30 Tex. App. 291, 17 S. W. 450.

32. See generally the statutes.

[a] **Statute Construed.**—Under a statute authorizing the judge either before or during the term to order drawn additional jurors, he may make the order in vacation. *State v. Giudice*, 170 Iowa 731, 153 N. W. 336.

33. *Mabry v. State*, 50 Ark. 492, 8 S. W. 823; *Colson v. State*, 51 Fla. 19, 40 So. 183. See also *infra*, IV, B, 3, d.

34. *Milton v. State*, 134 Ala. 42, 32 So. 653.

35. *Stoball v. State*, 116 Ala. 454, 23 So. 162; *Hurd v. State*, 116 Ala. 440, 22 So. 993. See also *Hall v. State*, 40 Ala. 698; *Henry v. State*, 33 Ala. 389.

In ordering a special venire, the court may direct the sheriff to summon men with certain qualifications.<sup>36</sup> And it may direct the summoning of men from certain localities,<sup>37</sup> as from some adjoining county,<sup>38</sup> or remote locality,<sup>39</sup> when it is satisfied that it will be impracticable to obtain a jury free from bias in the county where the cause is pending.<sup>40</sup> The order may designate the names of those to be summoned.<sup>41</sup> Statutes sometimes require the court to fix the number of the special venire.<sup>42</sup> But the order need not set out the nature of the indictment to be tried.<sup>43</sup>

The order should be entered on the minutes;<sup>44</sup> but a temporary delay in so doing is not prejudicial to the accused.<sup>45</sup>

c. *Drawing*.<sup>46</sup>—The box used need not be that used and provided for in the drawing of ordinary juries.<sup>47</sup> The statutes vary as to who shall draw the names from the box, some requiring the names to be drawn by the judge in open court,<sup>48</sup> and some provide for a

36. *State v. Cody*, 119 N. C. 908, 26 S. E. 252, 56 Am. St. Rep. 692; *Jackson v. Pool*, 91 Tenn. 448, 451, 19 S. W. 234.

**Qualifications of jurors generally,** see *infra*, VII, F.

37. *State v. Rosa*, 87 Conn. 585, 89 Atl. 163; *Webb v. Shelton* (Okla.), 158 Pac. 1128.

38. See generally the statutes, and *Massie v. Com.*, 18 Ky. L. Rep. 367, 36 S. W. 550.

39. *Bell v. Van Riper*, 3 N. J. L. 511; *Waller v. Com.*, 84 Va. 492, 5 S. E. 364; *Lawrence v. Com.*, 81 Va. 484; *Chahoon v. Com.*, 21 Gratt. (62 Va.) 822.

40. *Roberts v. Com.*, 94 Ky. 499, 22 S. W. 845; *Brafford v. Com.*, 13 Ky. L. Rep. 154, 16 S. W. 710.

41. *Jackson v. Pool*, 91 Tenn. 448, 451, 19 S. W. 234; *Hannum v. State*, 90 Tenn. 647, 18 S. W. 269; *Clingan v. East Tenn.*, etc. R. Co., 2 Lea (Tenn.) 726; *Eason v. State*, 6 Baxt. (Tenn.) 431.

42. *Mayo v. State* (Ala. App.), 73 So. 141.

[a] **Statute Is Mandatory.**—*Mayo v. State* (Ala. App.), 73 So. 141.

**As to number drawn and summoned,** see *infra*, III, B, 2, d.

43. *White v. State*, 16 Tex. 206.

44. See generally the statutes, and *English v. State*, 34 Tex. Crim. 190, 30 S. W. 233.

[a] **May Be Made After Return.** In a capital case where it appeared that the order for a special venire had not been entered upon the minutes though entered upon the court docket,

it was not error after the return of the writ to make the minutes of the court to conform to the order. *English v. State*, 34 Tex. Crim. 190, 30 S. W. 233.

45. *Hawes v. State*, 88 Ala. 37, 7 So. 302.

46. **As to drawing regular panel,** see *supra*, III, B, 1.

47. *Lee v. State*, 45 Miss. 114 (holding it to be no disqualification that the clerk used jury box No. 2 instead of No. 1, both being empty); *Pocket v. State*, 5 Tex. App. 552, a cigar box with any kind of a lid may be used.

[a] **An order directing additional names to be drawn from the box** "containing the names of trial jurors for said court" contemplates that the names shall be drawn from box number one which is the box of ordinary supply and containing the names of all trial jurors, primarily liable to serve at the term. *People v. Kiernan*, 101 N. Y. 618, 4 N. E. 130, *affirming* 36 Hun 642, 3 N. Y. Crim. 247.

48. *Godau v. State*, 179 Ala. 27, 60 So. 908; *Morris v. State*, 146 Ala. 66, 41 So. 274; *Allen v. State*, 145 Ala. 11, 40 So. 660; *Scott v. State*, 141 Ala. 39, 37 So. 366; *Huguley v. State* (Ala. App.), 72 So. 764; *Colson v. State*, 51 Fla. 19, 40 So. 183.

[a] **Distinction Between Presiding Judge and Court.**—(1) A recital that the court drew the names from the box does not show affirmatively that the presiding judge did the drawing. *Scott v. State*, 141 Ala. 39, 37 So. 366. (2) This distinction has since been abrogated by statute, however, in Alabama.

drawing by the clerk of court,<sup>49</sup> or by a child under ten years of age.<sup>50</sup> The names should be drawn out of the box one at a time;<sup>51</sup> but it is not necessary that the names drawn be called aloud, it being sufficient if the names drawn are handed to the clerk with a direction that he allow the defendant and his attorney to see them and make a list of them.<sup>52</sup>

The party drawing the names, has no authority or discretion to reject the name of any person who meets the legal requirements,<sup>53</sup> unless authorized by statute.<sup>54</sup> The presence of the accused is not required when the special venire is drawn from the box.<sup>55</sup>

d. *Number Drawn.*<sup>56</sup>—The number of jurors to be drawn on a special venire is usually prescribed by the statutes,<sup>57</sup> which are mandatory,<sup>58</sup> though within the limits prescribed by the statute, the court has a discretion as to the number.<sup>59</sup> Under some statutes, the court

Godau v. State, 179 Ala. 27, 60 So. 908.

[b] **Delegation of Authority.**—The presiding judge must perform the manual act of drawing the names, and he cannot authorize anyone else to do it under his direct supervision. Scott v. State, 141 Ala. 39, 37 So. 366.

49. Pocket v. State, 5 Tex. App. 552.

50. See generally the statutes and N. C. Revisal, 1905, §1974.

51. See State v. Walsh, 44 La. Ann. 1122, 11 So. 811.

[a] **Effect of Omission.**—But the fact that the officer drawing took out a handful of slips and counted 150 and returned the remainder, while irregular, does not nullify the panel of tales jurors thus drawn. State v. Walsh, 44 La. Ann. 1122, 11 So. 811.

52. Parnell v. State, 129 Ala. 6, 29 So. 860.

53. Finnett v. State, 12 Ala. App. 237, 67 So. 768.

54. State v. Cluff (Utah), 158 Pac. 701, holding the statute authorizes the rejection of jurors in distant parts of the county and not readily accessible.

55. Ala.—Ragland v. State, 125 Ala. 12, 27 So. 983; Stoball v. State, 116 Ala. 454, 23 So. 162; Hurd v. State, 116 Ala. 440, 22 So. 993. Fla.—Colson v. State, 51 Fla. 19, 40 So. 183. Tex.—Pocket v. State, 5 Tex. App. 552.

56. Number of jurors drawn on a regular panel, see *supra*, III, B, 1, h.

57. See generally the statutes.

58. Wright v. State (Ala. App.), 72 So. 564; Linggold v. State, 10 Ala. App. 57, 65 So. 304.

[a] **Correcting Errors.**—If by any error or inadvertence a less number is

drawn, the court has the power to correct the error; and there can be no proper distinction between drawing the less number by error and a drawing which results in adding to the organized panel of petit jurors less than the number of fifty persons. Wilkins v. State, 112 Ala. 55, 21 So. 56.

[b] **Waiver of Objection.**—An objection that the court directed the summoning of fifty additional jurors when the statute provided for twenty-four only is waived when made for the first time after conviction. Bronson v. People, 32 Mich. 34.

59. Ala.—Hunt v. State, 135 Ala. 1, 33 So. 329; Wilkins v. State, 112 Ala. 55, 21 So. 56; Clarke v. State, 87 Ala. 71, 6 So. 638; Hubbard v. State, 72 Ala. 164; Blevins v. State, 68 Ala. 92; Linggold v. State, 10 Ala. App. 57, 65 So. 304. N. C.—See State v. Brogden, 111 N. C. 656, 16 S. E. 170. Tex.—Beard v. State, 41 Tex. Crim. 173, 53 S. W. 348; Hall v. State, 28 Tex. App. 146, 12 S. W. 739. Wis.—Rounds v. State, 57 Wis. 45, 14 N. W. 865.

[a] **Determination by Clerk or Sheriff.**—Within the statutory limits, the matter of the number is to be determined by the court, and not by the clerk nor the sheriff, and not by accident or chance. Linggold v. State, 10 Ala. App. 57, 65 So. 304. See Harrison v. State, 3 Tex. App. 558.

[b] **Where the statute prescribes a minimum, any number in excess thereof is discretionary with the court.** Hall v. State, 28 Tex. App. 146, 12 S. W. 739.

[c] **Where the jurors are to be summoned from a list furnished by the**

may order as many additional jurors as it may deem necessary.<sup>60</sup>

**3. In Territorial and Federal Courts.**—Where a territory has made no provision for the selection and drawing of jurors for causes arising under the constitution and laws of the United States, the rule of the common law will prevail,<sup>61</sup> and the United States marshal must summon the jurors,<sup>62</sup> from the body of the district at large.<sup>63</sup> The acts of congress prescribing the manner of obtaining juries in the federal courts require that the state practice shall be followed as near as may be.<sup>64</sup> A strict adherence to the state regulations is not required, however; a substantial conformity, and that only as far as practicable is all that is necessary.<sup>65</sup>

**IV. PROCURING AND COMPELLING ATTENDANCE OF JURORS.**—**A. DEFINITIONS.**—The writ of *venire facias* is merely a precept to the sheriff to summon a jury according to a list of names, or panel annexed.<sup>66</sup>

**B. PROCURING ATTENDANCE GENERALLY.**—**1. In General.**—At common law, some precept to the sheriff or a writ of *venire facias* was

judge the number to be placed on this list is not limited or fixed by the law, except as to a minimum, and the list may and should contain more than such minimum. *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. 238; *Mitchell v. Com.*, 33 Gratt. (74 Va.) 845.

**60.** See generally the statutes, and the following cases: *Ga.*—*Robinson v. State*, 109 Ga. 506, 34 S. E. 1017. *Ia.* *State v. Giudice*, 170 Iowa 731, 153 N. W. 336. *N. Y.*—*Colt v. People*, 1 Park. Crim. 611. *N. C.*—*State v. Brogden*, 111 N. C. 656, 16 S. E. 170, in a capital case. *Ohio.*—*Dayton v. State*, 19 Ohio St. 584. *Pa.*—*Com. v. Twitchell*, 1 Brewst. 551.

**61.** *United States v. Beebe*, 2 Dak. 292, 11 N. W. 505.

**62.** *U. S.*—*Clawson v. United States*, 114 U. S. 477, 5 Sup. Ct. 949, 29 L. ed. 179. See *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. ed. 659. *Colo.* *Beery v. United States*, 2 Colo. 186. *Dak.*—*United States v. Beebe*, 2 Dak. 292, 11 N. W. 505. *Idaho.*—*United States v. Kuntze*, 2 Idaho 480, 21 Pac. 407.

**63.** *Beery v. United States*, 2 Colo. 186; *United States v. Kuntze*, 2 Idaho 480, 21 Pac. 407.

**64.** *United States v. Shackelford*, 18 How. (U. S.) 588, 15 L. ed. 495; *United States v. Woodruff*, 4 McLean 105, 28 Fed. Cas. No. 16,758 (as to the mode of selecting the jurors); *United States v. Dow*, Taney's Dec. 34, 25 Fed.

Cas. No. 14,990. See generally the title, "*United States Courts.*"

[a] **Necessity for Express Adoption of State Practice.**—The practice of the state courts in summoning juries, whether statutory or otherwise, does not become the practice of the United States courts until expressly adopted by them. *Alston v. Manning*, Chase 460, 1 Fed. Cas. No. 266. See also *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208; *United States v. Shackelford*, 18 How. 588, 15 L. ed. 495; *Silsby v. Foote*, 14 How. 218, 14 L. ed. 394; *United States v. Richardson*, 28 Fed. 61, 69; *United States v. Woodruff*, 4 McLean 105, 28 Fed. Cas. No. 16,758; *United States v. Tallman*, 10 Blatchf. 21, 28 Fed. Cas. No. 16,429; *United States v. Reed*, 2 Blatchf. 435, 27 Fed. Cas. No. 16,134; *United States v. Insurgents*, 2 Dall. 335, 1 L. ed. 404, 26 Fed. Cas. No. 15,443; *United States v. Dow*, Taney's Dec. 34, 25 Fed. Cas. No. 14,990; *United States v. Collins*, 1 Woods 499, 25 Fed. Cas. No. 14,837.

**65.** *United States v. Insurgents*, 2 Dall. 335, 1 L. ed. 404, 26 Fed. Cas. No. 15,443; *United States v. Tallman*, 10 Blatchf. 21, 28 Fed. Cas. No. 16,429, what is practicable defined.

**66.** *Bird v. State*, 14 Ga. 43; *State v. McElmurray*, 3 Strobb. (S. C.) 33.

[a] **For other definitions**, see the following: *U. S.*—*Brewer v. Jacobs*, 22 Fed. 217; *United States v. Antz*, 16

necessary to summon the jury, except in some courts.<sup>67</sup> This course of proceeding has generally been changed by statutes,<sup>68</sup> which have either abolished the writ entirely,<sup>69</sup> or have substituted other writs known variously as a venire, an order, precept, summons or process,<sup>70</sup> which are usually necessary in both civil and criminal cases.<sup>71</sup> Under the practice in some jurisdictions, however, an order of the court for drawing and summoning the jurors is all that is required, no venire being necessary.<sup>72</sup>

**2. Compliance With Statute.**—Statutes relative to the procuring of the attendance of jurors are merely directory, and a substantial compliance therewith is sufficient;<sup>73</sup> trivial departures therefrom,

Fed. 119. **Ala.**—Posey v. State, 73 Ala. 490. **Va.**—Perry's Case, 3 Gratt. (44 Va.) 602.

67. See cases cited *infra*, this note.

[a] The sheriff did not summon under the venire facias, but simply returned it with the juror's names under the fiction that the jurors would not come; thereupon a new process, called the habeas corpora juratorum was issued, and if the jurors did not come, a compulsory process called the distringas followed. **U. S.**—Brewer v. Jacobs, 22 Fed. 217. **Ga.**—Bird v. State, 14 Ga. 43. **N. Y.**—See McGuire v. People, 2 Park. Crim. 148. **Pa.**—Williams v. Com., 91 Pa. 493, 500.

68. See generally the statutes.

[a] **Statutes Retroactive.**—A statute changing the mode of summoning jurors applies to all cases tried thereafter, though the offense was committed before its passage. So, where a venire facias issued under the former law is annulled by a later law, another may be issued and a new jury summoned consistent with the new law. Perry's Case, 3 Gratt. (44 Va.) 602.

69. People v. Ferris, 1 Abb. Pr. N. S. (N. Y.) 193; People v. Cummings, 3 Park. Crim. (N. Y.) 343. See People v. McKay, 18 Johns. (N. Y.) 212; McGuire v. People, 2 Park. Crim. (N. Y.) 148, under earlier statutes.

70. See generally the statutes.

71. **U. S. v. Antz**, 16 Fed. 119; **State v. Dozier**, 2 Speers (S. C.) 211. See **Clinton v. Englebrecht**, 13 Wall (U. S.) 434, 20 L. ed. 659. *Contra*, **Bird v. State**, 14 Ga. 43.

[a] A venire (1) is not required in each particular case (**Barr v. People**, 103 Ill. 110; **People v. Justices of General Sessions**, 20 Johns. [N. Y.] 310, [a general venire to summons jurors for the trial of all the causes to be

tried during the term being sufficient]), (2) although such was the ancient practice. **Brewer v. Jacobs**, 22 Fed. 217, 242. (3) The ancient practice of issuing the writ in every separate case was changed by a statute of Geo. II, c. 25. **Brewer v. Jacobs**, 22 Fed. 217, 242.

[b] In a felony case a venire is essential in Virginia. **Barker v. Com.**, 90 Va. 820, 20 S. E. 776; **Myers v. Com.**, 90 Va. 785, 20 S. E. 152; **Jones v. Com.**, 87 Va. 63, 12 S. E. 226; **Vawter v. Com.**, 87 Va. 245, 12 S. E. 339; **Spurgeon v. Com.**, 86 Va. 652, 10 S. E. 979; **Hall v. Com.**, 80 Va. 555.

[c] But where the court names certain jurors at the request of a party and they enter the box ready for service as jurors, the failure to issue a formal venire is no substantial error, as a venire operates only to compel the attendance of jurors. **Trembly v. State**, 20 Kan. 116.

72. **U. S.**—**United States v. Reed**, 2 Blatchf. 435, 27 Fed. Cas. No. 16,134. **La.**—**State v. Folke**, 2 La. Ann. 744; **Lyon v. Commercial Ins. Co.**, 2 Rob. 266. **Mo.**—**Samuels v. State**, 3 Mo. 68. **Tenn.**—**Bennett v. State**, Mart. & Y. 133. **Can.**—**Milmore v. Woodstock**, 38 N. Bruns. 133.

[a] **Form of Order.**—Under a statute which provides that the court may direct the sheriff to summon jurors, it is undoubtedly sufficient if the direction be given by an order made of record to stand as a general order, by a writ under seal of court called a venire facias, by an order under the hands and seals of the judges or by a bare command ore tenus. **Samuels v. State**, 3 Mo. 68.

73. **Ala.**—**Bales v. State**, 63 Ala. 30. **Ill.**—**Healy v. People**, 177 Ill. 306, 52 N. E. 426. **Ia.**—**State v. Wilson**, 144

which are not prejudicial, will not be deemed reversible error.<sup>74</sup>

3. **Issuance of Process.**—a. *Necessity for Court Order.*—Where an order directing the issuance of a writ of venire for jury is required, such order should be made;<sup>75</sup> but where the writ regular in all respects was issued by the proper officer under seal of court, and no objection by motion or challenge is made, it will be presumed that the proper order was made.<sup>76</sup>

b. *Who May Issue.*—Statutes variously provide that the precept or process directing the sheriff to summon the jury shall be issued by the court,<sup>77</sup> the clerk of the court,<sup>78</sup> or by the district attorney or corresponding officer.<sup>79</sup>

c. *Time of Issuance.*—An order to the sheriff to summon the jury cannot be made until after the jury has been drawn;<sup>80</sup> and in a civil case, a venire cannot issue until the defendant has appeared.<sup>81</sup> Statutes providing for the time of issuance of a venire are directory only.<sup>82</sup>

N. W. 47. **Miss.**—Gavigan v. State, 55 Miss. 533; Head v. State, 44 Miss. 731. **Mo.**—State v. Lehman, 182 Mo. 424, 81 S. W. 1118, 103 Am. St. Rep. 670, 66 L. R. A. 490; State v. Riddle, 179 Mo. 287, 78 S. W. 606; State v. Jackson, 167 Mo. 291, 66 S. W. 938; State v. Matthews, 88 Mo. 121. **N. Y.**—People v. Ferris, 1 Abb. Pr. (N. S.) 193. **Okla.**—Wadsworth v. State, 9 Okla. Crim. 84, 130 Pac. 808. **Pa.**—Com. v. Nye, 240 Pa. 359, 87 Atl. 585; Com. v. Zillafrow, 207 Pa. 274, 56 Atl. 539. **Tex.**—Pauska v. Daus, 31 Tex. 67; Franklin v. State, 34 Tex. App. 625, 31 S. W. 643; Jackson v. State, 30 Tex. App. 664, 18 S. W. 643; Roberts v. State, 30 Tex. App. 291, 17 S. W. 450; Murray v. State, 21 Tex. App. 466, 1 S. W. 522, 3 S. W. 104. **Can.**—Ross v. B. C. Electric Ry. Co., 7 Brit. Col. 394.

[a] **Strict Compliance Recommended.** See People v. Davis, 73 Cal. 355, 15 Pac. 8.

74. **Ala.**—Bales v. State, 63 Ala. 30. **Ill.**—Healy v. People, 177 Ill. 306, 52 N. E. 426. **Miss.**—Head v. State, 44 Miss. 731. **Mo.**—State v. Matthews, 88 Mo. 121; State v. Knight, 61 Mo. 373. **Ohio.**—Forsythe v. State, 6 Ohio 19. **Tex.**—Franklin v. State, 34 Tex. Crim. 625, 31 S. W. 643; Jackson v. State, 30 Tex. App. 664, 18 S. W. 643; Murray v. State, 21 Tex. App. 466, 1 S. W. 522.

75. See Peri v. People, 65 Ill. 17.

76. Peri v. People, 65 Ill. 17.

77. See generally the statutes, and Stamey v. Barkley, 211 Pa. 313, 60

Atl. 991; Wilson v. Com., 86 Va. 666, 10 S. E. 1007.

78. See generally the statutes, and **Conn.**—Hart v. Tallmadge, 2 Day 381, 2 Am. Dec. 105, the issuing of the venire is the act of the court performed through the clerk. **Ill.**—Siebert v. People, 143 Ill. 571, 32 N. E. 431. **Me.**—State v. Smith, 67 Me. 328. **Mich.**—Dickson v. Judge, 136 Mich. 479, 99 N. W. 405. **Pa.**—Stamey v. Barkley, 211 Pa. 313, 60 Atl. 991. **S. C.**—State v. McElmurray, 3 Strobb. 33.

That the clerk is party to suit as ground for challenge, see *infra*, VII, E.

79. People v. McKay, 18 Johns. (N. Y.) 212; McGuire v. People, 2 Park. Crim. 148.

[a] The precept issued by the district attorney is neither the common law venire nor a substitute therefor because no return thereon is required. See McCann v. People, 3 Park. Crim. 272; People v. Cummings, 3 Park. Crim. 343; People v. Robinson, 2 Park. Crim. 235. As to necessity for return generally, see *infra*, IV, B, 7, a.

80. Soniat v. Supple, 48 La. Ann. 296, 19 So. 128.

81. Wills v. McDole, 5 N. J. L. 501; Sutton v. Coleman, 2 N. J. L. 134.

82. **Me.**—State v. Smith, 67 Me. 328. **S. C.**—State v. McElmurray, 3 Strobb. 33. **Tex.**—Roberts v. State, 30 Tex. App. 291, 17 S. W. 450. **Va.**—Wash v. Com., 16 Gratt. (57 Va.) 530.

[a] A venire issued after the time named in the statute, but in full time for service by the proper officer is valid. State v. Smith, 67 Me. 328.

d. *Presence of Accused.*—Inasmuch as the practice of summoning a special jury for each case has generally been abolished, the statute does not contemplate the defendant's presence when the order for the venire is made.<sup>83</sup>

e. *Alias Writ.*—In a proper case an alias writ of venire may issue.<sup>84</sup>

4. **Who May Serve the Writ.**—a. *In General.*—No person can summon a jury except those designated by law;<sup>85</sup> but the party may waive the objection that the writ is not served by the proper officer by a failure to make timely objection,<sup>86</sup> or by his conduct.<sup>87</sup> It does not devolve upon the party asking the venire to procure its service.<sup>88</sup>

Statutes provide that the writ shall be served by the sheriff,<sup>89</sup>

[b] **Time of Summoning Jury for Special Term.**—Whether a jury for a special term is ordered to be summoned before or after the beginning of the special term is immaterial. *White v. Com.*, 120 Ky. 178, 85 S. W. 753.

[c] **Where the statute forbids the summoning of a jury at a probate term,** a district judge has no power to summon a jury at the time fixed for holding the regular probate term of court. *State v. Doyall*, 13 La. Ann. 418.

[d] **A venire is issued in sufficient time** where issued on August 3rd for a trial beginning the week of October 12th, where it is only required to be issued thirty days before date on which jurors are to attend. *Stamey v. Barkley*, 211 Pa. 313, 60 Atl. 991.

83. *State v. Barrington*, 198 Mo. 23, 95 S. W. 235. See *Hannum v. State*, 90 Tenn. 647, 18 S. W. 269, where it was held that if erroneous to order summoned a special panel in the absence of the defendant it was not reversible error, and was cured where a second judge ordered the same panel returned at a continued date in the presence of the defendant and his counsel. See also *supra*, III, B, 2, b.

[a] **Where the practice is to summon a special jury for each case,** the order for the venire is a material step in the progress of the trial, and the defendant's presence is necessary when the order is made. *Osborn v. State*, 24 Ark. 629; *Brown v. State*, 24 Ark. 620. For present law in Arkansas, see cases cited *supra*, this note.

84. See *Davis v. State*, 25 Ohio St. 369.

[a] **A return of "not found"** is equivalent to a return that the jurors were "absent from the county" and

is ground for the issuance of an alias venire. *Davis v. State*, 25 Ohio St. 369.

[b] **The defendant is not entitled to an alias writ for jurors not found,** where it appears that diligent effort was made to summon all. *Gillum v. State*, 62 Miss. 547; *Rodriguez v. State*, 23 Tex. App. 503, 5 S. W. 255; *Osborne v. State*, 23 Tex. App. 431, 5 S. W. 251.

85. *Mass.*—*Com. v. Justices of Court*, 5 Mass. 434. *Nev.*—*State v. McNamara*, 3 Nev. 70. *N. Y.*—*Cooper v. Bissell*, 16 Johns. 146; *People ex rel. McLane v. Whitney*, 22 Misc. 224, 49 N. Y. Supp. 589. *Tex.*—*Todd v. State*, 69 Tex. Crim. 610, 155 S. W. 220.

[a] **A special constable may be appointed for the purpose.** *State v. Arthur*, 39 Iowa 631.

[b] **By Commissioner of Jurors.**—See *Kenny v. People*, 31 N. Y. 330.

[c] **Effect on Conviction of Service by Another.**—A conviction by jurors properly drawn and impaneled will not be disturbed because the venire was served by the sheriff instead of one of the police. *People v. Williams*, 24 Mich. 156, 9 Am. Rep. 119.

86. *Harriman v. State*, 2 G. Gr. (Iowa) 270; *Kennedy v. Com.*, 14 Bush (Ky.) 340, by failure to object until after verdict.

87. *Boykin v. People*, 22 Colo. 496, 45 Pac. 419.

88. *Moslander v. Hays*, 2 N. J. L. 161.

89. See generally the statutes, and *Ala.*—*Bradberry v. State*, 156 Ala. 74, 46 So. 968. *Colo.*—*Burnside v. People*, 39 Colo. 485, 90 Pac. 97. *Ga.*—*Conner v. State*, 25 Ga. 515, 71 Am. Dec. 184. *Ia.*—*State v. Arthur*, 39 Iowa

or his deputy.<sup>90</sup> The accused has no legal right to have the jurors summoned by the sheriff himself in preference to a competent deputy.<sup>91</sup>

**Delegation of Authority.**—The person designated by law to summon the jury cannot delegate his authority.<sup>92</sup>

b. *Where Sheriff Is Disqualified.*—(I.) **In General.**—The statutes generally provide for service of the venire by another where the sheriff or the officer designated by law is for any reason disqualified from serving it.<sup>93</sup> The person usually designated is the coroner,<sup>94</sup>

631. **Mass.**—*Com. v. Justices of Court*, 5 Mass. 434. **Mich.**—*Dickson v. Phelan*, 136 Mich. 479, 99 N. W. 405. **Mo.** *State v. Matthews*, 88 Mo. 121. **N. J.** *Hugg v. Kille*, 7 N. J. L. 435; *State v. Johnson*, 1 N. J. L. 219. **N. Y.** *Cooper v. Bissell*, 16 Johns. 146.

90. See generally the statutes, and **Ala.**—*Bradberry v. State*, 156 Ala. 74, 46 So. 968. **Colo.**—*Burnside v. People*, 39 Colo. 485, 90 Pac. 97; *Smith v. People*, 39 Colo. 202, 88 Pac. 1072. **Ga.** *Conner v. State*, 25 Ga. 515, 71 Am. Dec. 184. **Ia.**—*State v. Arthur*, 39 Iowa 631. **Mass.**—*Com. v. Justices of Court*, 5 Mass. 434. **Miss.**—*Kelly v. State*, 3 Smed. & M. 518. **N. Y.**—*Trustees v. Patchen*, 8 Wend. 47. **Okla.**—*Saunders v. State*, 4 Okla. Crim. 264, 111 Pac. 965, Ann. Cas. 1912B, 766.

[a] **Service in Part by Sheriff.**—A sheriff in person need not make service of the writ directed to the sheriff or any constable of the county. All the service could be made by the sheriff's deputies, their returns made to him and he make a return to the court, or it could be made in part by him and his deputies, and in part by the constable. If the writ required amendment it should be made by the sheriff. *Hull v. State*, 50 Tex. Crim. 607, 100 S. W. 403.

[b] **Manner of Appointing Deputies.** It is not necessary that the deputies shall be formally appointed in writing by the sheriff. It is sufficient to show that the jurors have been notified to appear by some person professing to act for the sheriff. *Gillum v. State*, 62 Miss. 547. See also *State v. Toland*, 36 S. C. 515, 15 S. E. 599, holding that where a deputy sheriff is named to summon some of the jurors his appointment need not be indorsed upon the venire.

[c] **De Facto Deputy.**—Jurors attending and serving who were summoned by a de facto deputy are lawful jurors, although the deputy's appoint-

ment was never approved, and he had not taken the oath of office. *State v. McGraw*, 35 S. C. 283, 14 S. E. 630.

[d] **A deputy, who is a minor**, may summon the jurors. *State v. Toland*, 36 S. C. 515, 15 S. E. 599.

[e] **A bailiff acting under authority of the sheriff is his deputy pro hac vice.** *Westmoreland v. State*, 45 Ga. 225; *Conner v. State*, 25 Ga. 515, 71 Am. Dec. 184.

[f] **A bailiff who is a deputy sheriff also may act.** *Smith v. People*, 39 Colo. 202, 88 Pac. 1072.

[g] **Constable Cannot Act.**—(1) Where the statute designates the sheriff or one of his deputies, a constable cannot summons the jury. *Com. v. Justices*, 5 Mass. 435. (2) And the converse is equally true. *People ex rel. McLane v. Whitney*, 22 Misc. 224, 49 N. Y. Supp. 589.

91. *Smith v. People*, 39 Colo. 202, 88 Pac. 1072; *Saunders v. State*, 4 Okla. Crim. 264, 111 Pac. 965, Ann. Cas. 1912B, 766.

92. *Ayres v. Novinger*, 8 Pa. 412. See *McMasters v. Carothers*, 1 Pa. 324.

[a] **A deputy sheriff cannot deputize another to summon the jury.** *McMasters v. Carothers*, 1 Pa. 324.

93. See generally the statutes.

[a] **The defendant cannot object to the person other than the sheriff designated by the court, the selection by the court being deemed a guaranty of his fitness.** *Forman v. Com.*, 86 Ky. 605, 6 S. W. 579.

94. See generally the statutes, and **Cal.**—*People v. Fellows*, 122 Cal. 233, 54 Pac. 830; *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269. **Ia.**—*Gollobitsch v. Ranibon*, 84 Iowa 567, 51 N. W. 48; *Minott v. Vineyard*, 11 Iowa 90. **Mass.**—*Barre Tpk. Corp. v. Appleton*, 2 Pick. 430.

[a] **The statute applies to criminal and civil cases alike.** *State v. Hardin*, 46 Iowa 623, 26 Am. Rep. 174; *Hariman v. State*, 2 G. Gr. (Iowa) 270.

who possessed this power at common law as well.<sup>95</sup> Under some statutes the court may appoint the coroner or another disinterested person.<sup>96</sup> Some statutes provide for the appointment of an elisor where the sheriff,<sup>97</sup> or both the sheriff and coroner,<sup>98</sup> are disqualified, or if there is no coroner.<sup>99</sup> The person appointed may with the consent of court appoint an assistant.<sup>1</sup>

(II.) **Grounds of Disqualification.** — The officer serving the venire must be free from bias, interest, prejudice, and partiality.<sup>2</sup> If he is

[b] **Where Sheriff Unable To Act.** The act authorizing the coroner to act when the sheriff is a party and perform his duties whenever he may be incompetent merely authorizes him to act when the sheriff is temporarily incompetent, and not when the sheriff is unable to act. *State v. Monk*, 3 Ala. 415.

[c] **A bailiff cannot serve the writ** where the sheriff is disqualified under a statute providing for service by the coroner. And if a venire is directed to a bailiff the court will presume he was not a deputy sheriff. *Burnside v. People*, 39 Colo. 485, 90 Pac. 97.

95. *Ala.*—*State v. Monk*, 3 Ala. 415. *N. J.*—*Dewit v. Decker*, 9 N. J. L. 148. *Pa.*—*Com. v. Mallini*, 214 Pa. 50, 63 Atl. 414. *Eng.*—*Co. Litt.* 158a; *Rex v. Smith*, 2 Shower 288, 89 Eng. Reprint 944; *Rex v. Dolby*, 1 Dow. & Ry. 145.

96. *Phillips v. State*, 29 Ga. 105.

[a] **Bailiff may be appointed under this statute.** *Phillips v. State*, 29 Ga. 105.

97. *State v. Barber*, 13 Idaho 65, 88 Pac. 418; *Allen v. Com.*, 11 Ky. L. Rep. 555, 12 S. W. 582.

98. *People v. Fellows*, 122 Cal. 233, 54 Pac. 830; *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495; *People v. Young*, 108 Cal. 8, 13, 41 Pac. 281. See *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341; *People v. Welch*, 49 Cal. 174; *Burnside v. People*, 39 Colo. 485, 90 Pac. 97.

[a] **Objection to Coroner by Implication.**—Where in his affidavit stating the sheriff to be prejudiced against him, the accused prays that the court appoint an elisor to summon the jury there is manifested by implication an objection against the coroner and the court properly appointed an elisor. *Harriman v. State*, 2 G. Gr. (Iowa) 270.

99. *Pacheco v. Hunsacker*, 14 Cal. 120, 124.

1. *Forman v. Com.*, 86 Ky. 605, 6 S. W. 579.

2. *Conn.*—*Quinebaug Bank v. Tarbox*, 20 Conn. 510. *Idaho.*—*State v. Jordan*, 19 Idaho 192, 112 Pac. 1049. *Mich.*—*People v. Felker*, 61 Mich. 114, 28 N. W. 83. *N. J.*—*Vanauken v. Beemer*, 4 N. J. L. 364. *Okla.*—*Koontz v. State*, 10 Okla. Crim. 553, 139 Pac. 842; *Harjo v. United States*, 1 Okla. Crim. 590, 98 Pac. 1021, 20 L. R. A. (N. S.) 1013. *Can.*—*Murchison v. Marsh*, 4 N. Bruns. 608.

**As ground of challenge to array, see** *infra*, VII, E, 3.

[a] **That the sheriff exercised much diligence in pursuing and arresting the defendant is no ground for alleging that the sheriff was prejudiced.** *State v. Jeffries*, 210 Mo. 302, 109 S. W. 614.

[b] **That the officer may be subjected to an action for damages for an illegal levy in an attachment suit does not disqualify him, as the protection of the attachment bond makes him wholly disinterested.** *H. T. Simon Gregory Dry Goods Co. v. McMahan*, 61 Mo. App. 499.

[c] **Offer of Reward.**—The objection that the sheriff who summoned the jury might have been influenced by a reward offered for the arrest and conviction of the defendant is no ground for a new trial where each juror swore he had no prejudice against the accused, was otherwise competent to serve, and was not objected to. *Armstrong v. Com.*, 15 Ky. L. Rep. 344, 22 S. W. 750, 23 S. W. 654.

[d] **Relationship to parties as ground of disqualification, see:** *Ga.* *Brown v. State*, 14 Ga. App. 21, 80 S. E. 26; *Kelly v. State*, 14 Ga. App. 20, 80 S. E. 24. *Pa.*—*Munshower v. Patton*, 10 Serg. & R. 334, 13 Am. Dec. 678. *Wis.*—*State v. Cameron*, 2 Pinn. 490, 2 Chand. 172. *Can.*—*Wetmore v. Levy*, 10 N. Bruns. 180.

a party to the suit, he cannot summon the jury.<sup>3</sup> Nor can he do so where he is the prosecuting witness.<sup>4</sup> But the fact that the officer has knowledge of facts which would be against the accused if called upon to testify as a witness will not disqualify him.<sup>5</sup> Nor is he disqualified merely because he was subpoenaed as a witness,<sup>6</sup> or because he was examined as a witness in the preliminary examination,<sup>7</sup> or because he made the information upon which the accused was arrested, where he made the information upon information and belief by virtue of his office,<sup>8</sup> or because he caused the charge against the accused to be raised to a higher grade.<sup>9</sup> The test of the officer's qualifications to summon a jury is whether he would be qualified to sit as a juror in the case.<sup>10</sup>

**As to Deputies.**—The venire cannot be served by a deputy if the sheriff is for some reason disqualified to make the service.<sup>11</sup> So also,

3. **Cal.**—*Pacheco v. Hunsacker*, 14 Cal. 120. **Ind.**—*Cowgill v. Worden*, 2 Blackf. 332. **Ia.**—*Gollobitsch v. Ranibon*, 84 Iowa 567, 51 N. W. 48. **N. Y.** *Woods v. Rowan*, 5 Johns. 133. **Pa.** *Munshower v. Patton*, 10 Serg. & R. 334, 13 Am. Dec. 678; *Legaux v. Wells*, 4 Yeates 43. **S. D.**—*Jones v. Woodworth*, 24 S. D. 583, 124 N. W. 844, Ann. Cas. 1912A, 1134. **Can.**—*Mellon v. Kings*, 33 N. Bruns. 8, wherein it was held cause for challenge to the array that the sheriff was a taxpayer of the defendant municipality. But see *Harris v. McKenzie*, 3 Nova Scotia 242, holding it no ground for challenging the jury that the sheriff was one of the parties to the suit.

[a] **Statute Mandatory.**—A statute providing that the coroner shall serve all process when the sheriff is a party is mandatory, and if the court's attention is called to the fact that the sheriff has summoned a jury in such a case, it must dismiss the venire and issue a new one directed to the coroner. *General Film Co. v. McAfee*, 58 Colo. 344, 145 Pac. 707.

As to service by coroner where sheriff disqualified, see generally *supra*, IV, B, 4, b, (I).

[b] **Party in Interest But Not of Record.**—Even though the sheriff be not a party of record, if it appears that he is a party in interest the coroner will be ordered to summon the tales jurors. *People v. Tweed* No. Four, 50 How. Pr. (N. Y.) 286.

**As ground for challenge to the array**, see *infra*, VII, E.

4. *State v. Powers*, 136 Mo. 194, 37 S. W. 936. *Compare*, *Forrester v. State*,

73 Tex. Crim. 61, 163 S. W. 87, wherein the sheriff was the assaulted party, and the court held that the fact that he was an important witness would not disqualify him from serving the process. There was, however, nothing in the record to show that the sheriff had summoned any of the jurors.

5. *Sullivan v. State*, 75 Wis. 650, 44 N. W. 647.

6. *Com. v. Zillaflow*, 207 Pa. 271, 56 Atl. 539.

7. *People v. Slater*, 119 Cal. 620, 51 Pac. 957, it is no ground for a challenge to the panel where he testified that he was without bias.

8. *Clark v. Com.*, 123 Pa. 555, 16 Atl. 795.

9. *Mabry v. State*, 50 Ark. 492, 8 S. W. 823.

10. See the following: **Cal.**—*People v. Ryan*, 108 Cal. 581, 41 Pac. 451; *People v. Coyodo*, 40 Cal. 586. **N. Y.** *People v. Ferris*, 1 Abb. Pr. (N. S.) 193. **N. D.**—*State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686. **S. D.**—*State v. Hall*, 16 S. D. 6, 91 N. W. 325, 65 L. R. A. 151.

[a] Where there is no opinion as to whether the homicide was justifiable, the mere opinion on the part of the officer that the defendant had committed the crime will not disqualify him where it was not denied that the accused did the killing. *People v. Ryan*, 108 Cal. 581, 41 Pac. 451.

11. **Idaho.**—*State v. Barber*, 13 Idaho 65, 88 Pac. 418. **Ia.**—*Gollobitsch v. Ranibon*, 84 Iowa 567, 51 N. W. 48. **Tenn.**—See *Clapp v. State*, 94 Tenn. 186, 30 S. W. 214.

**Service by coroner where sheriff dis-**

the deputy may for some reason be disqualified from serving.<sup>12</sup>

(III.) **Manner of Obtaining Substitute.**—Where the officer designated to summon the jurors is disqualified, the court may designate a substitute at the instance of either party,<sup>13</sup> or on its own motion.<sup>14</sup> The application of the party therefor should be made before the venire has been served,<sup>15</sup> and before the trial commences;<sup>16</sup> it comes too late after verdict,<sup>17</sup> or in arrest of judgment.<sup>18</sup>

Some statutes vest a discretion in the court to determine whether the sheriff is disqualified;<sup>19</sup> but others make it the duty of the clerk to issue the process to the coroner where the statutory affidavit is filed.<sup>20</sup> Where the statute does not prescribe how the court shall ascertain the prejudice or bias of the officer, the form and sufficiency

qualified, see *supra*, IV, B, 4, b, (I).

[a] **The fact that the coroner was also a deputy under the sheriff who was disqualified to summon the jurors did not disqualify him from summoning the jurors.** *Milmore v. Woodstock*, 38 N. Bruns. (Can.) 133.

12. *Barre Tpk. Corp. v. Appleton*, 2 Pick. (Mass.) 430, holding that if one deputy is interested and so disqualified, other deputies in same county were disqualified also.

[a] **Relationship Doubtful.**—Where the alleged relationship of the deputy sheriff who summoned the jury to the deceased is very doubtful it is not reversible error that he summoned the jury in a prosecution for murder. *Com. v. Manfredi*, 162 Pa. 144, 29 Atl. 404.

13. *Johns v. Com.* (Ky.), 3 S. W. 269.

14. *Allen v. Com.*, 11 Ky. L. Rep. 555, 12 S. W. 582. But see *Healy v. People*, 177 Ill. 306, 52 N. E. 426, holding that Rev. St., 1874, ch. 78, §§12 and 13, does not authorize the court to clothe a special bailiff with power to select and summon a special venire unless one of the parties objects to the exercise of such power by the sheriff.

15. *State v. Jeffries*, 210 Mo. 302, 109 S. W. 614, should not wait till the jurors are in court.

[a] **Tardy Affidavit.**—Where the affidavit in support of the application was not made until after the venire had been served by the sheriff, and there is an entire absence of any showing that the jurors summoned were objectionable, there is no error in denying the request to have the coroner summon the jury. *Peck v. Farnham*, 24 Colo. 141, 49 Pac. 364.

16. *Daniel v. Frost*, 62 Ga. 697;

*Samuels v. State*, 3 Mo. 68; *Vierling v. Stifel Brewing Co.*, 15 Mo. App. 125.

17. *Ga.*—*Daniel v. Frost*, 62 Ga. 697.

*Ia.*—*Harriman v. State*, 2 G. Gr. 270.

*Ky.*—*Kennedy v. Com.*, 14 Bush 340.

[a] **A motion for a new trial based on the disqualification of the sheriff will not be granted where it is not shown that the defendant was injured and no previous objection was made.** *Webster v. State*, 47 Fla. 108, 36 So. 584. See also *Vierling v. Stifel Brew. Co.*, 15 Mo. App. 125 (holding the objection cannot be made by motion for new trial); and generally the title "New Trial."

18. *Harriman v. State*, 2 G. Gr. (Iowa) 270; *Samuels v. State*, 3 Mo. 68; *Vierling v. Stifel Brewing Co.*, 15 Mo. App. 125. See generally the title "Arrest of Judgment."

19. *State v. Hultz*, 106 Mo. 41, 16 S. W. 940; *State v. Mathews*, 98 Mo. 119, 10 S. W. 30, 11 S. W. 1136; *State v. Hall*, 16 S. D. 6, 91 N. W. 325, 65 L. R. A. 151. See *Hanna v. People*, 86 Ill. 243, holding that where the defendant objects to the sheriff serving a special venire because of his relationship to the prosecuting attorney, the court should appoint a special bailiff to fill the panel.

20. *General Film Co. v. McAfee*, 58 Colo. 344, 145 Pac. 707; *Litch v. People*, 19 Colo. App. 433, 75 Pac. 1083.

[a] **Right To File Counter-Affidavits.** The fact that the party filed a motion supported with an affidavit does not authorize the adverse party to file counter-affidavits or authorize the court in its discretion to deny the motion where the statute does not provide "where it shall appear," etc., but provides that when the affidavit is filed,

of the evidence is within the sound discretion of the court;<sup>21</sup> and the decision of the court will not be reversed on appeal except for an abuse of such discretion.<sup>22</sup>

**5. Form and Sufficiency of Writ or Process.**<sup>23</sup> — *a. In General.* The venire or order for the summoning of the jurors must conform to any requirements prescribed in the statutes regulating such process.<sup>24</sup> It should issue in the name of the state.<sup>25</sup> At common law,<sup>26</sup> and under some,<sup>27</sup> but not all statutes,<sup>28</sup> the venire must be under the seal of the court.

*b. Direction of Writ.* — The venire should usually be directed to the sheriff.<sup>29</sup> It is irregular where directed to "any constable" in

the clerk shall direct the process to the coroner. *Litch v. People*, 19 Colo. App. 433, 75 Pac. 1083.

21. *State v. Jeffries*, 210 Mo. 302, 109 S. W. 614; *State v. Hultz*, 106 Mo. 41, 16 S. W. 940.

[a] **Character of Proof Necessary.** The unsupported affidavit of the accused is not sufficient evidence to set aside the sheriff and obtain service by another. The evidence necessary ought to be competent evidence of acts, declarations, bias or other circumstances showing impartiality. *McCandless v. Com.*, 170 Ky. 301, 185 S. W. 1100.

[b] **A verified application** (1) of the prosecuting attorney that the sheriff and coroner were biased and prejudiced in favor of the defendant is sufficient to authorize the court to appoint an elisor. *State v. Hultz*, 106 Mo. 41, 16 S. W. 940. (2) But the court is not bound by the affidavit as conclusive, and has some discretion in the matter, and this discretion will not be disturbed unless there has been an abuse thereof. *State v. Mathews*, 98 Mo. 119, 10 S. W. 30, 11 S. W. 1136; *State v. Leabo*, 89 Mo. 247, 1 S. W. 288; *H. T. Simon Gregory Dry Goods Co. v. McMahan*, 61 Mo. App. 499.

22. *State v. Mathews*, 98 Mo. 119, 10 S. W. 30, 11 S. W. 1136; *State v. Leabo*, 89 Mo. 247, 1 S. W. 288; *State v. Hall*, 16 S. D. 6, 91 N. W. 325, 65 L. R. A. 151.

23. See generally the title "Process."

24. *Fowler v. State*, 100 Ala. 96, 14 So. 860. See *Stewart v. State*, 98 Ala. 70, 13 So. 319; *Lewis v. State*, 51 Ala. 1, substantial compliance sufficient.

**Form of venire**, see 9 STANDARD PROC. 752.

25. *White v. Com.*, 6 Binn. (Pa.)

179, 6 Am. Dec. 443; *State v. Hill*, 19 S. C. 435; *State v. Gilreath*, 19 S. C. 603.

26. **N. J.**—*Howell v. Robertson*, 6 N. J. L. 142, want of seal cause for reversal of judgment. **N. Y.**—*People v. McKay*, 18 Johns. 212. **S. C.**—*State v. Williams*, 1 Rich. L. 188.

[a] **A venire not under seal** is no writ and no authority to the sheriff to summon the jury. *State v. Dozier*, 2 Speers (S. C.) 211.

[b] **Sufficiency of Seal.**—See *State v. Thayer*, 4 Strobb. (S. C.) 286; *State v. McElmurray*, 3 Strobb. (S. C.) 33; *Cordova v. State*, 6 Tex. App. 207.

[c] **Where Court Has No Seal.**—The precepts for courts of oyer and terminer may issue under the private seals of the judges appointing such courts, no seals being required for the courts themselves. *White v. Com.*, 6 Binn. (Pa.) 179, 6 Am. Dec. 443.

27. See generally the statutes, and Minn. Rev. Laws, 1905, §5265.

[a] **Under statute requiring all judicial process** issued to be under seal, the writ must be sealed. *State v. McElmurray*, 3 Strobb. (S. C.) 33.

28. **Ala.**—*Powell v. State*, 25 Ala. 21; *Maher v. State*, 1 Port. 265, 26 Am. Dec. 379. **Mo.**—*State v. Marshall*, 36 Mo. 400. **N. H.**—*State v. Bradford*, 57 N. H. 188. **Tenn.**—*Bennett v. State*, Mart. & Y. 133.

29. **Mich.**—*Dickson v. Judge*, 136 Mich. 479, 99 N. W. 405. **N. J.**—*Hugg v. Kille*, 7 N. J. L. 435. **Pa.**—*Com. v. Miller*, 4 Phila. 210.

**As to who may serve writ**, see *supra*, IV, B, 4.

[a] **The statute is mandatory**, and the clerk cannot direct it to the superintendent of police. *Dickson v. Judge*, 136 Mich. 479, 99 N. W. 405.

[b] **The direction of the writ to**

addition to the sheriff and should not be so directed.<sup>30</sup>

c. *Mandatory Clause*.—The common-law venire commands the sheriff to cause to come a certain number of jurors.<sup>31</sup>

d. *Description of Jurors To Be Summoned*.—The writ usually directs the sheriff to summon the jurors from a list or panel annexed thereto.<sup>32</sup> It is not necessary that the names of the jurors be embodied in the writ,<sup>33</sup> it being sufficient if they are arranged in lists below the signature.<sup>34</sup> The fact that the name of a juror appeared twice in the venire through mistake is a mere informality.<sup>35</sup> So also a mistake in the names of jurors in the venire is not a fatal error.<sup>36</sup> A venire for a petit jury should not contain a panel for a grand jury.<sup>37</sup>

the coroner without a showing that the sheriff was incompetent is a fatal defect which is not cured by verdict. *Hugg v. Kille*, 7 N. J. L. 435.

[c] *To What Sheriff*.—A statute requiring "all original, mesne and final process" to be directed to "any sheriff of the state of Alabama" does not apply to a venire facias. *State v. Stedman*, 7 Port. (Ala.) 495.

30. *Jackson v. State*, 30 Tex. App. 664, 18 S. W. 643; *Suit v. State*, 30 Tex. App. 319, 17 S. W. 458.

As ground of challenge, see *infra*, VII, E.

31. *United States v. Antz*, 16 Fed. 119, 125.

[a] That the order reads "I command you to summon" instead of "you are hereby commanded to summon" is immaterial. *State v. Cole*, 9 Humph. (Tenn.) 626.

[b] *The command included*: "First, the selection of the names, which was left to sheriff's discretion, from the body of the county, from the class of men who were by law qualified; secondly, the summoning of the persons thus selected; and thirdly, a return of the writ with his doings under it, whereby 'he returned and delivered in' the jury to the court." *United States v. Antz*, 16 Fed. 119, 125.

32. *State v. McMurray*, 3 Strobb. (S. C.) 33; *Coleman v. Com.*, 84 Va. 1, 3 S. E. 878.

[a] *Where the list is not so furnished*, a venire is invalid. *Spurgeon v. Com.*, 86 Va. 652, 10 S. E. 979.

[b] *In Alabama* (1) when the order directing the sheriff to summon a jury sets a day for trial within the week, the practice is to put on the list ordered to be summoned only the names of such of the drawn and summoned jurors for the week as are in attend-

ance when the order is made. *Posey v. State*, 73 Ala. 490. (2) But when the trial and order occur in different weeks, the statute is conformed to when the jurors summoned for the particular week are made a part of the venire. *Dick v. State*, 87 Ala. 61, 6 So. 395; *Morrison v. State*, 84 Ala. 405, 4 So. 402. See also *Jackson v. State*, 77 Ala. 18; *Floyd v. State*, 55 Ala. 61.

[c] *List Prepared After Summoning*.—Where the court ordered the summoning of additional jurors, and upon their appearance in court reduced the list thereof to writing, it was held a substantial compliance with the statute. *State v. Sansone*, 116 Mo. 1, 22 S. W. 617.

[d] *Jury From Another County*. Where a venire facias is directed to the sheriff of another county to summon a jury, a list need not be furnished to him. *Clark v. Com.*, 90 Va. 360, 18 S. E. 440.

[e] *Indorsement of Names*.—A statute prescribing that jurors may be summoned by reading the venire with the indorsement thereon of his having been summoned does not necessitate that the clerk or selectmen shall certify the drawing on the venire. The indorsement may be made by the officer serving the writ. *Com. v. Besse*, 143 Mass. 80, 8 N. E. 878.

33. *State v. Stokely*, 16 Minn. 282 (the statute requires the sheriff to summon the "persons so drawn" by the commissioners); *State v. McMurray*, 3 Strobb. (S. C.) 33.

34. *State v. McMurray*, 3 Strobb. (S. C.) 33.

35. *McCarty v. State*, 26 Miss. 299.

36. *Kimbrell v. State*, 130 Ala. 40, 30 So. 454, not ground for quashing writ.

37. *Forsythe v. State*, 6 Ohio 19, as

**Number of Jurors.** — At common law the venire facias to the sheriff directed the sheriff to return only twelve men to serve on the petit jury.<sup>38</sup> The statutes now regulate this matter.<sup>39</sup>

**Qualifications of Jurors.**<sup>40</sup> — The statutory qualifications of the jurors need not be inserted in the venire,<sup>41</sup> although it is correct to do so.<sup>42</sup> If an unauthorized qualification which excludes a class of persons eligible by law is inserted, the venire may be quashed.<sup>43</sup>

**From Whence Summoned.** — At common law, it was required that the writ order the jurors to be summoned from the vicinage;<sup>44</sup> but under statute, the jurors are directed to be summoned from the county at large, usually called the body of the county.<sup>45</sup>

**e. Date Returnable.**<sup>46</sup> — The writ may be made returnable on the same day it issued,<sup>47</sup> but it is usual to make the writ returnable on the first day of the term in which the court sits,<sup>48</sup> or any day during

they must be separately summoned.

**Summoning grand jurors,** see 10 STANDARD PROC. 619, et seq.

38. *Com. v. Eaton*, 8 Phila. (Pa.) 428, [1869] Leg. Int. 68.

**Number of jury,** see *supra*, II, B, 2.

39. See generally the statutes, and *supra*, III, B, 1, h.

[a] **Statute Construed.**—A statute providing for the manner of drawing a jury panel which directs that if there is no jury, the court shall order a venire to issue for twelve competent jurors, contemplates that the court may issue a venire for a greater number in case it decrees a greater number is needed. *Yunker v. Marshall*, 65 Ill. App. 667.

[b] **In a capital case,** a venire facias which commands the sheriff to summon a different number of jurors than that prescribed by statute is void. *Jones v. Com.*, 100 Va. 842, 41 S. E. 951; *Spurgeon v. Com.*, 86 Va. 652, 10 S. E. 979. See *Baker v. The Milwaukee*, 14 Iowa 214.

**As ground for challenge to panel,** see *infra*, VII, E, 3.

40. **As to qualifications of jurors generally,** see *infra*, VII, F.

41. *Sharp v. Hendrickson*, 3 N. J. L. 685; *Cox v. Haines*, 3 N. J. L. 687; *State v. Alderson*, 10 Yerg. (Tenn.) 523; *Cornwell v. State*, Mart. & Y. (Tenn.) 147.

[a] **It is sufficient if the writ directs "good and lawful" men to be summoned.** *Sharp v. Hendrickson*, 3 N. J. L. 685; *Bartow v. Murry*, 2 N. J. L. 97; *State v. Alderson*, 10 Yerg. (Tenn.) 523.

42. *Sharp v. Hendrickson*, 3 N. J. L.

685; *Bartow v. Murry*, 2 N. J. L. 97.

43. *Wash v. Com.*, 16 Gratt. (57 Va.) 530. See *Jackson v. Pool*, 91 Tenn. 448, 451, 19 S. W. 234.

44. *Grand Rapids v. Grand Rapids & I. R. R. Co.*, 58 Mich. 641, 26 N. W. 159; *Matter of Converse*, 18 Mich. 459; *Shaffer v. State*, 1 How. (Miss.) 238.

[a] The "vicinage" may be limited by statute to the municipality instead of the county at large. *Grand Rapids v. Grand Rapids & I. R. R. Co.*, 58 Mich. 641, 26 N. W. 159.

45. See generally the statutes, and *Mich.*—*Houghton Common Council v. Huron Copper Min. Co.*, 57 Mich. 547, 24 N. W. 820. **N. Y.**—*People v. Mallon*, 3 Lans. 224. **Pa.**—*Com. v. Zillafrow*, 207 Pa. 274, 56 Atl. 539; *Com. v. Valsalka*, 181 Pa. 17, 24, 37 Atl. 405; *White v. Com.*, 6 Binn. 197, 6 Am. Dec. 443.

**Failure to do so as ground of challenge,** see *infra*, VII, E.

46. **As to date returnable,** see generally *infra*, IV, B, 7, b.

47. *Shaffer v. State*, 1 How. (Miss.) 238; 1 Chitty's C. L. 508, 513; 4 Hawk. P. C. 376, 377; *Cro. Car.* 315.

[a] **Clerical Error in Fixing Date.** Where the order for the summoning of the jurors directs that they appear "at the next term of the court," but the exact day is also designated, being a day at the term at which the order was made, the words "at the next term of the court" will be treated as a clerical mispersion. *Peters v. State*, 100 Ala. 10, 14 So. 896.

48. *Beach v. Fulton Bank*, 7 Cow. (N. Y.) 509; *Potter v. Shackelford*, 3 Brev. (S. C.) 487.

such term.<sup>40</sup> The parties may waive the provision of the statute as to the date of return by consent.<sup>50</sup>

f. *Teste*.—The omission of the clerk to sign the writ,<sup>51</sup> or to designate his office after his name<sup>52</sup> does not invalidate the writ. The venire need not bear teste of the chief justice,<sup>53</sup> or the signature of the attorney general.<sup>54</sup>

g. *Indorsements*.<sup>55</sup>—The omission of the sheriff to indorse the fact of entry in his office, does not invalidate the venire.<sup>56</sup>

h. *Amendment*.<sup>57</sup>—The venire may be amended;<sup>58</sup> but where the writ has served its purpose, a motion to quash dispenses with the necessity of amendment.<sup>59</sup>

6. **Executing the Writ of Process.**—a. *Time of Execution*.—The sheriff cannot summon the jurors until the panel has been drawn;<sup>60</sup> but thereafter the time of summoning jurors is generally immaterial.<sup>61</sup> The jurors need not be summoned before the list thereof is served on the defendant.<sup>62</sup> They may be summoned before the issuance of the venire.<sup>63</sup>

b. *Number of Jurors To Be Summoned*.<sup>64</sup>—Notwithstanding the fact, that at common law, and under some statutes, the venire facias

[a] **Where Time of Holding Court Is Changed.**—A venire facias returnable to a certain day is rendered valid by an act of the legislature altering the time of holding the court and declaring the same to be good for the day so fixed, although different from the day on which it was returnable. *Potter v. Shackleford*, 3 Brev. (S. C.) 487.

49. *Shaffer v. State*, 1 How. (Miss.) 238.

50. *Fiero v. Reynolds*, 20 Barb. (N. Y.) 275.

51. *Hale v. State*, 72 Miss. 140, 16 So. 387.

52. *State v. Cole*, 9 Humph. (Tenn.) 626.

53. *State v. Bradford*, 57 N. H. 188.

54. *State v. Gilreath*, 19 S. C. 603; *State v. Hill*, 19 S. C. 435.

55. **As to necessity for indorsing appointment of deputy serving the writ**, see *supra*, IV, B, 4, a.

56. *State v. Clayton*, 11 Rich. L. (S. C.) 581.

57. **Amendment of process generally**, see the title "Process."

58. *Miss.*—*Hale v. State*, 72 Miss. 140, 16 So. 387. *N. Y.*—*Beach v. Fulton Bank*, 7 Cow. 509, or a new one made and filed nunc pro tunc. *Pa.* *Com. v. Chiemilewski*, 243 Pa. 171, 89 Atl. 964; *Com. v. Smith*, 16 Pa. Co. Ct. 568, 577.

[a] **A seal may be supplied by amendment.** *Jackson ex dem. Culver v. Brown*, 4 Cow. (N. Y.) 550.

[b] **Teste.**—Any clerical mistakes or irregularities in the teste may be corrected by amendment. *People v. Justices of General Sessions*, 20 Johns. (N. Y.) 310; *Com. v. Chiemilewski*, 243 Pa. 171, 89 Atl. 964.

[a] **The signature of the clerk may be supplied.** *Hale v. State*, 72 Miss. 140, 16 So. 387.

[b] **Annexation of the panel to the distringas instead of the venire is amendable.** *Hill v. Hill*, 1 N. J. L. 261, 1 Am. Dec. 206.

59. *Hale v. State*, 72 Miss. 140, 16 So. 387.

60. *State v. Williams*, 5 Port. (Ala.) 130.

61. *Cal.*—*Thrall v. Smiley*, 9 Cal. 529. *Me.*—*State v. Smith*, 67 Me. 328. *Miss.*—*Johnson v. State*, 33 Miss. 363. *Ohio.*—*Hurley v. State*, 6 Ohio 399. *Tex.*—*Roberts v. State*, 30 Tex. App. 291, 17 S. W. 450.

62. *State v. Chambers*, 45 La. Ann. 36, 11 So. 944.

**As to serving list of jurors drawn on the defendant**, see *infra*, V.

63. *Samuels v. State*, 3 Mo. 68; *State v. Crosby*, Harp. (S. C.) 90.

64. **Number of jurors**, see generally *supra*, II, B, 2.

directs the return of twelve men,<sup>65</sup> the practice is to return more on the panel.<sup>66</sup> Where the statute or precept fixes a minimum number of jurors to be summoned and returned, the officer may summon more;<sup>67</sup> but it has been held that a return of a lesser number than prescribed by statute is fatal to the constitution of the court.<sup>68</sup>

c. *Who May Be Summoned*.—The sheriff must summon only those persons whose names were drawn;<sup>69</sup> but a difference in the name of a juror drawn and the juror served is not ground for discarding him,<sup>70</sup> or for a new trial,<sup>71</sup> or for arresting judgment,<sup>72</sup> especially where there is no mistake as to the identity of the person.<sup>73</sup> So also, the fact that one is summoned having the same name as the person drawn is not ground for a new trial where such person was competent to act and such fact was not known until after verdict and discharge of the jury.<sup>74</sup> The same is true when one other than the person drawn

65. See *supra*, IV, B, 5, d.

66. Mass.—*Hosmer v. Warner*, 15 Gray 46; *Fitchburg R. Co. v. Boston & M. R.*, 3 Cush. 58. Pa.—*Com. v. Eaton*, 8 Phila. 428. R. I.—*Barber v. James*, 18 R. I. 798, 31 Atl. 264.

67. *United States v. Fries*, 3 Dall. 515, 9 Fed. Cas. No. 5,126; *United States v. Insurgents*, 2 Dall. 335, 1 L. ed. 404, 26 Fed. Cas. No. 15,443; *Prall v. Peet's Curator*, 3 La. 274.

68. *Donaldson v. Com.*, 95 Pa. 21.

69. *Com. v. Valsalka*, 181 Pa. 17, 37 Atl. 405.

70. *Untreinor v. State*, 146 Ala. 26, 41 So. 285. See *McHugh v. State*, 42 Ohio St. 154.

[a] A mistake (1) in the middle name or initial of the juror is immaterial if the right man is summoned and the mistake is not ground for discarding him. Ala.—*Martin v. State*, 144 Ala. 8, 40 So. 275. Ga.—*Pool v. Callahan*, 88 Ga. 468, 14 S. E. 867; *Williams v. State*, 69 Ga. 11; *Judge v. State*, 8 Ga. 173. N. C.—*State v. Mills*, 91 N. C. 581. (2) It is otherwise, however, where it is doubtful whether person drawn and person summoned is same, due to such a mistake. *Martin v. State*, 144 Ala. 8, 40 So. 275.

[b] *Misnomer in Christian Name*. The court cannot excuse *ex mero motu* one of the regular jurors of the week for a misnomer as to his Christian name, where he has not been adjudged incompetent or disqualified, nor asked to be excused. Such act of the court will be presumed to be prejudicial to the defendant. *Sullivan v. State*, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22.

[c] The addition of the word "Jr." does not constitute a variance. *Untreinor v. State*, 146 Ala. 26, 41 So. 285; *Teague v. State*, 144 Ala. 42, 40 So. 312.

As a ground for challenge, see *infra*, VII, E.

71. *McHugh v. State*, 42 Ohio St. 154; *Swope v. Donnelly*, 7 Pa. Dist. 448, 21 Pa. Co. Ct. 167. See generally the title "New Trial."

72. *Munshower v. State*, 56 Md. 514.

Objections to formation of trial jury as grounds for arrest of judgment, see generally 2 STANDARD PROC. 1024, et seq.

73. Md.—*Munshower v. State*, 56 Md. 514; *Horsev v. State*, 3 Har. & J. 2. Tex.—*Valigura v. State*, 69 Tex. Crim. 320, 153 S. W. 856. Eng.—*The Case of a Jurymen*, 12 East 231, 104 Eng. Reprint 90; *Roe v. Devys*, Cro. Car. 563, 79 Eng. Reprint 1084.

[a] *Presumption of Non-identity Rebutted*.—Where the name of the person summoned failed to correspond exactly with any name on the jury list but very nearly corresponds, any *prima facie* presumption that the juror summoned is not one of those selected is rebutted by proof that there is no person of the exact name appearing on the list. *Com. v. Valsalka*, 181 Pa. 17, 37 Atl. 405.

74. *Mann v. Fairlee*, 44 Vt. 672. See generally the title "New Trial."

[a] It is otherwise if the person summoned is not legally competent to act. *Mann v. Fairlee*, 44 Vt. 672.

is summoned and the accused knowing that fact accepts him.<sup>75</sup>

The exemption or disqualification of a particular juror does not relieve the sheriff of his duty to summon him as this is a question for the court,<sup>76</sup> and the juror may waive his privilege.<sup>77</sup>

The person substituted for a sheriff who is disqualified may summon any or all of the panel previously summoned by such officer.<sup>78</sup>

**Interference With Selection.**—It is improper for anyone to request the sheriff to discriminate in favor of or against any class of persons eligible to jury duty.<sup>79</sup>

d. *Manner of Summoning.*—The statutes regulating the manner of serving and summoning persons drawn to serve as jurors are directory merely,<sup>80</sup> and any irregularity in the manner of summoning is immaterial so long as the jurors actually appear;<sup>81</sup> but it is otherwise if a few only appear.<sup>82</sup> In any event such irregularity is cured by verdict.<sup>83</sup>

Statutes usually provide that service may be had by giving the jurors personal notice,<sup>84</sup> or by leaving a notice in writing at the residence with some one residing there.<sup>85</sup> Some statutes require that

75. *State v. Brinte*, 4 Penne. (Del.) 551, 58 Atl. 258.

76. *Ezell v. State*, 102 Ala. 161, 15 So. 810; *Roberts v. State*, 68 Ala. 515; *State v. Toland*, 36 S. C. 515, 15 S. E. 599; *State v. Merriam*, 34 S. C. 16, 12 S. E. 619.

As to qualifications of jurors, see *infra*, VII.

77. *State v. Toland*, 36 S. C. 515, 15 S. E. 599; *State v. Merriam*, 34 S. C. 16, 12 S. E. 619.

78. *State v. Weeden*, 133 Mo. 7, 34 S. W. 473 (it is error for the court to call the regular panel summoned by the sheriff and not summoned by the substitute); *State v. Wiley*, 109 Mo. 439, 19 S. W. 197. See also *Smith v. State*, 4 Neb. 277.

79. *Babcock v. People*, 13 Colo. 515, 22 Pac. 817.

[a] But it is not error to make a request when a panel is ordered that the sheriff summon good and lawful men where the direction of the writ is to summon such persons. *Babcock v. People*, 13 Colo. 515, 22 Pac. 817.

80. *Com. v. Nye*, 240 Pa. 359, 87 Atl. 585; *Com. v. Zillafrow*, 207 Pa. 274, 56 Atl. 539.

81. *Ga.*—*Judge v. State*, 8 Ga. 173, it is no objection to a juror who appeared and answered that the summons was left at his residence and not served on him personally. *N. J.*—*Martin v. Steele*, 3 N. J. L. 718. *S. C.* *State v. Tidwell*, 100 S. C. 248, 84

S. E. 778; *State v. Crosby*, Harp. 90.

[a] **Waiver of Objection.**—Where a juror, being present in the courtroom, was not summoned by venire but was called, accepted, and sworn, objection could not be made thereafter to the manner of his appearing. *State v. Anderson*, 26 S. C. 599, 2 S. E. 699.

**Irregular summoning as affecting right to compel juror's attendance**, see *infra*, IV. D.

82. *Clay v. State*, 40 Tex. Crim. 593, 51 S. W. 370, holding that a service made by mail was tantamount to no service at all where only sixteen jurors out of sixty summoned by mail appeared.

83. *Martin v. Steele*, 3 N. J. L. 718.

[a] Where there is no showing of prejudice a verdict will not be disturbed merely for an irregularity and informality in the summoning, drawing and impaneling of the jurors. *State v. Matthews*, 88 Mo. 121; *State v. Ward*, 74 Mo. 253; *State v. Knight*, 61 Mo. 373; *State v. Breen*, 59 Mo. 413.

84. See generally the statutes, and *Godau v. State*, 179 Ala. 27, 60 So. 908; *Clay v. State*, 40 Tex. Crim. 593, 51 S. W. 370; *Charles v. State*, 13 Tex. App. 658.

85. See generally the statutes, and *Godau v. State*, 179 Ala. 27, 60 So. 908.

[a] **At House or Usual Place of Abode.**—Where the return states that the service of the summons was made

the sheriff summon each juror by reading the venire to him.<sup>86</sup> If the jurors appear, it is a sufficient summoning to mail written notices to them;<sup>87</sup> but the better practice is to personally serve them.<sup>88</sup>

In summoning jurors in a capital case the sheriff or officer serving the venire cannot interrogate the persons summoned as to their scruples on capital punishment or as to their opinions of the guilt or innocence of the accused.<sup>89</sup>

e. *Effect*.—When the sheriff has once summoned the jurors his powers cease, and he cannot legally discharge a person summoned and summon another in his stead;<sup>90</sup> but the fact that he does so will not invalidate a verdict in the absence of a showing of actual injury or prejudice from the misconduct.<sup>91</sup>

7. *Return*.—a. *In General*.—It is the duty of the officer who serves the writ, both at common law and under statute, to make a return of his proceedings under the writ.<sup>92</sup>

*Presumption*.—A due summoning and return of the jurors will be presumed in a proper case.<sup>93</sup>

b. *Time of*.—The venire should be returned on the return day

by leaving the same "at his house or usual place of residence," it is sufficient. *State v. Toland*, 36 S. C. 515, 15 S. E. 599.

[b] *Contents of Notice*.—The failure of the sheriff to state in his notice summoning jurors that they were to serve in the court of oyer and terminer is no reason for setting aside a conviction for murder. *Com. v. Johnson*, 213 Pa. 432, 62 Atl. 1064.

86. See generally the statutes, and *Conn.*—*Maples v. Park*, 17 Conn. 333. *Mass.*—*Com. v. Besse*, 143 Mass. 80, 8 N. E. 878. *S. C.*—*State v. Toland*, 36 S. C. 515, 15 S. E. 599.

[a] *It will be presumed* that the sheriff read the venire to the juror where his return did not state that fact. *State v. Toland*, 36 S. C. 515, 15 S. E. 599.

87. *N. Y.*—*People v. Burgess*, 153 N. Y. 561, 47 N. E. 889. *Pa.*—*Com. v. Nye*, 240 Pa. 359, 87 Atl. 585. *S. C.*—*State v. Tidwell*, 100 S. C. 248, 84 S. E. 778.

88. *State v. Tidwell*, 100 S. C. 248, 84 S. E. 778; *State v. Crosby*, Harp. (S. C.) 90; *Cordova v. State*, 6 Tex. App. 207, even where the statute authorizes service by leaving notice at the juror's residence.

89. *Com. v. Nye*, 240 Pa. 359, 87 Atl. 585.

90. *Trustees v. Patchen*, 8 Wend. (N.

Y.) 47. See *State v. Shuck*, 38 Wash. 270, 80 Pac. 444.

91. *Bennett v. Matthews*, 40 How. Pr. (N. Y.) 428.

92. *Collins v. State*, 31 Fla. 574, 12 So. 906; *Rolland v. Com.*, 82 Pa. 306, 322, 22 Am. Rep. 758; *Eaton v. Com.*, 6 Binn. (Pa.) 447.

[a] *Failure to return* (1) and file the precept is sufficient cause to reverse the judgment (*McGuire v. People*, 2 Park. Crim. [N. Y.] 148. But see *Rolland v. Com.*, 82 Pa. 306, 322, 22 Am. Rep. 758, holding supplying the return is but an amendment of the record which may be done even after writ of error or certiorari and that the court would hesitate to reverse upon this ground). (2) But it is not ground for nonsuit of the plaintiff, since another venire may issue. *Blanchard v. Richley*, 7 Johns. (N. Y.) 198; *Day v. Wilber*, 2 Caines (N. Y.) 134.

93. *Hudson v. State*, 1 Blackf. (Ind.) 317.

[a] Where a record does not state that the jury had been returned by virtue of a venire, but stated that "whereupon came the jurors of the jury, to-wit, etc., twelve good and lawful men, who were elected, tried and sworn, etc.," it is sufficient from which to presume that the jury had been returned according to law. *Hudson v. State*, 1 Blackf. (Ind.) 317.

thereof,<sup>94</sup> unless sooner executed, when it may be returned earlier.<sup>95</sup> If, however, the writ has not been completely executed, as where all the jurors have not been served, a return before return day is premature.<sup>96</sup>

Statutes sometimes prescribe the time for return;<sup>97</sup> but such statutes are generally held to be directory merely,<sup>98</sup> and if the officer has made a premature,<sup>99</sup> or a tardy<sup>1</sup> return, the remedy of the party is not by motion to quash the venire.

c. *Form and Sufficiency*.—The return may be made upon the venire itself,<sup>2</sup> or upon a separate paper.<sup>3</sup> It should show a full compliance with the directions of the venire,<sup>4</sup> show the date and manner of executing the writ,<sup>5</sup> and set out the names of the jurors summoned,<sup>6</sup>

94. *Hale v. State*, 10 Ala. App. 22, 64 So. 530.

As to date returnable, see *supra*, IV, B, 5, e.

95. *Hale v. State*, 10 Ala. App. 22, 64 So. 530.

96. *Hale v. State*, 10 Ala. App. 22, 64 So. 530.

97. See generally the statutes.

[a] **Return (1) must be made either before or on the opening day of court.** *State v. Toland*, 36 S. C. 515, 15 S. E. 599. (2) If not filed until the day of sentence, the court will award a new trial. *State v. Vegas*, 19 La. Ann. 105. (3) Where the return shows it was made on the day court convened it will be presumed it was made before 10 a. m., the usual hour for opening court. *State v. Toland*, 36 S. C. 515, 15 S. E. 599.

[b] **The return of an extra panel of jurors drawn after the commencement of the term is in time if made before the court overrules a challenge to the array of the extra panel.** *People v. Lammerts*, 164 N. Y. 137, 58 N. E. 22.

98. *Mowry v. Starbuck*, 4 Cal. 274; *State v. Squaires*, 2 Nev. 226, the only object of the statute is to give the parties a chance to inspect the panel.

[a] **Substantial Compliance**.—Where the statute directed that the venire should be returned "forthwith," it was a substantial compliance where it was returned the next day at one o'clock. *Palmer v. Highway Comr.*, 49 Mich. 45, 12 N. W. 903.

[b] **No Prejudice Shown**.—Where a writ returnable at 10 a. m. was not actually returned until 2:45 p. m. there was no prejudice where the special venire had been served on the defendant one full day before the trial. *Ryan*

*v. State* (Tex. Crim.), 35 S. W. 288.

99. *Hale v. State*, 10 Ala. App. 22, 64 So. 530; *State v. Gut*, 13 Minn. 341.

[a] **Remedy**.—If an officer makes a return before he has served all the jurors and before return day, the remedy of the party is, on his arraignment or at some other appropriate time, to have the officer make proof that those not served and returned as not in the county, will probably return before the regular return day, and to move on such showing for a postponement of the arraignment until that regular return day, and to require the sheriff in the meantime to continue in his effort to serve those jurors. *Hale v. State*, 10 Ala. App. 22, 64 So. 530.

1. *State v. Payne*, 6 Wash. 563, 34 Pac. 317.

2. *People v. McKay*, 18 Johns. (N. Y.) 212.

3. *Com. v. Smith*, 2 Serg. & R. (Pa.) 300, where a return made on a separate paper signed by the deputy sheriff under each of the panels of the jurors was held to be sufficient.

4. *Eaton v. Com.*, 6 Binn. (Pa.) 447. As to directions of writ, see *supra*, IV, B, 5, b.

5. *Ga.*—*Bird v. State*, 14 Ga. 43. *Mich.*—*People v. Jones*, 24 Mich. 215. *Pa.*—*Eaton v. Com.*, 6 Binn. 447.

[a] **From Body of County**.—Though the precept itself fails to command that the jurors be summoned from the body of the county, the return must show that they were in fact so summoned. *White v. Com.*, 6 Binn. (Pa.) 179, 6 Am. Dec. 443.

6. *Bird v. State*, 14 Ga. 43.

[a] **In case of the omission of the name of a juror who had actually been summoned, the juror may be impaneled**

and their residences.<sup>7</sup> It should set out the names of the jurors not summoned,<sup>8</sup> together with a statement of the reasons why they were not summoned,<sup>9</sup> and the diligence used in attempting to procure service on the latter.<sup>10</sup>

Where the officer is required to summon jurors with certain qualifications he must show that those summoned possessed the qualifications prescribed.<sup>11</sup> It is immaterial that the return is informal so long as it shows a compliance with the statute.<sup>12</sup>

**Signature of Officer.**—The officer who served the writ should sign the return.<sup>13</sup>

d. **Amendment.**—A return may be duly amended<sup>14</sup> upon leave

on making oath that he had been summoned. *In re Patterson*, 6 Mass. 486.

**Mistake in name as ground of challenge**, see *infra*, VII, E.

7. *Jones v. State*, 104 Ala. 30, 16 So. 135, residence should be given by name of city or town fully written out.

8. *Bird v. State*, 14 Ga. 43.

9. *Bird v. State*, 14 Ga. 43.

10. *Brown v. State* (Tex. Crim.), 65 S. W. 912; *Clay v. State*, 40 Tex. Crim. 593, 51 S. W. 370; *Charles v. State*, 13 Tex. App. 658.

[a] **Particularity Required.**—The sheriff need not specifically state that he went to the house of the juror, or his office, or place of business, or how much time he spent in searching for him. Ordinarily it is only necessary to state that he made search where the juror was likely to be found and failed to find him. *Furrow v. State*, 41 Tex. Crim. 12, 51 S. W. 938.

[b] He is excused when he recites such facts as would render any amount of diligence on his part unnecessary, as where he sets out that a juror was and had been absent and was a resident of another county for the past two years. *Coleman v. State*, 48 Tex. Crim. 343, 88 S. W. 238.

[c] **Contents of Motion To Quash.** On a motion to quash a special venire because of the failure of the return to show due diligence in summoning unserved jurors, the motion must show that the jurors summoned were not sufficient to enable the defendant to obtain a fair and impartial jury. *Parker v. State*, 33 Tex. Crim. 111, 21 S. W. 604, 25 S. W. 967.

11. *People v. Brighton*, 20 Mich. 57.

12. *State v. Gut*, 13 Minn. 341; *Haight v. Holley*, 3 Wend. (N. Y.) 258, in civil cases under statute no

defects in the return will affect the judgment.

[a] **A mere verbal error is immaterial**, and where the jurors are in attendance, it is not material how they were summoned. *State v. Gut*, 13 Minn. 341.

[b] **Dissimilarity in the name of the juror as stated on the list and in the return which may rest on typographical errors is not ground for reversal.** *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362.

13. **Mass.**—*Com. v. Parker*, 2 Pick. 550. **N. J.**—*O'Hagan v. Crossman*, 50 N. J. L. 516, 14 Atl. 752. **Pa.**—*Cóm. v. Chauncey*, 2 Ashm. 90; *Com. v. Green*, 1 Ashm. 289; *Dewar v. Spence*, 2 Whart. 211, 30 Am. Dec. 241; *Com. v. Miller*, 4 Phila. 210.

[a] **Where there are two sheriffs the return may be made in the name of both**, even though the one not executing the process was a party to the action. *Rich v. Player*, 2 Shower 286, 89 Eng. Reprint 943.

[b] **Official Description.**—An objection that the constable added to his name the words "constable of the town" instead of "constable of the town of Mexico," as in the direction of the writ, amounts to nothing. *Fellows' Case*, 5 Greenl. (Me.) 333.

14. *Com. v. Chauncey*, 2 Ashm. (Pa.) 90, on court's own motion.

[a] **To Show Who Were Not Summoned.**—Where the return showed that one hundred and fifty men had been summoned, the court may allow an amendment to show who were actually summoned and who were not, with the reasons therefor. *State v. Whitt*, 113 N. C. 716, 18 S. E. 715.

[b] **Date of service may be supplied by amendment on payment of the costs of bringing the officer into**

of court,<sup>15</sup> in its discretion,<sup>16</sup> upon timely application therefor.<sup>17</sup> But after the return of the panel, the officer cannot strike out names of jurors summoned but failing to appear, and substitute others therefor,<sup>18</sup> although it has been held that this is not such an irregularity as will invalidate the proceedings.<sup>19</sup>

e. *Waiver of Defects.*—Under some statutes, a party waives all errors and defects relative to the return of the jury by going to trial on the merits.<sup>20</sup>

f. *Conclusiveness.*—At common law, the return of the officer is conclusively true in the particular case;<sup>21</sup> but under the statutes, it is regarded as *prima facie* true only.<sup>22</sup>

8. **Filing List of Jurors Summoned.**<sup>23</sup>—Statutes requiring that the sheriff file in court a list of persons summoned by him are directory only.<sup>24</sup>

9. **Objections.**—Objections to the sufficiency of the venire must be made in the trial court.<sup>25</sup> A fatal defect in the venire may be ground for a motion in arrest of judgment, although not previously objected to;<sup>26</sup> but objections involving mere irregularities in the writ must be made before a verdict has been returned,<sup>27</sup> and under some statutes, before the jury is impaneled and sworn.<sup>28</sup>

court. Anonymous, 1 Pick. (Mass.) 196.

15. Ala.—Ramey v. State, 83 Ala. 31, 3 So. 593; Gray v. State, 55 Ala. 86. Mass.—Com. v. Krathofski, 171 Mass. 459, 50 N. E. 1040. Miss.—Logan v. State, 53 Miss. 431. N. J.—Berry v. Williams, 21 N. J. L. 423, wherein the sheriff added the name of a juror omitted from the panel. Pa.—*In re Mullin's Appeal*, 2 Sad. 158, 5 Atl. 738; Com. v. Miller, 4 Phila. 210. Tex.—Franklin v. State, 34 Tex. Crim. 625, 31 S. W. 643; Williams v. State, 29 Tex. App. 89, 14 S. W. 388; Powers v. State, 23 Tex. App. 42, 5 S. W. 153; Murray v. State, 21 Tex. App. 466, 1 S. W. 522, 3 S. W. 104.

16. State v. Whitt, 113 N. C. 716, 18 S. E. 715.

17. Logan v. State, 53 Miss. 431.

[a] **By the Prosecuting Attorney.** Rodriguez v. State, 23 Tex. App. 503, 5 S. W. 255.

[b] **After a motion to quash the special venire** has been made, an amendment may be allowed. Renfro v. State, 42 Tex. Crim. 393, 56 S. W. 1013.

[c] **Any time during the term,** the court may allow an amendment. Gray v. State, 55 Ala. 86.

18. Lyon v. Sharp, 3 N. J. L. 463.

19. *In re Mullin's Appeal*, 2 Sad. 158, 5 Atl. 738.

20. Fife v. Com., 29 Pa. 429.

[a] **The omission of the sheriff's name** to the return is a defect relative to the return, which may be waived. Com. v. Smith, 2 Serg. & R. (Pa.) 300.

21. Logan v. State, 53 Miss. 431.

22. Hale v. State, 10 Ala. App. 22, 64 So. 530; Logan v. State, 53 Miss. 431.

23. **As to filing of list of jurors drawn,** see *supra*, III, B, 1, k.

**As to jury list,** see *supra*, III, A.

**As to serving list on defendant,** see *infra*, V.

24. Johnson v. State, 59 N. J. L. 535, 37 Atl. 949; Johnson v. State, 59 N. J. L. 271, 35 Atl. 787.

25. Organ v. State, 26 Miss. 78; Brantley v. State, 13 Smed. & M. (Miss.) 468, or they are not available on error.

26. State v. Stephens, 11 S. C. 319. *Contra*, Johnson v. Cole, 2 N. J. L. 266, holding an objection that a venire is without seal comes too late after verdict. The objection should be made on the return.

27. Ark.—Brown v. State, 12 Ark. 623. S. C.—State v. Stephens, 11 S. C. 319; State v. Coleman, 8 S. C. 237. Tex.—Perry v. State (Tex. Crim.), 45 S. W. 566.

28. Ala.—Bell v. Killcrease, 11 Ala. 685. Miss.—Gavigan v. State, 55 Miss. 533. Pa.—Jewell v. Com., 22 Pa. 94.

**Want of Venire.** — Where a venire is essential, an objection to a want thereof may be made in arrest of judgment.<sup>29</sup> Objection on such ground may be made for the first time on appeal.<sup>30</sup>

**To the Summoning.** — If any omission or irregularity in the summoning or drawing of the jury is not corrected when pointed out by the defendant, it is error,<sup>31</sup> but such objections cannot be raised for the first time on a motion for new trial,<sup>32</sup> or on appeal.<sup>33</sup> Statutes sometimes provide that no irregularity in drawing, summoning or impaneling of jurors shall be sufficient to set aside the verdict unless objection was made before swearing of the jurors.<sup>34</sup>

**C. PROCURING ATTENDANCE OF SPECIAL VENIREMEN.**<sup>35</sup> — **1. Issuance of Special Venire.**<sup>36</sup> — The statutes generally provide when the venire for additional jurors shall be issued.<sup>37</sup> Where the record does not positively show the issuance of the special venire, it will be presumed that a special venire was regularly issued where it appears that an order therefor was obtained and the jurors attended.<sup>38</sup>

**2. Form of Special Venire.**<sup>39</sup> — A special venire may be entitled as of the cause in which it is issued;<sup>40</sup> but it is not required that it

See *Com. v. Chiemilewski*, 243 Pa. 171, 89 Atl. 964; *Com. v. Smith*, 2 Serg. & R. 300.

As to impaneling jury, see *infra*, VII.

As to swearing jury, see *infra*, VIII.

29. *State v. Dozier*, 2 Spears (S. C.) 211, on the authority of *People v. McKay*, 18 Johns. (N. Y.) 212. *Contra*, *Bird v. State*, 14 Ga. 43.

As to necessity of venire, see *supra*, IV, B, 1.

30. *Myers v. Com.*, 90 Va. 785, 20 So. 152, because at common law the record must affirmatively show compliance with all essential formalities in a felony case in order to constitute a conviction by due process of law. But see *State v. Williams*, 3 Stew. (Ala.) 454, holding that although it is necessary that the record contain enough to show a legal conviction, after general issue pleaded, no objection can be made which reaches the venire facias.

31. *People v. Coffman*, 24 Cal. 230.

[a] Objection that officer is disqualified comes too late if made after the jury is completed and sworn. *Morgan v. Com.*, 172 Ky. 684, 189 S. W. 943.

32. Cal.—*People v. Coffman*, 24 Cal. 230. Miss.—*Jackson v. State*, 55 Miss. 530. Mo.—*State v. Sansone*, 116 Mo. 1, 22 S. W. 617.

See generally the title "New Trial."

33. *Smith v. State*, 88 Ala. 73, 7 So. 52.

34. See generally the statutes, and *Spurgeon v. Com.*, 86 Va. 652, 10 S. E. 979, decided before the statute.

35. **Procuring attendance of jurors generally**, see *supra*, IV, B.

36. **Issuance of process to summon jurors generally**, see *supra*, IV, B, 3.

37. See generally the statutes.

[a] **During the Term.**—*State v. Tidwell*, 100 S. C. 248, 84 S. E. 778.

[b] **Before or During the Term.** *State v. Giudice*, 170 Iowa 731, 153 N. W. 336; *State v. John*, 124 Iowa 230, 100 N. W. 193.

38. *State v. Perry*, 44 N. C. 330.

39. **Form and sufficiency of venire generally**, see *supra*, IV, B, 5.

40. *Wood v. State*, 92 Ind. 269.

[a] "No material injury can be done by giving the title of the cause, and where there is no substantial injury there can be no reversal." *Wood v. State*, 92 Ind. 269.

[b] **Omission of Court.**—If the special venire shows the style and number of the case, and distinctly states that the persons named were to be summoned before a designated court at a certain time, it is sufficient, even though in its preliminary recitals it omitted the name of the court or county in which the case was pending. *Murray v. State*, 21 Tex. App. 466, 1 S. W. 522.

[c] **The omission of the name of**

do so.<sup>41</sup> It should be directed to the sheriff,<sup>42</sup> and should state the number of jurors to be summoned;<sup>43</sup> but it is not necessary to specify the names of the jurors,<sup>44</sup> or state that the case in which it is issued is a capital case,<sup>45</sup> or that it shall state the nature of the offense,<sup>46</sup> or the name of the person whose death is charged.<sup>47</sup>

**Amendment.**—A special venire may be amended;<sup>48</sup> but the officer into whose hands the writ has been placed for service cannot make any alteration in the names of the persons to be summoned.<sup>49</sup>

**3. Service of Writ.**—The general rules applicable to serving venires,<sup>50</sup> and as to the qualifications of the officer serving the same,<sup>51</sup> apply in the case of a special venire.<sup>52</sup> It is the duty of the officer serving a special venire to summon all the jurors named in the writ;<sup>53</sup> but a failure to serve all is not ground for a new trial.<sup>54</sup> Some statutes require a special oath to be taken by the officer where it is necessary to summon jurors who have not been selected by the jury commissioners.<sup>55</sup> It is not necessary, however, that the pre-

a joint defendant on whom there was no service does not render the venire insufficient. *Hutchins v. Fitch*, 4 Johns. (N. Y.) 222.

[d] **Effect of Erroneous Description of Action.**—That the venire described the action as "civil" instead of "criminal" is a matter of form and not of substance, and is no ground for challenge to the panel. *State v. Nerbovig*, 33 Minn. 480, 24 Pac. 321.

41. *Loeffner v. State*, 10 Ohio St. 598.

42. *Healy v. People*, 177 Ill. 306, 52 N. E. 426; *Com. v. Zillafrow*, 207 Pa. 271, 56 Atl. 539.

43. *State v. Stokely*, 16 Minn. 282.

[a] **For What Number Issued.**—The special venire must be issued for the number provided for in the order. *Hunter v. State*, 34 Tex. Crim. 599, 31 S. W. 674.

44. *State v. Stokely*, 16 Minn. 282.

45. *Harrelson v. State*, 60 Tex. Crim. 534, 132 S. W. 783.

46. *Harrelson v. State*, 60 Tex. Crim. 534, 132 S. W. 783.

47. *Loeffner v. State*, 10 Ohio St. 598.

48. *Caldwell v. West*, 21 N. J. L. 411; *Suit v. State*, 30 Tex. App. 319, 17 S. W. 458.

[a] **As to Date.**—Where the order for the return of the writ was dated May 22, 189—, the court could permit it to be amended to read 1891. *Suit v. State*, 30 Tex. App. 319, 17 S. W. 458.

[b] **The tam quam clause may be**

supplied by amendment. *Caldwell v. West*, 21 N. J. L. 411.

49. *Williams v. State*, 29 Tex. App. 89, 14 S. W. 388, if he does so, writ will be quashed.

[a] **Where no injury is shown** and the party did not exhaust his peremptory challenges, a new trial will not be granted by reason of the alteration in the names of the jurors by the officer. *Williams v. State*, 29 Tex. App. 89, 14 S. W. 388.

50. **Executing venire generally**, see *supra*, IV, B, 6.

51. As to who may serve venire generally, see *supra*, IV, B, 4.

52. *Burnside v. People*, 39 Colo. 485, 90 Pac. 97; *Smith v. People*, 39 Colo. 202, 88 Pac. 1072.

53. *Taylor v. State* (Miss.), 30 So. 657; *Logan v. State*, 53 Miss. 431; *King v. Hunt*, 4 B. & Ald. 430, 6 E. C. L. 547, 106 Eng. Reprint 994.

54. *Taylor v. State* (Miss.), 30 So. 657; *Logan v. State*, 53 Miss. 431. See generally the title "New Trial."

55. See generally the statutes, and *Wyers v. State*, 22 Tex. App. 258, 2 S. W. 722; *Hicks v. State*, 5 Tex. App. 488, both holding that where it appears that prescribed oath was not taken, judgment of conviction will be reversed.

[a] **Time of Objection.**—An objection that the officer who summoned the jury was not sworn must be made before trial and comes too late after verdict. *Newman v. Dodson*, 61 Tex. 91.

scribed oath be administered to the sheriff every time he is ordered to summon additional jurors,<sup>56</sup> it being sufficient if he has been sworn early in the term.<sup>57</sup> especially where the attention of the officer is again called to his duties under the oath taken.<sup>58</sup>

Under statutes in some jurisdictions, the court may appoint any proper person to serve a special venire.<sup>59</sup>

D. PROCEEDINGS TO COMPEL ATTENDANCE OF JURORS. — The duty of any venireman summoned to appear in obedience to the venire,<sup>60</sup> or to make a reasonable excuse for not doing so,<sup>61</sup> may be enforced by attachment.<sup>62</sup> It is generally within the discretion of the court, however, whether or not to attach a juror who fails to appear in answer to the venire.<sup>63</sup> In the absence of a statute expressly requiring it the court may refuse to compel the attendance of absent jurors,<sup>64</sup>

56. *Blanton v. Mayes*, 72 Tex. 417, 10 S. W. 452; *Shaw v. State*, 32 Tex. Crim. 155, 22 S. W. 588; *Habel v. State*, 28 Tex. App. 588, 13 S. W. 1001.

[a] The oath of office is sufficient, so that it is unnecessary to swear the sheriff in ordering him to summon a special venire. *Fowler v. State*, 71 Tex. Crim. 1, 158 S. W. 1117.

57. *Blanton v. Mayes*, 72 Tex. 417, 10 S. W. 452; *Deon v. State*, 37 Tex. Crim. 506, 40 S. W. 266; *Habel v. State*, 28 Tex. App. 588, 13 S. W. 1001.

58. *Blanton v. Mayes*, 72 Tex. 417, 10 S. W. 452; *Shaw v. State*, 32 Tex. Crim. 155, 22 S. W. 588.

59. See generally the statutes, and *Carroll County v. Durham*, 219 Ill. 64, 76 N. E. 78 (holding that the fact that the court appointed a person who was a constable makes no difference as to his power and duties, nor as to his compensation); *Com. v. Carson*, 3 Phila. (Pa.) 219.

[a] **Waiver of Objection by Failure To Challenge.**—Where the court ordered a United States marshal to summon a talesman, and the defendant objected thereto because the sheriff was present, but did not challenge the juror so summoned, any error committed was without prejudice to the defendant. *Meeker v. Gardella*, 1 Wash. 139, 23 Pac. 837.

60. *Robbins v. Gorham*, 25 N. Y. 588, *affirming* 26 Barb. 586.

[a] In case a person exempted from jury service is summoned he must nevertheless appear and show his exemption to the court. He cannot rely on his exemption and refuse to appear. *People v. Holdridge*, 4 Lans. (N. Y.) 511.

61. *Robbins v. Graham*, 25 N. Y. 588, *affirming* 26 Barb. 586.

[a] A defendant who objects to the excusing of jurors (1) may have an attachment in order to verify or disprove the ground of excuse. *Kennedy v. State*, 19 Tex. App. 618; *Thompson v. State*, 19 Tex. App. 593. (2) Defendant cannot complain that the court suspended the proceedings in sending for a juror who had been given leave of absence by the court to which he had objected. *Coleman v. State*, 59 Miss. 484.

62. See generally the cases cited throughout this section.

[a] Only in special venire cases does the statute permit attachment or other process to be issued for special veniremen who do not appear. *Forrester v. State*, 73 Tex. Crim. 61, 163 S. W. 87.

63. Cal.—*People v. Collins*, 105 Cal. 504, 39 Pac. 16. La.—*State v. Ballerio*, 11 La. Ann. 81. Miss.—*Boles v. State*, 24 Miss. 445.

[a] "The attendance or non-attendance of jurors, before they are impaneled, the punishment of them for non-attendance, and their discharge from attendance on grounds of personal excuse, we understand to be matters between the court and jurors, and with which the parties cannot of right interfere." *Bond v. State*, 23 Ohio St. 349.

64. Ala.—*Johnson v. State*, 47 Ala. 9, except where the juror summoned is in jail, then it is error for the court to refuse to send for him when motion has been made by the defendant. Miss.—*Hale v. State*, 72 Miss. 140, 16 So. 387, *distinguishing* *Boles v. State*,

especially when bystanders can be summoned in their places,<sup>65</sup> or where there are enough jurors in attendance to complete the jury.<sup>66</sup> Statutes, however, sometimes make it obligatory upon the court to compel the attendance of absent jurors.<sup>67</sup> The court cannot compel the attendance of persons not legally summoned.<sup>68</sup>

The application for an attachment may be made by either party to the proceeding,<sup>69</sup> before going to trial.<sup>70</sup> After the trial has begun, however, it cannot be interrupted by requiring attachments for absent jurors.<sup>71</sup> But the power to act summarily is not limited to the time while the suit is pending.<sup>72</sup> Statutes, however, sometimes require that the application be made when the juror fails to appear and answer to his name.<sup>73</sup> If an attachment is not demanded within the time limited by statute, the party is deemed to have waived his right thereto.<sup>74</sup> The court need not suspend the proceedings until an attachment can be served;<sup>75</sup> it is discretionary with the court whether

24 Miss. 445, which was decided under a statute which was later amended. *N. Y.*—*Foster's Case*, 13 Abb. Pr. (N. S.) 372.

[a] Absentees summoned but not residents of county cannot be compelled to attend. *Furlow v. State*, 41 Tex. Crim. 12, 51 S. W. 938.

65. *Curtis v. Com.*, 87 Va. 589, 13 S. E. 73.

66. *La.*—*State v. Ballerio*, 11 La. Ann. 81. *Md.*—*Johns v. State*, 55 Md. 350. *Miss.*—*Boles v. State*, 24 Miss. 445.

[a] Where Juror Who Appeared Is Absent.—No distinction is made between the default of a juror who has not appeared, and one who after appearing in court was absent when called. In either case, if a sufficient number of the panel are present, the jury will be completed from them, unless the court, in its discretion, should defer the trial to bring in the defaulting juror by attachment. *State v. Lovenstein*, 9 La. Ann. 313.

[b] Even where the application was made in due time the court may refuse attachments where there is a sufficient number of jurors present to form the panel. *State v. Saunders*, 37 La. Ann. 389; *State v. Rountree*, 32 La. Ann. 1144; *State v. Breaux*, 32 La. Ann. 222; *State v. Shonhausen*, 26 La. Ann. 421; *State v. Ballerio*, 11 La. Ann. 81.

67. See generally the statutes, and *Pennell v. Percival*, 13 Pa. 197; *Cahn v. State*, 27 Tex. App. 709, 11 S. W. 723.

[a] Where a juror fails to appear after being sworn the court must either

compel his attendance or dismiss the jury and impanel another, and cannot dispense with the attendance of the defaulting juror and swear another in his place without the consent of the parties. *Pennell v. Percival*, 13 Pa. 197.

68. *Per Curiam Opinion*, 1 Browne (Pa.) 200; *Furlow v. State*, 41 Tex. Crim. 12, 51 S. W. 938; *Rodriguez v. State*, 23 Tex. App. 503, 5 S. W. 255.

69. *State v. Miller*, 53 Iowa 84, 4 N. W. 838; *Sinclair v. State*, 35 Tex. Crim. 130, 32 S. W. 531.

70. *State v. Saunders*, 37 La. Ann. 389.

71. *State v. Harp*, 133 La. 1007, 63 So. 500; *State v. Washington*, 37 La. Ann. 828; *State v. Saunders*, 37 La. Ann. 389; *State v. Farrer*, 35 La. Ann. 315.

72. *Robbins v. Gorham*, 25 N. Y. 588, *affirming* 26 Barb. 586, it may be had after the termination of the suit in which the default occurred.

73. See generally the statutes, and *Sinclair v. State*, 35 Tex. Crim. 130, 32 S. W. 531; *Jackson v. State*, 30 Tex. App. 664, 18 S. W. 643.

74. *State v. Miller*, 53 Iowa 84, 4 N. W. 838; *Sinclair v. State*, 35 Tex. Crim. 130, 32 S. W. 531; *Hudson v. State*, 28 Tex. App. 323, 13 S. W. 388; *Jackson v. State*, 30 Tex. App. 664, 18 S. W. 643; *Kennedy v. State*, 19 Tex. App. 618.

75. *Cal.*—*People v. Collins*, 105 Cal. 504, 39 Pac. 16. *Ia.*—*State v. Harris*, 64 Iowa 287, 20 N. W. 439. *Tex.*—*Deon v. State*, 37 Tex. Crim. 506, 40 S. W. 266; *Shaw v. State*, 32 Tex. Crim. 155, 22 S. W. 588.

or not to wait for the return of the attachment.<sup>76</sup>

**Summary Proceeding.** — The proceeding to punish a defaulting juror is a summary one.<sup>77</sup>

A reasonable notice to appear and show cause must be given before the defaulting juror can be fined for contempt.<sup>78</sup>

**Collection of Fine.** — Where not authorized by statute, the fine cannot be collected by execution against the body of the juror.<sup>79</sup>

**V. SERVING LIST OF JURORS ON DEFENDANT.** — A. IN GENERAL. — The right of a person charged with an offense to have a list of the jurors summoned to try his case is purely statutory; it does not exist unless the statute so provides.<sup>80</sup> Statutes so providing have been enacted in several jurisdictions, however.<sup>81</sup> The statutes are generally regarded as mandatory,<sup>82</sup> and a strict compliance there-

76. *State v. Miller*, 53 Iowa 84, 4 N. W. 838.

77. *Robbins v. Gorham*, 25 N. Y. 588, *affirming* 26 Barb. 586.

78. *State v. Hollinshead*, 16 N. J. L. 539.

79. *State v. Hollinshead*, 16 N. J. L. 539.

80. *Green v. State*, 38 Ark. 304; *Wright v. State*, 35 Ark. 639; *Benton v. State*, 30 Ark. 328.

81. See generally the statutes, and the following: **U. S.**—*Stewart v. United States*, 211 Fed. 41, 127 C. C. A. 477. **Ala.**—*Levy v. State*, 48 Ala. 171; *Chaney v. State*, 31 Ala. 342; *Bill v. State*, 29 Ala. 34; *Bone v. State*, 8 Ala. App. 59, 62 So. 455. **Colo.**—*Giano v. People*, 30 Colo. 20, 69 Pac. 504. **D. C.** *United States v. Neverson*, 1 Mackey 152. **Fla.**—*Collins v. State*, 31 Fla. 574, 12 So. 906. **Ga.**—*Schumpert v. State*, 9 Ga. App. 553, 71 S. E. 879. **Ill.**—*State v. Pennington*, 267 Ill. 45, 107 N. E. 871. **La.**—*State v. Dodson*, 136 La. 185, 66 So. 773; *State v. Stewart*, 34 La. Ann. 1037. **Miss.**—*Collier v. State*, 106 Miss. 613, 64 So. 373; *Loper v. State*, 3 How. 429. **Mo.**—*State v. Hunter*, 181 Mo. 316, 80 S. W. 955. **N. J.**—*State v. Tomassi*, 75 N. J. L. 739, 69 Atl. 214. **N. Y.**—*Colt v. People*, 1 Park. Crim. 611. **Ohio.**—*Thurman v. State*, 4 Ohio Cir. Ct. 141, 2 Ohio Cir. Dec. 466. **S. C.**—*State v. Colclough*, 31 S. C. 156, 9 S. E. 811. **Tenn.**—*Link v. State*, 3 Heisk. 252. **Tex.**—*Luster v. State*, 63 Tex. Crim. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089; *Houillion v. State*, 3 Tex. App. 537. **Va.**—*Craft v. Com.*, 24 Gratt. (65 Va.) 602. **Wash.** *State v. Mayo*, 42 Wash. 540, 85 Pac. 251. **Wis.**—*Peterson v. State*, 45 Wis. 535, 542.

[a] The purpose of such statutes is to afford the defendant ample time to inspect the list and inquire into the qualifications of persons constituting the venire for his trial, so that he may get a fair and impartial jury. **Ala.**—*Daniel v. State* (Ala. App.), 71 So. 79; *Haisten v. State*, 5 Ala. App. 56, 59 So. 361. **La.**—*State v. Chambers*, 45 La. Ann. 36, 11 So. 944; *State v. Howell*, 3 La. Ann. 50. **N. J.**—*State v. Aaron*, 4 N. J. L. 231, 7 Am. Dec. 592. **Tex.**—*Kellum v. State*, 33 Tex. Crim. 82, 24 S. W. 897; *Houillion v. State*, 3 Tex. App. 537.

[b] Persons accused of capital offenses (1) only have the right under some statutes. *United States v. Williams*, 1 Cranch C. C. 178, 28 Fed. Cas. No. 16,709; *Burries v. State*, 36 Tex. Crim. 13, 35 S. W. 164. (2) Consequently one accused of counterfeiting is not entitled to a list of jurors. *United States v. Williams*, 1 Cranch C. C. 178, 28 Fed. Cas. No. 16,709.

[c] In England, the right to a copy of the jury panel does not exist except in the case of treason. *Reg. v. Dowling*, 3 Cox C. C. (Eng.) 509.

82. **Ala.**—*Ziniam v. State*, 186 Ala. 9, 65 So. 56; *Brown v. State*, 128 Ala. 12, 29 So. 200; *Linnehan v. State*, 116 Ala. 471, 22 So. 662; *Haisten v. State*, 5 Ala. App. 56, 59 So. 361; *Welch v. State*, 1 Ala. App. 144, 56 So. 11. **Mo.** *State v. Hunter*, 181 Mo. 316, 80 S. W. 955. **Tex.**—*Foster v. State*, 38 Tex. Crim. 525, 43 S. W. 1009; *Jones v. State*, 33 Tex. Crim. 617, 28 S. W. 464; *Kellum v. State*, 33 Tex. Crim. 82, 24 S. W. 897.

*Contra*, *People v. Pennington*, 267 Ill. 45, 107 N. E. 871; *Bartley v. Peo-*

with required.<sup>83</sup> The defendant cannot be compelled against his objection to go to trial without having a list of jurors,<sup>84</sup> although he may waive the privilege,<sup>85</sup> by failing to insist upon the statute and proceeding to trial without objection.<sup>86</sup> But if on timely objection, the defendant's right is denied, he is entitled to a reversal.<sup>87</sup>

The proper time to object to a failure to furnish a list of jurors is when the venire is called for the trial of the cause;<sup>88</sup> an objection made upon this particular ground for the first time after trial,<sup>89</sup>

ple, 156 Ill. 234, 40 N. E. 831; *Fouts v. State*, 8 Ohio St. 98.

[a] **Notwithstanding interpretive clause** providing that the provisions of the statute shall be directory merely. *Zininam v. State*, 186 Ala. 9, 65 So. 56.

83. *Haisten v. State*, 5 Ala. App. 56, 59 So. 361; *Welch v. State*, 1 Ala. App. 144, 56 So. 11; *Harvey v. State*, 37 Tex. 365. *Compare Luster v. State*, 63 Tex. Crim. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089, holding the facts constituted a substantial compliance.

84. *La.*—*State v. Stewart*, 34 La. Ann. 1037. *Miss.*—*Loper v. State*, 3 How. 429. *Mo.*—*State v. Hunter*, 181 Mo. 316, 80 S. W. 955. *N. J.*—*Patterson v. State*, 48 N. J. L. 381, 4 Atl. 449. *Tenn.*—*Link v. State*, 3 Heisk. 252. *Tex.*—*Harvey v. State*, 37 Tex. 365; *Burries v. State*, 36 Tex. Crim. 13, 35 S. W. 164; *Jones v. State*, 33 Tex. Crim. 617, 28 S. W. 464; *Kellum v. State*, 33 Tex. Crim. 82, 24 S. W. 897, when the defendant is in jail.

85. *Colo.*—*Giano v. People*, 30 Colo. 20, 69 Pac. 504. *Ga.*—*Schumpert v. State*, 9 Ga. App. 553, 71 S. E. 879. *Ill.*—*Bartley v. People*, 156 Ill. 234, 40 N. E. 831, even if he is a minor. *La.*—*State v. Risso*, 131 La. 946, 60 So. 625; *State v. Fuller*, 14 La. Ann. 667; *State v. Price*, 6 La. Ann. 691. *Miss.*—*Logan v. State*, 50 Miss. 269; *Loper v. State*, 3 How. 429. *Mo.*—*State v. Hunter*, 181 Mo. 316, 80 S. W. 955; *State v. Klinger*, 46 Mo. 224. *N. J.*—*State v. Aaron*, 4 N. J. L. 231, 7 Am. Dec. 592. *S. C.*—*State v. Colclough*, 31 S. C. 156, 9 S. E. 811. *Tenn.*—*Link v. State*, 3 Heisk. 252. *Tex.*—*Foster v. State*, 38 Tex. Crim. 525, 43 S. W. 1009; *Houillion v. State*, 3 Tex. App. 537.

[a] **A waiver of a special venire in writing** dispenses with the necessity of serving a copy upon the defendant. *Flowers v. State*, 2 Ala. App. 65, 56 So. 98.

**Waiver by failure to make demand,** see *infra*, V, B.

86. *Ala.*—*Webb v. State*, 138 Ala. 53, 34 So. 1011. *Colo.*—*Minich v. People*, 8 Colo. 440, 9 Pac. 4. *Miss.*—*State v. Johnson*, 1 Walk. 392. *Mo.*—*State v. McLain*, 159 Mo. 349, 350, 60 S. W. 736; *State v. Klinger*, 46 Mo. 224.

[a] **The acceptance of a jury without objection is a waiver.** *Houillion v. State*, 3 Tex. App. 537.

[b] **The mere statement that the defendant waives nothing** does not assist a defendant who did not call the court's attention to the failure of the clerk to furnish the list. *Schumpert v. State*, 9 Ga. App. 553, 71 S. E. 879.

[c] **But a defendant who stands mute and refuses to plead** is entitled to a list of jurors. *Link v. State*, 3 Heisk. (Tenn.) 252.

87. *Minich v. People*, 8 Colo. 440, 9 Pac. 4; *Houillion v. State*, 3 Tex. App. 537.

[a] **To make the omission available on error,** the defendant should demand it, and on being refused, should accept and present the facts by a bill of exceptions. *People v. Pennington*, 267 Ill. 45, 107 N. E. 871; *Kelly v. People*, 132 Ill. 363, 24 N. E. 56. As to necessity for demand, see generally *infra*, V, B.

[b] **Hearing on Appeal.**—In considering the point, the question whether or not the defendant is prejudiced by a failure to obtain the list does not arise. *State v. Hunter*, 181 Mo. 316, 80 S. W. 955. *Compare Minich v. People*, 8 Colo. 440, 9 Pac. 4.

88. *Houillion v. State*, 3 Tex. App. 537.

**Objection to omission of name of juror from list,** see *infra*, V, E, 2, a, (I).

89. *State v. Cook*, 20 La. Ann. 145; *State v. Fuller*, 14 La. Ann. 667; *State v. Jackson*, 12 La. Ann. 679; *State v.*

on motion for new trial,<sup>90</sup> or on appeal,<sup>91</sup> comes too late.

**Effect of Right on Personnel of Jury.**—The statutes giving an accused a right to a list of jurors do not give him a right to have a jury which is to try his case selected exclusively from the list furnished,<sup>92</sup> or a right to demand that such list be exhausted before a special venire is issued, where a part of such jurors are in attendance in another department of the court.<sup>93</sup>

**B. DEMAND.**—Some statutes provide for furnishing a list of jurors only upon demand made by the defendant at a stated time.<sup>94</sup> If the defendant does not make a demand at the time prescribed, he is deemed to have waived his right to a list,<sup>95</sup> and the court in its discretion may deny a subsequent demand.<sup>96</sup>

**C. ORDER AND WRIT.**—Some statutes provide for an order of court directing service of the list,<sup>97</sup> while under other statutes no order of record is required.<sup>98</sup> Some statutes require the clerk to issue a writ commanding the sheriff to deliver a copy of the list of jurors summoned to the defendant.<sup>99</sup>

*Iaflleur*, Man. Unrep. Cas. (La.) 292; *Roberts v. State*, 5 Tex. App. 141.

90. *Houillion v. State*, 3 Tex. App. 537. See generally the title "New Trial."

91. *State v. Blackman*, 35 La. Ann. 483; *Loper v. State*, 3 How. (Miss.) 429.

92. *State v. Mayo*, 42 Wash. 540, 85 Pac. 251.

93. *State v. Mayo*, 42 Wash. 540, 85 Pac. 251.

94. See generally the statutes, and *Colo.*—*Giano v. People*, 30 Colo. 20, 69 Pac. 504, statute requires a demand unless the crime charged is a felony. *Ill.*—*People v. Pennington*, 267 Ill. 45, 107 N. E. 871. *Miss.*—*Collier v. State*, 106 Miss. 613, 64 So. 373.

[a] **Where Defendant Waives Arraignment.**—Under a statute requiring the furnishing of list before arraignment, the party should demand a list before waiving formal arraignment and pleading to the indictment. *Kelly v. People*, 132 Ill. 363, 24 N. E. 56.

[b] **The court's attention must be called to a motion for a list of the special venire under a statute providing that a person accused of a capital crime shall, if demanded by him by motion at a stated time, have a list of the special venire summoned.** *Collier v. State*, 106 Miss. 613, 64 So. 373.

[c] **In the Missouri statute providing that a list of jurors shall be furnished the defendant in cases specified in the first subdivision of section 5223,**

"at least twenty-four hours before the trial, and in the cases specified in the second subdivision 'of said section, at least twelve hours before the trial; and in other cases, before the jury is sworn, if such list be required'" the word "required" refers only to "other cases." *State v. May*, 142 Mo. 135, 43 S. W. 637.

**As to necessity for objection where no list is furnished,** see *supra*, V, A.

95. *Giano v. People*, 30 Colo. 20, 69 Pac. 504; *Peterson v. State*, 45 Wis. 535.

**That defendant may waive right,** see generally *supra*, V, A.

96. *Hannah v. State*, 87 Miss. 375, 39 So. 855.

97. See generally the statutes, and *Breden v. State*, 88 Ala. 20, 7 So. 258; *Shelton v. State*, 73 Ala. 5; *Bone v. State*, 8 Ala. App. 59, 62 So. 455; *Kirby v. State*, 5 Ala. App. 128, 59 So. 374, holding order to be in strict compliance with statute.

98. See generally the statutes, and *State v. Hunter*, 181 Mo. 316, 80 S. W. 955.

[a] **A verbal direction to the clerk to furnish the defendant with a list is all that is necessary under a statute providing that the list shall be delivered to the defendant if such list is required.** *State v. Hunter*, 181 Mo. 316, 80 S. W. 955.

99. See generally the statutes, and *Ollora v. State*, 60 Tex. Crim. 217, 131 S. W. 570. Compare *Luster v. State*,

**D. NUMBER OF LISTS TO BE FURNISHED.**—The statutes usually require only one list of jurors to be served on the defendant;<sup>1</sup> and it is improper to serve two lists containing different sets of names as jurors to try him,<sup>2</sup> though the defendant cannot complain because a list of jurors for another week was also served on him as this list is mere surplusage.<sup>3</sup>

Where a wrong or improper list has been served, however, the defective service may be cured by serving a proper list in due time.<sup>4</sup>

**E. FORM AND CONTENTS OF LIST.—1. Caption.**—It is not required that the list served have a caption,<sup>5</sup> and therefore a misnomer in the Christian name of the defendant in the caption is immaterial.<sup>6</sup>

**2. Contents.**—*a. Names of Jurors.*—(I.) *Whose Names Shall Appear.* The statutes vary as to what jurors' names shall be placed on the list to be served on the defendant,<sup>7</sup> some providing for a list of the

63 Tex. Crim. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089, holding there to have been a substantial compliance with the statute although no writ issued.

[a] **Writ Must Be Sealed.**—When a motion to quash the venire is made, the proper practice is to postpone the case and direct the service of a copy of the venire properly attested by the clerk. It is improper to direct the affixing of the seal when the objection is made. *Ollora v. State*, 60 Tex. Crim. 217, 131 S. W. 570.

1. See generally the statutes, and *Foster v. State*, 38 Tex. Crim. 525, 43 S. W. 1009.

[a] **Second List Where Indictment Is Nolle Prossed.**—Where the indictment is nolle prossed a second list need not be served on the accused when an information charging the same offense is filed at the same term of court. *State v. Washington*, 40 La. Ann. 669, 4 So. 864.

2. *Foster v. State*, 38 Tex. Crim. 525, 43 S. W. 1009.

[a] **A motion to quash service of the special panel upon this ground must be sustained or it will be reversible error.** *Foster v. State*, 38 Tex. Crim. 525, 43 S. W. 1009.

3. *State v. Casey*, 44 La. Ann. 969, 11 So. 553; *State v. Ward*, 14 La. Ann. 673; *State v. Cheney*, Man. Unrep. Cas. (La.) 394.

[a] **As he is presumed to know that those of one week cannot serve in the other week.** *State v. Ward*, 14 La. Ann. 673.

[b] **One copy may be made of the list of jurors to serve for two succes-**

sive weeks. *State v. Risso*, 131 La. 946, 60 So. 625.

4. *Coates v. State*, 1 Ala. App. 35, 56 So. 6.

[a] **Any irregularity in serving a list containing the names of jurors not summoned is cured by the service of another list omitting their names and containing the names of others summoned instead, to which is attached a certificate of the clerk explaining the purpose of the new list.** *Lewis v. State*, 178 Ala. 26, 59 So. 577. See *Hunter v. State*, 156 Ala. 20, 47 So. 133.

5. *Henderson v. State*, 98 Ala. 35, 13 So. 146 (it is sufficient if the list is correct and the defendant is served with a copy and informed by the sheriff that the list composed the special venire in his case); *State v. Brooks*, 30 N. J. L. 356, where the title of the court and cause is stated in the copy of the indictment served with the list, these things need not be repeated in the list.

[a] **Signing Notice at Head of List.** There is no law requiring that the clerk sign the notice at the head of the list giving notice to the defendant that the list would constitute the venire. *Phillips v. State*, 162 Ala. 14, 50 So. 194.

6. *Henderson v. State*, 98 Ala. 35, 13 So. 146.

7. See generally the statutes.

[a] **Statute Construed.**—A statute requiring a list of jurors to be furnished previous to arraignment can mean only the list of jurors then selected to serve immediately after arraignment; otherwise, in case of a continuance it cannot be complied with.

special venire only,<sup>8</sup> and some for a list of jurors on the regular panel only.<sup>9</sup> But generally such statutes require that the list contain the names of the jurors who have been summoned.<sup>10</sup> The names of jurors summoned, but not drawn, should not be included in some jurisdictions.<sup>11</sup> Nor is it contemplated by the statutes that the list shall contain the names of jurors engaged in another case.<sup>12</sup> A defend-

In such case, the prisoner will be furnished a list of jurors then selected if he requests it. *North v. People*, 139 Ill. 81, 28 N. E. 966.

[b] **Louisiana.**—Under a statute requiring a delivery of a list of jurors who are to pass on defendant's trial, the defendant cannot refuse to go to trial because some of the jurors have been excused, some had not been summoned, and two whose names are in the list were erased from the venire, one having been excused and the other having left the state permanently after being summoned. *State v. Kane*, 32 La. Ann. 999. To same effect, see *State v. Cheney*, Man. Unrep. Cas. (La.) 394.

[c] But where a list containing 156 names of whom 120 had either been excused or were not summoned, is served, the spirit of the statute is not complied with and the overruling of defendant's objection is reversible error. *State v. Howell*, 3 La. Ann. 50.

[d] The omission of jurors who were drawn and not summoned is not ground to set aside the venire. *State v. Wright*, 41 La. Ann. 600, 6 So. 135.

8. See generally the statutes, and *Fletcher v. State*, 60 Miss. 675; *McCarty v. State*, 26 Miss. 299; *Harvey v. State*, 37 Tex. 365.

[a] That the defendant is tried by a regular jury instead of the special venire guaranteed a defendant accused of a capital offense does not excuse the state for failing to furnish a copy of the special venire. *Burries v. State*, 36 Tex. Crim. 13, 35 S. W. 164.

9. See generally the statutes, and *Stewart v. United States*, 211 Fed. 41, 127 C. C. A. 477; *Territory v. Kelly*, 2 N. M. 292, 301.

10. **U. S.**—See *United States v. Dow*, Taney 34, 25 Fed. Cas. No. 14,990. *Ala.* *Lewis v. State*, 178 Ala. 26, 59 So. 577. See *Walker v. State*, 146 Ala. 45, 41 So. 878; *Plant v. State*, 140 Ala. 52, 37 So. 159; *Collins v. State*, 137 Ala. 50, 34 So. 403; *Johnson v. State*, 133 Ala.

38, 31 So. 951; *Brown v. State*, 128 Ala. 12, 29 So. 200, under an early statute requiring service of copy of the venire. **Fla.**—*Collins v. State*, 31 Fla. 574, 12 So. 906. **Mo.**—*State v. Melton*, 67 Mo. 594; *State v. Buckner*, 25 Mo. 167. For present law in Missouri see *Rev. St.*, 1909, §5227. **N. M.**—*Territory v. Kelly*, 2 N. M. 292, 301. **Tex.**—*Foster v. State*, 38 Tex. Crim. 525, 43 S. W. 1009; *Kellum v. State*, 33 Tex. Crim. 82, 24 S. W. 897; *Murray v. State*, 21 Tex. App. 466, 474, 1 S. W. 522, 3 S. W. 104; *Drake v. State*, 5 Tex. App. 649; *Harrison v. State*, 3 Tex. App. 558, 565.

[a] Objection that the list improperly contains names of jurors not summoned is not available on motion in arrest (*Thomas v. State*, 94 Ala. 74, 10 So. 432), but may be taken by motion to quash venire. See *infra*, VII, E, 3.

**Curing irregularity** in serving a list containing names of jurors not summoned by serving a proper list, see *supra*, V, D.

[b] **Serving a list of names drawn** is not a compliance with a statute requiring service of a copy of names of persons summoned. *Collins v. State*, 31 Fla. 574, 12 So. 906; *Foster v. State*, 38 Tex. Crim. 525, 43 S. W. 1009; *Harrison v. State*, 3 Tex. App. 558.

[c] **Where Names Are Erased.** Where the names of the jurors not summoned have been obliterated by having a pencil mark drawn through them, the copy is unobjectionable. *Murray v. State* (Tex. App.), 3 S. W. 104.

[d] **Construing List.**—In ruling on an objection that the copy does not contain the names of the jurors summoned, the whole copy will be taken together. *Wiggins v. State*, 47 Tex. Crim. 538, 84 S. W. 821.

**As to summoning jurors generally**, see *supra*, IV.

11. *Green v. State*, 97 Ala. 59, 12 So. 416, 15 So. 242.

12. *Jobe v. State*, 1 Ala. App. 112, 55 So. 430.

ant cannot refuse to go to trial because the list contains the names of jurors who have been excused.<sup>13</sup>

**Talesmen.**—The defendant is not entitled to a list of talesmen summoned from the bystanders for instant service where there is no time to serve the list;<sup>14</sup> but a list of talesmen ordered drawn in anticipation of the exhaustion of the regular panel must be served.<sup>15</sup>

**Effect of Omission of Name of Juror From List.**<sup>16</sup>—A juror whose name is omitted from the list should not be sworn;<sup>17</sup> but in the absence of objection, swearing such a juror is no ground for reversal, where no collusion appears.<sup>18</sup>

(II.) **Manner of Stating Names.**—Although it may be better practice to write out in full one Christian name of the juror, the practice of indicating the jurors by their initials has obtained too long to be brought into question.<sup>19</sup>

The appearance more than once of a juror's name does not vitiate the panel.<sup>20</sup>

13. *State v. Kane*, 32 La. Ann. 999. As to excusing of jurors, see *infra*, VI.

14. *Ala.*—*Untreinor v. State*, 146 Ala. 26, 41 So. 285; *Smith v. State*, 145 Ala. 17, 40 So. 957; *Bailey v. State*, 134 Ala. 59, 32 So. 673; *Johnson v. State*, 134 Ala. 54, 32 So. 724; *Mitchell v. State*, 129 Ala. 23, 30 So. 348. *Ga.*—*Chewning v. State* (Ga. App.), 88 S. E. 904. *La.*—*State v. Laborde*, 120 La. 136, 45 So. 38; *State v. Thompson*, 116 La. 829, 41 So. 107; *State v. Stewart*, 34 La. Ann. 1037; *State v. Henry*, 15 La. Ann. 297; *State v. Bennett*, 14 La. Ann. 651. *Mo.*—*State v. Buckner*, 25 Mo. 167; *State v. Price*, 3 Mo. App. 586. *N. M.*—*Territory v. Kelly*, 2 N. M. 292, 301. *Tex.*—*Dow v. State*, 31 Tex. Crim. 278, 20 S. W. 583; *Brother-ton v. State*, 30 Tex. App. 369, 17 S. W. 932; *Richardson v. State*, 7 Tex. App. 486; *Gardenhire v. State*, 6 Tex. App. 147; *Harris v. State*, 6 Tex. App. 97.

*Contra*, *State v. Aaron*, 4 N. J. L. 231, 7 Am. Dec. 592.

15. *State v. Laborde*, 120 La. 136, 45 So. 38; *State v. Pollet*, 45 La. Ann. 1168, 14 So. 179; *State v. Stewart*, 34 La. Ann. 1037; *Johnson v. State*, 4 Tex. App. 268.

[a] Where there are not sufficient names in the box to fill the venire ordered, and the court orders the summoning of talesmen to supply the deficiency, it is the sheriff's duty to place these names on the list of the special venire and the defendant is en-

titled to a copy. *Johnson v. State*, 4 Tex. App. 268.

[b] **Where Not Drawn for Service Generally.**—That the talesmen ordered in anticipation of the exhaustion of the regular panel are not ordered drawn to serve generally but to serve in a particular case does not obviate serving a list of them on the defendant. *State v. Pollet*, 45 La. Ann. 1168, 14 So. 179.

16. **As ground for quashing venire**, see *infra*, VII, E, 3.

17. *State v. Powell*, 7 N. J. L. 244; *Melton v. State*, 71 Tex. Crim. 130, 158 S. W. 550; *Campbell v. State*, 30 Tex. App. 645, 18 S. W. 409.

[a] Where the rejected juror is later summoned as a talesman, it is not error to refuse to set aside the list of talesmen on this ground where the juror is later challenged for cause. *Campbell v. State*, 30 Tex. App. 645, 18 S. W. 409.

18. *State v. Ward*, 9 Mo. App. 588.

19. *Hall v. State*, 130 Ala. 45, 30 So. 422; *Aikin v. State*, 35 Ala. 399.

[a] The use of initials (1) in indicating the christian names of the jurors is not ground for postponing the trial (*State v. Duperior*, 115 La. 478, 39 So. 455), (2) setting aside the verdict (*State v. Duperior*, 115 La. 478, 39 So. 455), (3) or arresting the judgment. *State v. Stedman*, 7 Port. (Ala.) 495.

**Use of initials as ground of challenge**, see *infra*, VII, E.

20. *Beard v. State*, 41 Tex. Crim. 173, 53 S. W. 348.

(III.) **Misnomer.**<sup>21</sup> — An inadvertent mistake in the names of jurors in the list is not ground for postponing the trial until a correct list is furnished,<sup>22</sup> or for disturbing a verdict,<sup>23</sup> but the juror whose name is imperfectly set forth should be rejected,<sup>24</sup> and it is error to refuse to stand him aside,<sup>25</sup> though this error becomes harmless when he is challenged.<sup>26</sup>

A variance in the middle initial does not constitute a mistake in name.<sup>27</sup> As to names misspelled, the doctrine of *idem sonans* applies.<sup>28</sup>

b. *Residence and Occupation of Jurors.* — The residence of the jurors need not be stated,<sup>29</sup> unless required by statute, as is sometimes the case.<sup>30</sup>

The occupation of the juror should be stated under some statutes.<sup>31</sup>

c. *Designating Specially and Regularly Drawn Jurors.* — It is not required that the list designate which are specially drawn jurors and which are regularly drawn.<sup>32</sup>

d. *Sheriff's Return on the Venire.* — A copy of the sheriff's return upon the venire is not required in the copy of the list of jurors summoned thereunder.<sup>33</sup>

e. *Proces Verbal and Certificate of Jury Commissioners.* — The copy of the venire served need not contain a copy of the proces verbal of the action of the jury commissioners in drawing the jury.<sup>34</sup>

21. As ground for quashing venire, see *infra*, VII, E, 3.

22. *State v. Dodson*, 136 La. 185, 66 So. 773; *State v. Brown*, 118 La. 373, 42 So. 969; *State v. Rodrigues*, 45 La. Ann. 1040, 13 So. 802; *State v. Brooks*, 92 Mo. 542, 572, 5 S. W. 257.

23. *State v. Dubord*, 2 La. Ann. 732.

24. *Ala.*—*Ezell v. State*, 102 Ala. 101, 15 So. 810; *Floyd v. State*, 55 Ala. 61. *Ill.*—*Mingia v. People*, 54 Ill. 274.

*La.*—*State v. Dubord*, 2 La. Ann. 732. *Tex.*—*Beard v. State*, 41 Tex. Crim. 173, 53 S. W. 348; *Mitchell v. State*, 36 Tex. Crim. 278, 33 S. W. 367, 36 S. W. 456; *Hudson v. State*, 28 Tex. App. 323, 13 S. W. 388; *Thompson v. State*, 19 Tex. App. 593; *Swofford v. State*, 3 Tex. App. 76, 88.

25. *Mingia v. People*, 54 Ill. 274; *Beard v. State*, 41 Tex. Crim. 173, 53 S. W. 348; *Hudson v. State*, 28 Tex. App. 323, 13 S. W. 388.

As to standing jurors aside see generally VII, C.

26. *State v. Rosenthal*, 85 N. J. L. 564, 89 Atl. 1045; *Beard v. State*, 41 Tex. Crim. 173, 53 S. W. 348; *Hudson v. State*, 28 Tex. Crim. 323, 13 S. W. 388.

27. *Kimbrell v. State*, 130 Ala. 40, 30 So. 454.

28. *Kimbrell v. State*, 130 Ala. 40, 30 So. 454; *Ratteree v. State*, 53 Ga. 570.

29. *White v. State*, 136 Ala. 58, 34 So. 177; *State v. Underwood*, 49 La. Ann. 1599, 22 So. 831.

30. See generally the statutes and *United States v. Insurgents*, 2 Dall. 335, 1 L. ed. 404, 26 Fed. Cas. No. 15,443; *United States v. Dow, Taney* 34, 25 Fed. Cas. No. 14,990; *State v. Brooks*, 30 N. J. L. 356.

[a] **Particularity.**—Giving the residence as in the state or county without a more particular designation is insufficient. *United States v. Insurgents*, 2 Dall. 335, 1 L. ed. 404, 26 Fed. Cas. No. 15,443.

[b] **Use of Abbreviations.**—The township residence of the jurors may be stated in an abbreviated form. *State v. Brooks*, 30 N. J. L. 356.

31. *Cole v. State*, 105 Ala. 76, 16 So. 762.

Omission to state occupation as ground for quashing venire, see *infra*, VII, E, 3.

32. *Cawley v. State*, 133 Ala. 128, 32 So. 227.

33. *Sterling v. State*, 15 Tex. App. 249.

34. *State v. Williams*, 47 La. Ann. 1609, 18 So. 647.

And as the certificate of the jury commissioners does not form any part of the venire required to be served on the defendant,<sup>35</sup> typographical errors in the certificate do not vitiate a service of the copy.<sup>36</sup>

**3. Signature and Certificate.** — The sheriff need not sign the list furnished the defendant.<sup>37</sup>

Some statutes provide for service of a certified copy of the venire.<sup>38</sup> In some jurisdictions, although there is no law requiring it,<sup>39</sup> it is the practice for the clerk to certify that the list is a copy of the names of jurors to try the case;<sup>40</sup> and though an omission of the certificate is an irregularity,<sup>41</sup> it is not prejudicial if the list served appears to have been an exact copy.<sup>42</sup>

**4. Amendment.** — The making of the list being regarded as a clerical duty merely, the court may direct amendments to be made.<sup>43</sup>

**5. Objections and Waiver.**<sup>44</sup> — Objections to irregularities and mistakes in the jury list served on the defendant must be made before entering on the trial.<sup>45</sup> If not objected to until at trial<sup>46</sup> or after verdict,<sup>47</sup> the objection comes too late and the defendant will be held to have waived his objections. A failure to object is tantamount to an acknowledgment that a correct list of jurors has been served on him.<sup>48</sup> If a defendant has been put to a disadvantage by a failure to serve him a correct list, his conviction will not stand,<sup>49</sup> but slight inaccuracies which could be corrected by calling the court's attention to them are regarded as harmless inaccuracies.<sup>50</sup>

**F. SERVING THE LIST. — 1. By Whom Served.** — Generally the list of jurors is served by the sheriff,<sup>51</sup> although under some statutes, it

35. *State v. Rodrigues*, 45 La. Ann. 1040, 13 So. 802.

36. *State v. Rodrigues*, 45 La. Ann. 1040, 13 So. 802, in name of jury commissioner.

37. *Porter v. State*, 146 Ala. 36, 41 So. 421; *Handy v. State*, 121 Ala. 13, 25 So. 1023.

38. *Luster v. State*, 63 Tex. Crim. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

[a] That the clerk filled out the certificate after service but omitted his official seal is immaterial where the defendant was furnished an exact copy at the time required in the statute. *Luster v. State*, 63 Tex. Crim. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089.

39. *Phillips v. State*, 162 Ala. 14, 50 So. 194.

40. *Underwood v. State*, 176 Ala. 17, 58 So. 389. See *Bailey v. State*, 134 Ala. 59, 32 So. 673, holding there is no statute requiring it.

41. *Underwood v. State*, 176 Ala. 17, 58 So. 389.

42. *Underwood v. State*, 176 Ala. 17, 58 So. 389.

43. *Kenan v. State*, 73 Ala. 15 (so

that it will correspond with the title of the cause); *Sterling v. State*, 15 Tex. App. 249, 255.

44. Objections for failure to furnish jury list, see *supra*, V, A.

Misnomer of juror as ground of objection, see *supra*, V, E, 2, a, (III).

45. *Gaston v. State*, 179 Ala. 1, 60 So. 805; *Bell v. State*, 59 Ala. 55; *Browning v. State*, 33 Miss. 47, 71.

[a] Objection after announcing ready for trial and accepting the jurors comes too late. *State v. Viaux*, 8 La. Ann. 514.

46. *State v. Brooks*, 30 N. J. L. 356.

47. *Browning v. State*, 33 Miss. 47.

48. *Territory v. Cordova*, 11 N. M. 367, 68 Pac. 919.

49. *Goodhue v. People*, 94 Ill. 37.

50. III.—*Goodhue v. People*, 94 Ill.

37. La.—*State v. Rodrigues*, 45 La. Ann. 1040, 13 So. 802. N. M.—*Territory v. Cordova*, 11 N. M. 367, 68 Pac. 919.

51. *Friar v. State*, 3 How. (Miss.) 422, inasmuch as the statute is silent as to who shall serve the list, the party has a right to look to the court and it is the duty of the court to

is sufficient if the list be furnished by the clerk.<sup>52</sup>

**2. On Whom Served.**—Statutes sometimes require service to be made upon the defendant,<sup>53</sup> or upon the defendant or his counsel,<sup>54</sup> but it need not be on both.<sup>55</sup>

**3. Time of Service.**—The time of service is generally regulated by statutes,<sup>56</sup> which sometimes require service before arraignment,<sup>57</sup> or a designated time before trial;<sup>58</sup> but the defendant may waive the

see it done by some one of its officers, none of whom are more proper than the sheriff.

[a] **Beyond Sheriff's Jurisdiction.** Where for want of a safe jail in the parish, the defendant is confined in an adjoining parish, the sheriff of the first parish may deliver the list of jurors to the defendant as the statute merely requires the list to be "delivered" to him. *State v. Washington*, 37 La. Ann. 828.

52. *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116.

53. *Ala.*—*Underwood v. State*, 176 Ala. 17, 58 So. 389; *Welch v. State*, 1 Ala. App. 144, 56 So. 11. See *Henderson v. State*, 98 Ala. 35, 13 So. 146; *Johnson v. State*, 94 Ala. 35, 10 So. 667; *Reese v. State*, 90 Ala. 624, 8 So. 818, under former statute permitting service on counsel. *La.*—*State v. Risso*, 131 La. 946, 60 So. 625; *State v. Pollet*, 45 La. Ann. 1168, 14 So. 179. *Tex.*—*Jones v. State*, 33 Tex. Crim. 617, 28 S. W. 464.

[a] **A service on counsel** (1) is unauthorized in such a case (*Ala.*—*Welch v. State*, 1 Ala. App. 144, 56 So. 11. *La.*—*State v. Pollet*, 45 La. Ann. 1168, 14 So. 179. *Tex.*—*Jones v. State*, 33 Tex. Crim. 617, 28 S. W. 464. *Contra*, *State v. Faulkner*, 175 Mo. 546, 578, 75 S. W. 116; *State v. Todd*, 146 Mo. 295, 47 S. W. 923), (2) even where the defendant cannot read (*Jones v. State*, 33 Tex. Crim. 617, 28 S. W. 464); (3) but if not objected to before announcing ready for trial, the defect is waived. *Underwood v. State*, 176 Ala. 17, 58 So. 389. See *State v. Todd*, 146 Mo. 295, 47 S. W. 923.

54. See generally the statutes.

55. *Aaron v. State*, 39 Ala. 75.

56. See generally the statutes, and *Ala.*—*Bain v. State*, 70 Ala. 4 (under early statute); *Swain v. State*, 8 Ala. App. 26, 62 So. 446; *Welch v. State*, 1 Ala. App. 144, 56 So. 11; *Weaver v. State*, 1 Ala. App. 48, 55 So. 956. *Mo.*—*State v. Faulkner*, 175 Mo. 546, 75 S.

W. 116; *State v. Ray*, 53 Mo. 345. *Ohio.*—*Thurman v. State*, 4 Ohio Cir. Ct. 141, 2 Ohio Cir. Dec. 466.

[a] **Statute is mandatory** as to time. *Haisten v. State*, 5 Ala. App. 56, 59 So. 361.

[b] **In Alabama**, (1) under *Jury Law*, Laws Sp. Sess., 1909, p. 317, §32, it is not necessary that service be made one entire day before the case is set for trial, as formerly required. *Kirby v. State*, 5 Ala. App. 128, 59 So. 374. (2) It is the duty of the officer to comply forthwith with the order directing service. *Daniel v. State* (Ala. App.), 71 So. 79; *Haisten v. State*, 5 Ala. App. 56, 59 So. 361. (3) This requires service promptly and with all convenient dispatch, without delay. *Haisten v. State*, 5 Ala. App. 56, 59 So. 361. (4) A service four (*Swain v. State*, 8 Ala. App. 26, 62 So. 446), (5) or five (*Daniel v. State* [Ala. App.], 71 So. 79) days before trial is a substantial compliance. (6) As to sufficiency of service on day of trial where defendant evades service, query. *Welch v. State*, 1 Ala. App. 144, 56 So. 11.

57. *Heller v. People*, 2 Colo. App. 459, 31 Pac. 773; *North v. People*, 139 Ill. 81, 28 N. E. 966.

[a] **Necessity for Service at Another Time.**—A statute requiring the furnishing of a list previous to arraignment does not require a service at any other time. *Heller v. People*, 2 Colo. App. 459, 31 Pac. 773.

58. *U. S.*—*United States v. Dow*, Taney 34, 25 Fed. Cas. No. 14,990. *D. C.*—*United States v. Neverson*, 1 Mackey 152. *La.*—*State v. Washington*, 37 La. Ann. 828; *State v. Kane*, 32 La. Ann. 999; *State v. Toby*, 31 La. Ann. 756. *Tex.*—*Robles v. State*, 5 Tex. App. 346.

[a] **Service before arraignment** is not required where the statute requires delivery "at least two entire days before the trial." *State v. Kane*, 32

provision as to time of service if he cares to.<sup>50</sup>

In computing time, in harmony with the general rules, fractions of days will not be counted.<sup>60</sup> Under a statute requiring "one day's service" the day of service and the day of trial are to be excluded.<sup>61</sup> The same is true of a statute requiring delivery of a copy two days at least before trial,<sup>62</sup> or two entire days before trial.<sup>63</sup> The days referred to in the statute are not required to be judicial days.<sup>64</sup>

**4. Presumption of Service.**—In the absence of objection and of evidence to the contrary, it will be presumed that the proper list was served on the accused.<sup>65</sup>

**G. RECORD AND RETURN.**—The record need not affirmatively show that the accused was served with a list of jurors.<sup>66</sup>

Where the sheriff makes a return of the service of the list of jurors, it is conclusive evidence of that fact;<sup>67</sup> but in the absence of a return, the fact of service may be shown otherwise,<sup>68</sup> or in the absence of objection, it may be presumed.<sup>69</sup> The return of service of the list of jurors may be amended.<sup>70</sup>

La. Ann. 999; *State v. Holmes*, 7 La. Ann. 567.

[b] The trial begins within the meaning of the statute when the jury is completed and sworn. *United States v. Neverson*, 1 Mackey (D. C.) 152, 163.

[c] **Where Day of Trial Is Postponed.**—Where three days intervene between delivery of the panel and the trial there is no error although less than three days intervened between the day of delivery and the day of trial as originally set. *Thurman v. State*, 4 Ohio Cir. Ct. 141, 2 Ohio Cir. Dec. 466.

[d] **Service of a list of talesmen** before the completion of the panel and before the drawing to complete the panel is sufficient. *State v. Washington*, 108 La. 226, 32 So. 396.

59. *State v. McLain*, 159 Mo. 340, 350, 60 S. W. 736; *State v. Waters*, 1 Mo. App. 7.

[a] **By Agreeing on a Day for Trial.** *State v. Waters*, 1 Mo. App. 7.

[b] **Necessity of Offer of Performance.**—An offer to perform within the time limited by law is not necessary before there can be a waiver. *State v. McLain*, 159 Mo. 340, 349, 60 S. W. 736.

60. *Speer v. State*, 2 Tex. App. 246.

61. *Speer v. State*, 2 Tex. App. 246.

62. *State v. McLendon*, 1 Stew. (Ala.) 195.

63. *United States v. Dow*, Taney 34, 25 Fed. Cas. No. 14,990.

64. *State v. Baudoin*, 115 La. 837, 40 So. 239.

[a] **Thanksgiving day is counted.** *State v. Green*, 66 Mo. 631.

[b] **Sundays are not counted.** *State v. Boyle*, 9 La. Ann. 371; *State v. May*, 142 Mo. 135, 43 S. W. 637. But see *State v. Green*, 66 Mo. 631. *Contra*, *Wiggins v. State*, 47 Tex. Crim. 538, 84 S. W. 821.

65. **Ala.**—*Shelton v. State*, 73 Ala. 5. **La.**—*State v. Risso*, 131 La. 946, 60 So. 625. **N. J.**—*Patterson v. State*, 48 N. J. L. 381, 4 Atl. 449. **Ohio.**—*Fouts v. State*, 8 Ohio St. 98.

[a] **Presumption From Order Directing Service.**—Where the record is silent as to service, but shows an order directing it, it will be presumed that the officer obeyed the order and served the list as directed. *Webb v. State*, 138 Ala. 53, 34 So. 1011; *Breden v. State*, 88 Ala. 20, 7 So. 258. As to order of service, see *supra*, V, C.

66. **Ala.**—*Shelton v. State*, 73 Ala. 5. **La.**—*State v. Blackman*, 35 La. Ann. 483. **N. J.**—*Patterson v. State*, 48 N. J. L. 381, 4 Atl. 449.

67. *Griffin v. State*, 90 Ala. 596, 8 So. 670; *Woodside v. State*, 2 How. (Miss.) 655.

68. *Griffin v. State*, 90 Ala. 596, 8 So. 670; *State v. Risso*, 131 La. 946, 60 So. 625.

69. See *supra*, V, E, 4.

70. *Kenan v. State*, 73 Ala. 15.

[a] **To show the fact of service of the list on the defendant.** *Kenan v. State*, 73 Ala. 15.

H. POSTPONING TRIAL TO ALLOW TIME TO EXAMINE LIST.—If the court is allowed to postpone the trial at all, it is a matter of discretion to postpone the trial a reasonable time so as to enable the defendant to examine a jury list furnished just before trial.<sup>71</sup>

VI. EXCUSING OF JURORS.<sup>72</sup>—A. POWER OF COURT GENERALLY.—The court has it in its discretion to excuse for good cause shown persons summoned to act as jurors;<sup>73</sup> and it makes no difference

[b] The amendment should be made as soon as directed but it is immaterial if it be delayed to another time during the term. *Kenan v. State*, 73 Ala. 15.

[c] When Made.—The sheriff may make or amend his return according to the real facts at the time of trial or even after conviction. *Griffin v. State*, 90 Ala. 596, 8 So. 670.

71. La.—*State v. Laborde*, 120 La. 136, 45 So. 38. N. Y.—*Colt v. People*, 1 Park. Crim. 611. Va.—*Craft v. Com.*, 24 Gratt. (65 Va.) 602, where the list was furnished after the case was called for trial.

[a] A continuance to the next term will not be granted. *Craft v. Com.*, 24 Gratt. (65 Va.) 602.

Grounds for continuances generally, see 5 STANDARD PROC. 444, et seq.

72. As to excusing or rejecting juror on court's own motion, see *infra*, VII, D.

73. Ala.—*Ziniam v. State*, 186 Ala. 9, 65 So. 56; *Andrews v. State*, 159 Ala. 14, 48 So. 853; *Gaines v. State*, 146 Ala. 16, 41 So. 865; *Nordan v. State*, 143 Ala. 13, 39 So. 406; *Plant v. State*, 140 Ala. 52, 37 So. 159; *Scott v. State*, 133 Ala. 112, 32 So. 623; *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 So. 687. Ark.—*Caughron v. State*, 99 Ark. 462, 139 S. W. 315; *Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054. Cal.—*People v. Hickman*, 113 Cal. 80, 45 Pac. 175; *People v. Collins*, 105 Cal. 504, 39 Pac. 16; *People v. Ward*, 105 Cal. 335, 38 Pac. 945; *Grady v. Early*, 18 Cal. 108. Colo.—*Mooney v. People*, 7 Colo. 218, 3 Pac. 325; *Stratton v. People*, 5 Colo. 276. Fla.—*Walsingham v. State*, 61 Fla. 67, 56 So. 195; *Peadon v. State*, 46 Fla. 124, 35 So. 204; *Mathis v. State*, 45 Fla. 46, 34 So. 287; *Edwards v. State*, 39 Fla. 753, 23 So. 537; *Ellis v. State*, 25 Fla. 702, 6 So. 768; *Metzger v. State*, 18 Fla. 481; *John D. C. v. State*, 16 Fla. 554. Ga.—*Ellis v. State*, 114 Ga. 36,

39 S. E. 881; *Benford v. State* (Ga. App.), 88 S. E. 747. Ia.—*State v. Ostrander*, 18 Iowa 435. Kan.—*State v. Miller*, 29 Kan. 43; *State v. Dickson*, 6 Kan. 209. Ky.—*Barnes v. Com.*, 24 Ky. L. Rep. 1143, 70 S. W. 827. La.—*State v. Ardoin*, 136 La. 1085, 68 So. 133; *State v. Huff*, 118 La. 194, 42 So. 771; *State v. Poindexter*, 117 La. 380, 41 So. 688; *State v. Michel*, 111 La. 434, 36 So. 869; *State v. Madison*, 47 La. Ann. 30, 16 So. 566; *State v. Hamilton*, 35 La. Ann. 1043. Mass.—*Com. v. Livermore*, 4 Gray 18. Mich.—*People v. Thacker*, 108 Mich. 652, 66 N. W. 562; *Michigan Condensed Milk Co. v. Wilcox*, 78 Mich. 431, 44 N. W. 281; *People v. Carrier*, 46 Mich. 442, 9 N. W. 487; *Atlas Mining Co. v. Johnston*, 23 Mich. 36. Minn.—*Leystrom v. City of Ada*, 110 Minn. 340, 125 N. W. 507. Miss.—*Hale v. State*, 72 Miss. 140, 16 So. 387; *Coleman v. State*, 59 Miss. 484; *Gilliam v. Brown*, 43 Miss. 641. Mo.—*Glasgow v. Metropolitan St. Ry. Co.*, 191 Mo. 347, 89 S. W. 915. Neb.—*Gran v. Houston*, 45 Neb. 813, 64 N. W. 245. Nev.—*State v. Switzer*, 38 Nev. 108, 145 Pac. 925. N. J.—*Aaronson v. State*, 56 N. J. L. 9, 27 Atl. 937; *Smith v. Clayton*, 29 N. J. L. 357. N. Y.—*People v. Jackson*, 111 N. Y. 362, 19 N. E. 54. N. C.—*Perry v. Western N. C. R. Co.*, 129 N. C. 333, 40 S. E. 191; *State v. Barber*, 113 N. C. 711, 18 S. E. 515. N. D.—*State v. Reilly*, 25 N. D. 339, 141 N. W. 720. Ohio.—*Bond v. State*, 23 Ohio St. 349; *Toledo Ry. & L. Co. v. Ward*, 25 Ohio Cir. Ct. 399. Ore.—*State v. White*, 48 Ore. 416, 87 Pac. 137. Pa.—*Com. v. Payne*, 205 Pa. 101, 54 Atl. 489. S. C.—*Yarborough v. Columbia Ry., G. & E. Co.*, 100 S. C. 33, 84 S. E. 308; *State v. Whitman*, 14 Rich. L. 113. Tenn.—*Fletcher v. State*, 6 Humph. 249. Tex.—*Mitchell v. State*, 36 Tex. Crim. 278, 33 S. W. 367. Utah.—*Anderson v. Wasatch, etc. R. Co.*, 2 Utah 518. Vt.—*State v. Ward*, 39 Vt. 225.

that the regular panel is thereby depleted.<sup>74</sup> Such excuse may be given in the absence of, and without the knowledge or consent of the accused.<sup>75</sup> But the court alone has the power to excuse one from serving on the jury;<sup>76</sup> the sheriff has no such authority.<sup>77</sup> The power of the court in this respect is sometimes recognized by statute;<sup>78</sup> but a statute is not necessary to confer such power.<sup>79</sup>

**B. TIME FOR EXCUSING.**—The court may excuse a juror in advance of the trial for which he has been summoned,<sup>80</sup> though the safer practice is not to do so.<sup>81</sup> A juror may be excused at any time before acceptance and administration of the oath,<sup>82</sup> and it seems that with the consent of counsel, a juror may be excused after acceptance and administration of the oath.<sup>83</sup>

**C. APPLICATION FOR.**—**1. In General.**—The general rule is that whatever is done in excusing a juror should be done in open court;<sup>84</sup>

**74. Cal.**—*People v. Hickman*, 113 Cal. 80, 45 Pac. 175; *People v. Lee*, 17 Cal. 76. **La.**—*State v. Ardoin*, 136 La. 1085, 68 So. 133. **N. D.**—*State v. Reilly*, 25 N. D. 339, 141 N. W. 720.

**75. Ala.**—*Maxwell v. State*, 89 Ala. 150, 7 So. 824; *Fariss v. State*, 85 Ala. 1, 4 So. 679. **Mich.**—*People v. Thacker*, 108 Mich. 652, 66 N. W. 562. **Pa.** *Jewell v. Com.*, 22 Pa. 94.

[a] **Reason.**—The discharge of jurors from attendance on grounds of personal excuse, is a matter between the court and the jurors, and with which the parties cannot, of right, interfere. Any other rule would result in giving the right to every suitor, whose case was liable to be tried by a jury, to interfere and be heard at any and all applications of attending jurors to be excused from further attendance. *Bond v. State*, 23 Ohio St. 349.

**76. Ark.**—*Vaughan v. State*, 58 Ark. 353, 24 S. W. 885. **Ill.**—*Ayers v. Metcalf*, 39 Ill. 307. **N. Y.**—*Trustees v. Patchen*, 40 Wend. 47. **Tex.**—*Gay v. State*, 40 Tex. Crim. 242, 49 S. W. 612.

**77. Ill.**—*Ayers v. Metcalf*, 39 Ill. 307. **N. Y.**—*Trustees v. Patchen*, 40 Wend. 47. **Tex.**—*Gay v. State*, 40 Tex. Crim. 242, 49 S. W. 612.

**78.** See generally the statutes, and **Ala.**—Code, 1907, §7280; *Louisville & N. R. Co. v. Young*, 168 Ala. 551, 53 So. 213; *Pierson v. State*, 99 Ala. 148, 13 So. 550; *Long v. State*, 86 Ala. 36, 5 So. 443. **Ark.**—*Kirby's Dig.*, 1904, §2360; *Caughron v. State*, 99 Ark. 462, 139 S. W. 315. **D. C.**—*United States v. Heath*, 9 Mackey 272.

**79.** *Stewart v. State*, 1 Ohio St. 66.

[a] "A statutory provision conferring in express terms the power to excuse is not indispensable. Without it, the court would have the power under the general jurisdiction conferred upon it." *Stewart v. State*, 1 Ohio St. 66.

**80.** *Maxwell v. State*, 89 Ala. 150, 7 So. 824; *Fariss v. State*, 85 Ala. 1, 4 So. 679; *Finney v. State*, 10 Ala. App. 39, 65 So. 93; *Watts v. State*, 8 Ala. App. 264, 63 So. 18.

[a] **Discretionary With Court.** "Whether the juror be excused at the trial or beforehand is also within the sound discretion of the court, though in the latter case the action and the reasons for it should be stated in open court, so that the fact that the excuse was judicially passed upon and found to be sufficient should appear on the record." *Com. v. Payne*, 205 Pa. 101, 54 Atl. 489.

**81.** *Sylvester v. State*, 71 Ala. 17, safer practice is not to excuse any juror in advance of the trial until he claims the privilege of an exemption on his name being regularly drawn.

**82.** *Phillips v. State*, 68 Ala. 469; *People v. Thacker*, 108 Mich. 652, 66 N. W. 562.

As to time for swearing jury, see *infra*, VIII.

**83.** *Hanvey v. State*, 68 Ga. 612. See also *Collins v. State*, 47 Tex. Crim. 303, 83 S. W. 806, wherein excuse granted after acceptance but before administration of oath.

**84.** *State v. Whitman*, 14 Rich. L. (S. C.) 113.

[a] "Some written memorial of the fact that a juror is excused, the time

the juror should establish and claim his excuse under his oath.<sup>85</sup> But this is not always true, for the occasion may arise where it is impossible for the juror to be present, in which event he may send his excuse by another to be determined by the court in his absence.<sup>86</sup> It has also been held that the juror may present his excuses to the judge outside of the courthouse.<sup>87</sup>

As under most statutes exemption from jury service is a matter of personal privilege which may be waived, a juror must show that he belongs to such exempt class before he will be excused.<sup>88</sup>

**2. Grounds of.**<sup>89</sup>—a. *In General.*—The reasons for excusing a juror are so numerous that they cannot be specified beforehand or reduced to any set rule, but they must be left to the discretion of the judge to dispose of as they arise.<sup>90</sup> Some of the grounds arising frequently and recognized as good cause for excusing jurors will be enumerated, however.<sup>91</sup> Thus a juror lacking in the requisite quali-

when, and the general reason why, should always be left with the clerk: ordinarily no more expedient form can be adopted than the judge's requiring an affidavit of the excuse, and writing thereon his order excusing the juror, with the date." *State v. Whitman*, 14 Rich. L. (S. C.) 113.

**Time for excusing**, see *supra*, VI, B.

**85.** *Livar v. State*, 26 Tex. App. 115, 9 S. W. 552; *Kennedy v. State*, 19 Tex. App. 618; *Thompson v. State*, 19 Tex. App. 593; *Thuston v. State*, 18 Tex. App. 26; *Foster v. State*, 8 Tex. App. 248; *Robles v. State*, 5 Tex. App. 346.

**86.** *Cameron v. State*, 69 Tex. Crim. 439, 153 S. W. 867; *Houston City St. Ry. Co. v. Ross* (Tex. Civ. App.), 28 S. W. 254; *Livar v. State*, 26 Tex. App. 115, 9 S. W. 552; *Kennedy v. State*, 19 Tex. App. 618; *Thompson v. State*, 19 Tex. App. 593; *Thuston v. State*, 18 Tex. App. 26.

[a] **Presence of Sick Juror Not Necessary.**—"It would be an unreasonable hardship on a juror seriously ill to require him to be brought into court merely to be excused." *Com. v. Payne*, 205 Pa. 101, 54 Atl. 489.

[b] The sheriff's return upon an attachment ordering a juror to be brought into court, stating that the juror was "over age and decrepit," was sufficient to permit the court to excuse him, in the absence of a showing of the probable falsity of the return and a demand for other process to bring the juror in person into court. *Livar v. State*, 26 Tex. App. 115, 9 S. W. 552.

[c] **Where a public officer would be**  
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unable to leave his office without endangering the public service, he may be excused without attendance upon court. *Kennedy v. State*, 19 Tex. App. 618.

**87.** *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885.

**88.** *Ala.*—*King v. State*, 90 Ala. 612, 8 So. 856; *Phillips v. State*, 68 Ala. 469. *Ohio.*—*Stewart v. State*, 1 Ohio St. 66. *Tex.*—*Moore v. State*, 49 Tex. Crim. 629, 95 S. W. 514. *Va.*—*Cluverius v. Com.*, 81 Va. 787.

[a] **Failure to claim exemption until after acceptance waives right to be excused.** *Kelly v. Chicago, R. I. & P. R. Co.*, 175 Ill. App. 196.

**89. Grounds of challenge**, see *infra*, VII, E.

**90.** *Com. v. Payne*, 205 Pa. 101, 54 Atl. 489; *Jewell v. Com.*, 22 Pa. 94.

**Power to excuse in discretion of court**, see *supra*, VI, A.

**91.** See *infra*, this section.

[a] **Miscellaneous Grounds of Excuse.**—(1) Deafness of juror. *Jesse v. State*, 20 Ga. 156. (2) Juror residing beyond certain distance from courthouse. *Steele v. State*, 83 Ala. 20, 3 So. 547. (3) Juror improperly approached by litigant (*United States Roll. Stock Co. v. Weir*, 96 Ala. 396, 11 So. 436), (4) or employe of company allied to defendant corporation. *Glasgow v. Metropolitan St. Ry. Co.*, 191 Mo. 347, 89 S. W. 915. (5) Juror excused to bid farewell to son about to take departure to distant country. *Brown v. State* (Miss.), 38 So. 316. And see *Com. v. Livermore*, 4 Gray (Mass.) 18, wherein the court, in the exercise of its discretion excused a

cation of intelligence should be excused,<sup>92</sup> and in this connection failure to understand the English language sufficiently well is a good ground of excuse.<sup>93</sup> So also, a person called as juror should be excused when it is shown that he is not a citizen, and does not show any intention of becoming one.<sup>94</sup>

Where a juror's business would suffer serious injury because of his absence therefrom,<sup>95</sup> or where his absence is necessary to save his property from destruction in an emergency,<sup>96</sup> he should be excused.

Where a person called as a juror has public duties to perform which conflict with his serving as a juror, the court may excuse him.<sup>97</sup> So a juror who at the time he is called is sitting as a juror in another case,<sup>98</sup> or one who is a witness,<sup>99</sup> or is a party,<sup>1</sup> in a case to be tried at the same term, should be excused.

b. *Illness.* — Illness of the juror,<sup>2</sup> or of a member of the juror's fam-

juror because he lived in the same town as defendant, although the court stated that the reason assigned was not of itself a sufficient excuse.

92. *Scott v. State*, 133 Ala. 112, 32 So. 623.

93. Ala.—*Long v. State*, 86 Ala. 36, 5 So. 443. La.—*State v. Guidry*, 28 La. Ann. 630. Mich.—*O'Neil v. Lake Superior Iron Co.*, 67 Mich. 560, 35 N. W. 162; *Atlas Mining Co. v. Johnston*, 23 Mich. 36.

94. *Babcock v. People*, 13 Colo. 515, 22 Pac. 817.

95. *United States v. Heath*, 9 Mackey (D. C.) 272; *People v. Thacker*, 108 Mich. 652, 66 N. W. 562.

96. *Nordan v. State*, 143 Ala. 13, 39 So. 406; *Watts v. State*, 8 Ala. App. 264, 63 So. 18.

97. Ala.—*Pierson v. State*, 99 Ala. 148, 13 So. 550, policeman. Fla.—*Ellis v. State*, 25 Fla. 702, 6 So. 768, tax assessor. Mass.—*Com. v. Walton*, 17 Pick. 403, member of legislature in session. Miss.—*Hale v. State*, 72 Miss. 140, 16 So. 387, jailer. N. J.—*Aaronson v. State*, 56 N. J. L. 9, 27 Atl. 937, election officers. Pa.—*Case of Piper*, 2 Browne 59, inspector. Vt. *State v. Ward*, 39 Vt. 225, fireman.

[a] A postmaster has been excused. Fla.—*Edwards v. State*, 39 Fla. 753, 23 So. 537. Ohio.—*Stewart v. State*, 1 Ohio St. 66. Tex.—*Kennedy v. State*, 19 Tex. App. 618.

[b] *Where Deputy May Act.* Whenever the office or situation is of a public nature, and the holder has no power to act by deputy, he is entitled to be excused from serving as a juror; but it is otherwise where the trust is of a private nature, or the

party has the power to act by deputy. *Case of Piper*, 2 Browne (Pa.) 59.

98. *Jarvis v. State*, 138 Ala. 17, 34 So. 1025.

99. *People v. Carrier*, 46 Mich. 442, 9 N. W. 487.

1. *Claggett's Case*, 2 Cranch C. C. 247, 5 Fed. Cas. No. 2,779.

2. Ala.—*Sanford v. State*, 143 Ala. 78, 39 So. 370; *Thomas v. State*, 124 Ala. 48, 27 So. 315; *Parker v. State*, 7 Ala. App. 9, 60 So. 995. Ark.—*Bruder v. State*, 110 Ark. 402, 161 S. W. 1067; *Caughron v. State*, 99 Ark. 462, 139 S. W. 315; *Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054. D. C.—*United States v. Heath*, 9 Mackey 272. Ga.—*Ozburn v. State*, 87 Ga. 173, 13 S. E. 247; *Hanvey v. State*, 68 Ga. 612; *Jesse v. State*, 20 Ga. 156. Ill.—*Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321. Ind.—*Rulo v. State*, 19 Ind. 298. Ia.—*State v. Ostrander*, 18 Iowa 435. La.—*State v. Voorhies*, 115 La. 200, 38 So. 964; *State v. Johnson*, 48 La. Ann. 437, 19 So. 476; *State v. Madison*, 47 La. Ann. 30, 16 So. 566; *State v. Moncla*, 39 La. Ann. 868, 2 So. 814. Mo.—*State v. Baber*, 74 Mo. 292, 41 Am. Rep. 314. Pa.—*Com. v. Payne*, 205 Pa. 101, 54 Atl. 489; *Jewell v. Com.*, 22 Pa. 94. Tenn.—*Fletcher v. State*, 6 Humph. 249. Tex.—*Goodall v. State* (Tex. Crim.), 47 S. W. 359; *Houston City Ry. Co. v. Ross* (Tex. Civ. App.), 28 S. W. 254; *Thompson v. State*, 19 Tex. App. 593.

[a] It is immaterial how fact of illness is shown, if the judge is satisfied it exists. *Ozburn v. State*, 87 Ga. 173, 13 S. E. 247.

[b] Physician's testimony or certificate not necessary. *Ozburn v. State*,

ily,<sup>2</sup> is likewise ground for excusing a juror when properly presented.

**3. Presumption Upon Granting.**—It will be presumed that the court in excusing a juror acted upon a proper ground and correct principles.<sup>4</sup>

**4. Review of Decision Upon.**—As the excusing of a juror is purely discretionary with the court, its action will not be disturbed or reversed in an appellate court,<sup>5</sup> unless it appear that such discretion was abused to the detriment of the parties.<sup>6</sup>

**D. RECALLING EXCUSED JURORS.**—The court may, in its discretion, excuse the jurors until a future day during the term;<sup>7</sup> but if the juror is excused from serving on the panel, he cannot subsequently be recalled for service thereon.<sup>8</sup>

87 Ga. 173, 13 S. E. 247; *Shawnee-town v. Mason*, 82 Ill. 337, 25 Am. Rep. 321.

**3. Ala.**—*Williams v. State*, 147 Ala. 10, 41 So. 992; *Yarbrough v. State*, 105 Ala. 43, 16 So. 758; *Finney v. State*, 10 Ala. App. 39, 65 So. 93. **D. C.** *United States v. Heath*, 9 Mackey 272. **Ia.**—*State v. Fielding*, 135 Iowa 255, 112 N. W. 539; *State v. Ostrander*, 18 Iowa 435. **Miss.**—*Coleman v. State*, 59 Miss. 484. **Mo.**—*King v. State*, 1 Mo. 717.

But see *Boles v. State*, 13 Smed. & M. (Miss.) 398, holding that it was an unjustifiable exercise of power for the court to excuse a qualified juror because his wife was ill, where there was no showing that his presence at home was necessary.

**4. Ala.**—*Plant v. State*, 140 Ala. 52, 37 So. 159; *Moseley v. State*, 107 Ala. 74, 17 So. 932; *Fariss v. State*, 85 Ala. 1, 4 So. 679. **La.**—*State v. Kane*, 32 La. Ann. 999; *State v. Breaux*, 32 La. Ann. 222. **Nev.**—*State v. Switzer*, 38 Nev. 108, 145 Pac. 925. **W. Va.**—*State v. Williams*, 49 W. Va. 220, 38 S. E. 495.

**5. Ala.**—*Gaines v. State*, 146 Ala. 16, 41 So. 865; *Nordan v. State*, 143 Ala. 13, 39 So. 406; *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 So. 687. **Colo.**—*Hill v. Corcoran*, 15 Colo. 270, 25 Pac. 171. **Fla.**—*Mathis v. State*, 45 Fla. 46, 34 So. 287; *Ellis v. State*, 25 Fla. 702, 6 So. 768; *Metzger v. State*, 18 Fla. 481; *John D. C. v. State*, 16 Fla. 554. **Kan.**—*State v. Dickson*, 6 Kan. 209. **La.**—*State v. Somnier*, 33 La. Ann. 237. **Pa.**—*Com. v. Payne*, 205 Pa. 101, 54 Atl. 489; *Jewell v. Com.*, 22 Pa. 94. **Tex.**—*Doll v. Mundine*, 7 Tex. Civ. App. 96, 26 S. W. 87.

**6. Fla.**—*Peadon v. State*, 46 Fla. 124, 35 So. 204; *Williams v. State*, 45 Fla. 128, 34 So. 279; *Mathis v. State*, 45 Fla. 46, 34 So. 287; *Metzger v. State*, 18 Fla. 481; *John D. C. v. State*, 16 Fla. 554. **Kan.**—*State v. Dickson*, 6 Kan. 209. **La.**—*State v. Michel*, 111 La. 434, 35 So. 629; *State v. Madison*, 47 La. Ann. 30, 16 So. 566. **Minn.**—*Leystrom v. City of Ada*, 110 Minn. 340, 125 N. W. 507. **Neb.** *Gran v. Houston*, 45 Neb. 813, 64 N. W. 245.

**7. Abbott v. Padrosa, 136 Ga. 278, 71 S. E. 419; *Fulton County v. Amorous*, 89 Ga. 614, 16 S. E. 201; *State v. Giudice*, 170 Iowa 731, 153 N. W. 336.**

[a] "Such jurors would not be 'without power or authority to serve as such' at the time designated for the trial of the case." *Abbott v. Padrosa*, 136 Ga. 278, 71 S. E. 419. Nor will this, in the absence of any suggestion of injury to the litigant, constitute cause for challenge to the array on the ground that they were not drawn to serve for the week in which the panel was made up. *Fulton County v. Amorous*, 89 Ga. 614, 16 S. E. 201.

**8. La.**—*Golding v. Castro*, 20 La. Ann. 458. **S. C.**—*State v. Whitman*, 14 Rich. L. 113. **Tenn.**—*Isaac v. State*, 2 Head 458. **Utah.**—*Anderson v. Watsch*, etc. R. Co., 2 Utah 518.

[a] The effect of the discharge of the juror was, so far as respects the power of the court over him, to place him exactly in the same position as if he never had been elected as a juror in the case. *State v. Whitman*, 14 Rich. L. (S. C.) 113; *Isaac v. State*, 2 Head (Tenn.) 458. Effect of discharge of jurors generally, see *infra*, X, K.







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